NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON CIRCULATING

CALIFORNIA REPORTER REFERENCES

70 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol.	P.2d Page
1	160	167
6	160	161
16	160	50
20	160	199
28	160	132
37	160	52
51	160	30
65	160	77
71	160	569
80	160	910
96	160	145
99	160	129
103	160	846
115	160	852
120	160	574
126	160	892
128	160	587
132	160	553
134	160	108
142	160	560
150	160	595
155	160	878
158	160	857
166	160	865
174	160	565
182	160	558
186	160	870
190	160	564
192	160	554
199	160	885
202	160	862
207	160	854
213	160	551
217	160	842
224	160	887
233	160	923
238	160	585
241	160	904
245	160	581
253	160	900
261	161	46
267	161	40
279	161	66
293	161	36
300	160	880
309	160	906
317	160	893
322	160	896
330	161	288
339	161	244
362	160	875
369	161	18
382	161	59
392	161	24
399	161	49
407	161	279
415	161	74
427	161	283
432	161	257
439	161	293
449	160	872
454	161	270
457	161	285
462	161	381
470	161	278
472	161	272
478	161	235
492	161	275
497	161	407
508	161	298
517	161	242
522	161	378
527	161	417
530	161	303
534	161	397
542	161	264
553	161	401
563	161	385
576	161	393
583	161	415
585	161	407
586	161	472
589	161	413
592	161	468
598	161	613
609	161	618
619	161	494
628	161	475
639	161	460
654	161	473
657	161	490
664	161	702
675	161	833
705	161	561
711	161	565
716	161	568
721	161	677
728	161	559
731	161	681
736	161	586
740	161	564
741	161	983
755	161	687
759	161	821
763	161	809
768	161	697
776	161	689
785	161	800
791	162	53
803	161	976
806	161	970
811	161	684
816	161	827
827	161	824
833	161	806
840	161	964
851	161	947
856	161	564
857	160	224
862	161	498
872	161	623

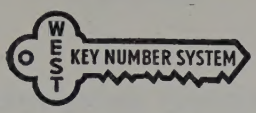
Cal.App. Page	P.2d Vol.	P.2d Page
1	161	803
5	161	957
18	162	59
25	162	21
35	161	997
41	161	990
50	162	35
55	161	953
60	162	33
65	161	944
70	162	26
82	162	46
94	161	1001
104	161	955
107	161	972
114	162	38
121	161	949
127	161	1006
136	161	979
142	161	996
144	162	313
146	161	978
150	162	62
152	162	64
152	162	837
154	162	494
160	162	318
166	162	300
168	162	299
170	162	64
177	162	321
181	162	468
195	162	317
198	162	301
206	162	314
211	162	475
213	162	476
217	162	486
223	162	498
235	162	658
235	163	501
244	162	488
250	162	662
257	162	640
261	162	684
278	162	693
291	162	505
301	162	679
309	162	497
312	162	653
318	162	666
323	162	656
325	162	946
333	162	865
340	162	984
347	162	925
351	162	674
361	162	650
366	162	669
375	162	837
378	162	857
382	162	953
390	163	89
396	162	843
398	162	647
403	162	707
412	162	855
415	162	957
421	162	974
432	162	988
444	162	961
455	162	939
463	162	944
467	162	966
481	162	863
486	163	45
492	163	48
502	162	950
508	163	33
524	162	862
526	163	32
528	162	927
535	162	937
538	162	934
544	162	859
550	163	92
555	163	94
557	162	980
565	162	931
570	163	100
577	162	995
584	163	98
588	163	71
593	163	73
599	163	67
606	163	110
637	163	41
641	163	95
646	163	59
660	163	105
667	163	44
669	163	85
676	163	479
685	163	456
687	163	470
703	163	484
710	163	490
714	163	487
719	163	505
729	163	453
734	163	501
739	163	746
759	163	462
767	163	766
773	163	498
777	163	756
783	163	466
788	163	457
795	163	878
800	163	913
815	163	774
820	163	771
826	163	760
831	164	28
835	163	882
837	163	780
843	162	73
849	162	743

WEST KEY NUMBER SYSTEM

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES



167 P.2d – 168 P.2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

Thus:
167 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1946

COPYRIGHT, 1946, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 167, Nos. 1–4;
Vol. 168, Nos. 1–5.

COPYRIGHT, 1946, BY WEST PUBLISHING CO.

JUDGES AND OFFICERS

SUPREME COURT

Chief Justice

PHIL S. GIBSON San Francisco

Associate Justices

JOHN W. SHENK San Francisco
DOUGLAS L. EDMONDS San Francisco
JESSE W. CARTER San Francisco
ROGER J. TRAYNOR Berkeley
B. REY SCHAUER Los Angeles
HOMER R. SPENCE San Francisco

Clerks

A. V. Haskell[1] Clerk San Francisco
William I. Sullivan[2] Clerk San Francisco
I. M. Johnson Chief Deputy Clerk San Francisco
Loren F. White Deputy Clerk San Francisco
Samuel C. Shenk Deputy Clerk San Francisco
E. L. Blake Deputy Clerk Los Angeles
H. P. Coultis Deputy Clerk Los Angeles
L. A. Endres Deputy Clerk Sacramento

[1] Resigned Aug. 3, 1946.
[2] Appointed to succeed A. V. Haskell.

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

PRESIDING JUSTICE

RAYMOND E. PETERS - - - - - - - - - - San Francisco

ASSOCIATE JUSTICES

BENJ. K. KNIGHT - - - - - - - - - - - - San Francisco
LOUIS H. WARD - - - - - - - - - - - - San Francisco

Division 2

PRESIDING JUSTICE

JOHN T. NOURSE - - - - - - - - - - - - San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL - - - - - - - - - - - - San Francisco
MAURICE T. DOOLING, Jr. - - - - - - - - - - Hollister

CLERKS

WALTER S. CHISHOLM - - Clerk - - - - - - - San Francisco
W. B. SULLIVAN - - - - Deputy Clerk - - - - San Francisco
HARRY M. GARDISER - - - Deputy Clerk - - - San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

PRESIDING JUSTICE

JOHN M. YORK - - - - - - - - - - - - - Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN - - - - - - - - - - - - Los Angeles
THOMAS P. WHITE - - - - - - - - - - - - - Los Angeles

Division 2

PRESIDING JUSTICE

MINOR MOORE - - - - - - - - - - - - - - Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB - - - - - - - - - - - Los Angeles
EMMET H. WILSON - - - - - - - - - - - - Los Angeles

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

PRESIDING JUSTICE

WALTER DESMOND - - - - - - - - - - - - Los Angeles

ASSOCIATE JUSTICES

CLEMENT L. SHINN - - - - - - - - - - - - Los Angeles
PARKER WOOD - - - - - - - - - - - - - Los Angeles

CLERKS

JAMES E. BROWN - - - - Clerk - - - - - - - Los Angeles
JOHN W. SHENK III - - - Deputy Clerk - - - - Los Angeles

THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS - - - - - - - - - Sacramento

ASSOCIATE JUSTICES

ROLFE L. THOMPSON - - - - - - - - - - - Sacramento
PAUL PEEK - - - - - - - - - - - - - - Long Beach

CLERKS

GEORGE N. DIDION - - - Clerk - - - - - - - Sacramento
Jas. WESLEY PLATT - - - Deputy Clerk - - - - Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

PRESIDING JUSTICE

CHARLES R. BARNARD - - - - - - - - - - Fresno

ASSOCIATE JUSTICES

E. J. MARKS - - - - - - - - - - - - - San Bernardino
LLOYD E. GRIFFIN - - - - - - - - - - - - San Diego

CLERKS

M. C. VANALLEN - - - - Clerk - - - - - - San Bernardino
LLOYD E. HIDDEN - - - - Deputy Clerk - - - - San Bernardino
EARL J. VERDECKBERG - - Deputy Clerk - - - - - San Diego
ROY M. BOSTWICK - - - Deputy Clerk - - - - - - Fresno

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

PRESIDING JUDGE

HARTLEY SHAW - - - - - - - - - - - - Los Angeles

JUDGES

EDWARD T. BISHOP - - - - - - - - - - - - Los Angeles
CLARENCE L. KINCAID - - - - - - - - - - Los Angeles

CLERK

JEROME B. WILLIAMS - - - - - - - - - - - - Los Angeles

SAN FRANCISCO COUNTY

PRESIDING JUDGE

FRANKLIN A. GRIFFIN - - - - - - - - - - - San Francisco

JUDGES

EDWARD P. MURPHY - - - - - - - - - - - San Francisco
ALFRED J. FRITZ - - - - - - - - - - - - San Francisco

CLERK

S. I. HUGHES - - - - - - - - - - - - - - San Francisco

SAN DIEGO COUNTY

PRESIDING JUDGE

CHARLES C. HAINES - - - - - - - - - - - - San Diego

JUDGES

GORDON THOMPSON - - - - - - - - - - - - San Diego
ROBERT B. BURCH - - - - - - - - - - - - San Diego

CLERK

DEAN SHULTZ - - - - - - - - - - - - - - San Diego

SACRAMENTO COUNTY

PRESIDING JUDGE

PETER J. SHIELDS - - - - - - - - - - - - Sacramento

JUDGES

MALCOLM C. GLENN - - - - - - - - - - - - Sacramento
RAYMOND T. COUGHLIN - - - - - - - - - - Sacramento

ATTORNEY GENERAL

ROBERT W. KENNY - - - - - - - - - - - - San Francisco

CASES REPORTED

	Vol.		Page
Abraham; Nelson v., App.	167	P.2d	801
Abrams; Corporation of America v., Super.	168	P.2d	74
Acme Egg & Poultry Co.; Johnston Pie Co. v., App.	168	P.2d	762
Aebli v. Board of Ed. of City and County of San Francisco, App.	168	P.2d	749
Alexander; Mayers v., App.	167	P.2d	818
Allen; Butler v., App.	167	P.2d	488
Amaral v. United Ben. Life Ins. Co., App.	168	P.2d	70
American Pipe & Steel Corp.; Yearout v., App.	168	P.2d	174
Argonne Van & Storage Co.; Atwater v., App.	168	P.2d	776
Armstrong v. Pacific Greyhound Lines, App.	168	P.2d	457
Atwater v. Argonne Van & Storage Co., App.	168	P.2d	776
Ayoob v. Ayoob, App.	168	P.2d	462
Baker; Bowker v., App.	167	P.2d	256
Bank of America Nat. Trust & Sav. Ass'n; Edgar v., App.	167	P.2d	509
Bank of America Nat. Trust & Sav. Ass'n; Martin v., App.	168	P.2d	232
Barnes; Harroun v., App.	167	P.2d	772
Beach; Davies v., App.	168	P.2d	452
Bear Film Co.; Hansen v., Sup.	168	P.2d	946
Beer; Lester v., Super.	168	P.2d	998
Belson v. Chernabaeff, App.	167	P.2d	10
Bernard v. Monheit, Sup.	168	P.2d	965
Bernstein v. Bernstein, App.	167	P.2d	229
Blumenthal; Ertman v., Super.	167	P.2d	273
Board of Ed. of City and County of San Francisco; Aebli v., App.	168	P.2d	749
Board of Medical Examiners of State; McPheeters v., App.	168	P.2d	65
Boivin v. Rhead, App.	168	P.2d	432
Borad; O'Morrow v., Sup.	167	P.2d	483
Botts v. Simpson, App.	167	P.2d	231
Bourzac; Cate v., App.	168	P.2d	971
Bowker v. Baker, App.	167	P.2d	256
Boyle v. Pasadena College, App.	168	P.2d	789
Brac; People v., App.	167	P.2d	535
Bridges; People v., App.	167	P.2d	793
Briggs v. California Employment Commission, Sup.	168	P.2d	696
Brisson; Kaluzok v., Sup.	167	P.2d	481
Buchman; Steinberg v., App.	167	P.2d	207
Butler v. Allen, App.	167	P.2d	488
California Dept. of Employment; Twentieth Century Lites v., Sup.	168	P.2d	699
California Employment Commission; Briggs v., Sup.	168	P.2d	696
California Employment Commission; Empire Star Mines Co. v., Sup.	168	P.2d	686
California Employment Stabilization Commission v. Citizens Nat. Trust & Sav. Bank, App.	167	P.2d	752
California Employment Stabilization Commission v. Matcovich, App.	168	P.2d	702
California St. Cable Ry. Co.; Middleton v., App.	167	P.2d	239
Carlson; People v., App.	167	P.2d	812
Carr, Application of, App.	167	P.2d	243
Case-Swayne Co.; Kadota Fig Ass'n of Producers v., App.	167	P.2d	518
Case-Swayne Co.; Kadota Fig Ass'n of Producers v., App.	167	P.2d	523
Case-Swayne Co.; Kadota Fig Ass'n of Producers v., App.	167	P.2d	529
Case-Swayne Co.; Yosemite Growers Co-op. Ass'n v., App.	167	P.2d	541
Castles; Helvey v., App.	167	P.2d	492
Cate v. Bourzac, App.	168	P.2d	971

	Vol.		Page
Chernabaeff; Belson v., App.	167	P.2d	10
Childers v. Childers, App.	168	P.2d	218
Christian Science Benev. Ass'n v. Palmer, Sup.	168	P.2d	669
Cigna; Monheit v., Sup.	168	P.2d	965
Citizens Nat. Trust & Sav. Bank; California Employment Stabilization Commission v., App.	167	P.2d	752
Citizens Nat. Trust & Sav. Bank of Los Angeles; Wheeler v., App.	168	P.2d	727
City and County of San Francisco; Isaacs v., App.	167	P.2d	221
City and County of San Francisco; Schulstad v., App.	168	P.2d	68
City of Fresno; Goodrich v., App.	167	P.2d	784
City of Fresno; Horwith v., App.	168	P.2d	767
City of Fresno; Jefford v., App.	167	P.2d	784
City of Fresno; Pretzer v., App.	167	P.2d	784
City of Huntington Beach; Denio v., App.	168	P.2d	785
City of Los Angeles; Heimann v., App.	168	P.2d	28
City of Los Angeles; Jones v., App.	168	P.2d	480
City of Santa Monica; Nutter v., App.	168	P.2d	741
Cloud v. Market St. Ry. Co., App.	168	P.2d	191
Coit v. Jefferson Standard Life Ins. Co., Sup.	168	P.2d	163
Collup; People v., Sup.	167	P.2d	714
Consolidated Vultee Aircraft Corp. v. United Auto. Aircraft and Agr. Implement Workers of America Local 904, Sup.	167	P.2d	725
Corporation of America v. Abrams, Super.	168	P.2d	74
Crenshaw; People v., App.	167	P.2d	781
Crenshaw v. Smith, App.	168	P.2d	752
Crumback v. Murdock, App.	168	P.2d	25
Dairyman's Co-op. Creamery; DeMello v., App.	167	P.2d	226
Davies v. Beach, App.	168	P.2d	452
Davis; Drake v., Super.	167	P.2d	560
Davis; Williams v., Sup.	167	P.2d	189
Davis' Estate, In re, App.	168	P.2d	789
Dean; Nelson v., Sup.	168	P.2d	16
D'Elia; People v., App.	167	P.2d	253
DeMello v. Dairyman's Co-op. Creamery, App.	167	P.2d	226
Denio v. City of Huntington Beach, App.	168	P.2d	785
Dill v. Hamilton, App.	167	P.2d	497
Dillon; Stevens v., App.	168	P.2d	492
Dobkin; People v., App.	168	P.2d	729
Dougherty v. Lee, App.	168	P.2d	54
Drake v. Davis, Super.	167	P.2d	560
Drew; Hagge v., App.	167	P.2d	263
Edgar v. Bank of America Nat. Trust & Sav. Ass'n, App.	167	P.2d	509
Edmonds; Garthofner v., App.	167	P.2d	789
Edward Brown & Sons; Garrison v., Sup.	168	P.2d	153
Edwards v. Hollywood Canteen, Sup.	167	P.2d	729
Egan; People v., App.	167	P.2d	766
Embassy Realty Associates; People v., App.	167	P.2d	797
Empire Star Mines Co. v. California Employment Commission, Sup.	168	P.2d	686
Erickson; People v., App.	168	P.2d	417
Ertman v. Blumenthal, Super.	167	P.2d	273
Etie, In re, Sup.	167	P.2d	203
Ettlinger v. Slevin, App.	167	P.2d	738
Ettlinger's Estate, In re, App.	167	P.2d	738
Evans; West v., App.	167	P.2d	491
Fiddyment v. Haman, App.	168	P.2d	61
Fiddyment's Estate, In re, App.	168	P.2d	61
Fillmore v. Fillmore, App.	168	P.2d	725
Finnegan v. Hernandez, App.	168	P.2d	32
Fitch; People v., App.	167	P.2d	211

	Vol.		Page
Follett; Huebotter v., Sup.	167	P.2d	193
Fresno Macaroni Mfg. Co.; Merlino v., App.	168	P.2d	182
Furness Pacific v. Industrial Acc. Commission, App.	168	P.2d	761
Garland; Lord v., Sup.	168	P.2d	5
Garrison v. Edward Brown & Sons, Sup.	168	P.2d	153
Garthofner v. Edmonds, App.	167	P.2d	789
Gentry; Swarthout v., App.	167	P.2d	501
Globe Brewing Co.; Merchants Ice & Cold Storage Co. v., App.	167	P.2d	503
Goodrich v. City of Fresno, App.	167	P.2d	784
Gossman v. Gossman, App.	168	P.2d	495
Green; Jones v., App.	168	P.2d	418
Greenberg; People v., App.	167	P.2d	214
Gunderson; Ogg v., App.	168	P.2d	793
Hagge v. Drew, App.	167	P.2d	263
Hall v. Scudder, App.	168	P.2d	990
Hall v. Watson, App.	167	P.2d	210
Haman; Fiddyment v., App.	168	P.2d	61
Hamilton; Dill v., App.	167	P.2d	497
Hancken; Knouse v., App.	168	P.2d	773
Hansen v. Bear Film Co., Sup.	168	P.2d	946
Harlan v. Harlan, App.	168	P.2d	985
Harms v. Reed, App.	167	P.2d	747
Harroun v. Barnes, App.	167	P.2d	772
Hatch v. Ward, Sup.	168	P.2d	22
Heare v. O'Reilly, App.	167	P.2d	217
Heimann v. City of Los Angeles, App.	168	P.2d	28
Helvey v. Castles, three cases, App.	167	P.2d	492
Helvey v. Miller, three cases, App.	167	P.2d	492
Hendy Iron Works v. Industrial Acc. Commission, App.	168	P.2d	203
Hermes; People v., App.	168	P.2d	44
Hernandez; Finnegan v., App.	168	P.2d	32
Himes v. Los Angeles County, Sup.	167	P.2d	189
Hirsch v. Hirsch, App.	168	P.2d	770
Hollywood Canteen; Edwards v., Sup.	167	P.2d	729
Hopkins; Olwell v., Sup.	168	P.2d	972
Horwith v. City of Fresno, App.	168	P.2d	767
Howard; Peck v., App.	167	P.2d	753
Huber v. Huber, Sup.	167	P.2d	708
Huebotter v. Follett, Sup.	167	P.2d	193
Hughes v. Hughes, two cases, App.	168	P.2d	429
Industrial Acc. Commission; Furness Pacific v., App.	168	P.2d	761
Industrial Acc. Commission; Joshua Hendy Iron Works v., App.	168	P.2d	203
Industrial Acc. Commission; Lumbermen's Mut. Cas. Co. v., App.	168	P.2d	979
Industrial Acc. Commission; Truck Ins. Exchange v., Sup.	167	P.2d	705
International Metals Development; U. S. Machinery Co. v., App.	168	P.2d	37
Isaacs v. City and County of San Francisco, App.	167	P.2d	221
Jackson; People v., App.	167	P.2d	776
Jefferson Standard Life Ins. Co.; Coit v., Sup.	168	P.2d	163
Jefford v. City of Fresno, App.	167	P.2d	784
Johnston Pie Co. v. Acme Egg & Poultry Co., App.	168	P.2d	762
Jones v. City of Los Angeles, App.	168	P.2d	480
Jones v. Green, App.	168	P.2d	418
Jones; Western Coal & Mining Co. v., Sup.	167	P.2d	719
Joshua Hendy Iron Works v. Industrial Acc. Commission, App.	168	P.2d	203
Kadota Fig Ass'n of Producers v. Case-Swayne Co., App.	167	P.2d	518
Kadota Fig Ass'n of Producers v. Case-Swayne Co., App.	167	P.2d	523
Kadota Fig Ass'n of Producers v. Case-Swayne Co., App.	167	P.2d	529
Kaluzok v. Brisson, Sup.	167	P.2d	481
Knouse v. Hancken, App.	168	P.2d	773

	Vol.		Page
Knox v. Wolfe, two cases, App.	167	P.2d	3
Korst; People v., App.	168	P.2d	42
Kroenert v. Zaslow, App.	168	P.2d	779
Kroenert; Zaslow v., App.	168	P.2d	780
Langdon v. Sayre, App.	168	P.2d	57
Lee; Dougherty v., App.	168	P.2d	54
Lester v. Beer, Super.	168	P.2d	998
Lewis; Siegel v., App.	168	P.2d	50
Leyvas; People v., App.	167	P.2d	770
Linneman; Silva v., App.	167	P.2d	794
Long Beach City High School Dist. of Los Angeles County v. Stewart, App.	167	P.2d	515
Lord v. Garland, Sup.	168	P.2d	5
Lord v. Superior Court of Los Angeles County, Sup.	168	P.2d	14
Lori, Ltd. v. Superior Court in and for Los Angeles County, App.	168	P.2d	982
Loring's Estate, In re, App.	168	P.2d	224
Los Angeles County; Himes v., Sup.	167	P.2d	189
Los Angeles County; S. Siwel & Co. v., Sup.	167	P.2d	177
Los Angeles County v. Southern Cal. Tel. Co., App.	168	P.2d	207
Los Angeles County; Trabue Pittman Corp. v., Sup.	168	P.2d	156
Los Angeles Ry. Corp.; White v., App.	167	P.2d	530
Loynes; Mortimer v., App.	168	P.2d	481
Lumbermen's Mut. Cas. Co. v. Industrial Acc. Commission, App.	168	P.2d	979
McCarthy v. Superior Court in and for City and County of San Francisco, App.	167	P.2d	744
McGivern's Estate, In re, App.	168	P.2d	232
McPheeters v. Board of Medical Examiners of State, App.	168	P.2d	65
Maico Co.; Markulics v., App.	168	P.2d	35
Market St. Ry. Co.; Cloud v., App.	168	P.2d	191
Markham's Estate, In re, Sup.	168	P.2d	669
Markulics v. Maico Co., App.	168	P.2d	35
Martin v. Bank of America Nat. Trust & Sav. Ass'n, App.	168	P.2d	232
Matcovich; California Employment Stabilization Commission v., App.	168	P.2d	702
Mayers v. Alexander, App.	167	P.2d	818
Merchants Ice & Cold Storage Co. v. Globe Brewing Co., App.	167	P.2d	503
Merchants' Ice & Cold Storage Co.; Sozzi v., App.	167	P.2d	503
Merlino v. Fresno Macaroni Mfg. Co., App.	168	P.2d	182
Middleton v. California St. Cable Ry. Co., two cases, App.	167	P.2d	239
Miller; Helvey v., App.	167	P.2d	492
Minter; People v., Super.	167	P.2d	11
Monheit; Bernard v., Sup.	168	P.2d	965
Monheit v. Cigna, Sup.	168	P.2d	965
Mortimer v. Loynes, App.	168	P.2d	481
Mostachetti; Stevens v., App.	167	P.2d	809
Murdock; Crumback v., App.	168	P.2d	25
Myers; Raisch v., Sup.	167	P.2d	198
Neff v. New York Life Ins. Co., App.	168	P.2d	423
Nelson v. Abraham, App.	167	P.2d	801
Nelson v. Dean, Sup.	168	P.2d	16
New York Life Ins. Co.; Neff v., App.	168	P.2d	423
Northwestern Pac. R. Co.; Tamalpais Land & Water Co. v., App.	167	P.2d	825
Nutter v. City of Santa Monica, App.	168	P.2d	741
Oaks v. Renshaw, App.	168	P.2d	199
O'Brien's Estate, In re, App.	168	P.2d	432
Ogg v. Gunderson, App.	168	P.2d	793
Olwell v. Hopkins, Sup.	168	P.2d	972
O'Morrow v. Borad, Sup.	167	P.2d	483
One 1941 Mercury Sedan; People v., App.	168	P.2d	443
Oreck; People v., App.	168	P.2d	186

	Vol.		Page
O'Reilly; Heare v., App.	167	P.2d	217
Otten v. San Francisco Hotel Owners Ass'n, App.	168	P.2d	739
Owens; People v., Sup.	168	P.2d	945
Pacific Greyhound Lines; Armstrong v., App.	168	P.2d	457
Pacific Greyhound Lines v. Superior Court of City and County of San Francisco, Sup.	168	P.2d	665
Palmer; Christian Science Benev. Ass'n v., Sup.	168	P.2d	669
Pasadena College; Boyle v., App.	168	P.2d	789
Peck v. Howard, App.	167	P.2d	753
People v. Brac, App.	167	P.2d	535
People v. Bridges, App.	167	P.2d	793
People v. Carlson, App.	167	P.2d	812
People v. Collup, Sup.	167	P.2d	714
People v. Crenshaw, App.	167	P.2d	781
People v. D'Elia, App.	167	P.2d	253
People v. Dobkin, App.	163	P.2d	729
People v. Egan, App.	167	P.2d	766
People v. Embassy Realty Associates, App.	167	P.2d	797
People v. Erickson, App.	168	P.2d	417
People v. Fitch, App.	167	P.2d	211
People v. Greenberg, App.	167	P.2d	214
People v. Hermes, App.	168	P.2d	44
People v. Jackson, App.	167	P.2d	776
People v. Korst, App.	168	P.2d	42
People v. Leyvas, App.	167	P.2d	770
People v. Minter, Super.	167	P.2d	11
People v. One 1941 Mercury Sedan, App.	168	P.2d	443
People v. Oreck, App.	168	P.2d	186
People v. Owens, Sup.	168	P.2d	945
People v. Pughsley, App.	168	P.2d	27
People v. Reid, App.	167	P.2d	234
People v. Richards, App.	168	P.2d	435
People v. Robinson, App.	167	P.2d	778
People v. Saffell, Super.	168	P.2d	497
People v. Salo, App.	167	P.2d	267
People v. Salo, App.	167	P.2d	269
People v. Sunseri, App.	168	P.2d	735
People v. Superior Court in and for City and County of San Francisco, App.	168	P.2d	177
People v. Taylor, App.	168	P.2d	736
People v. Vollmann, App.	167	P.2d	545
People v. Williams, App.	167	P.2d	488
People v. Wilson, Sup.	168	P.2d	683
Perrot; Sandvold v., App.	168	P.2d	995
Peterson v. Peterson, App.	168	P.2d	474
Porterfield, In re, Sup.	168	P.2d	706
Pretzer v. City of Fresno, App.	167	P.2d	784
Prout v. Prout, App.	167	P.2d	1
Pughsley; People v., App.	168	P.2d	27
Raisch v. Myers, Sup.	167	P.2d	198
Ralph, Ex parte, Sup.	168	P.2d	1
Redsted v. Weiss, App.	167	P.2d	735
Reed; Harms v., App.	167	P.2d	747
Reid; People v., App.	167	P.2d	234
Renshaw; Oaks v., App.	168	P.2d	199
Rhead; Boivin v., App.	168	P.2d	432
Richards; People v., App.	168	P.2d	435
Richardson's Estate, In re, App.	168	P.2d	774
Richardson's Estate, In re, App.	168	P.2d	775

	Vol.		Page
Robesky v. Robesky, App.	168	P.2d	976
Robinson; People v., App.	167	P.2d	778
Rosicrucian Fellowship v. Superior Court in and for San Diego County, App.	167	P.2d	213
Ruddell v. Warne, App.	167	P.2d	811
Saffell; People v., Super.	168	P.2d	497
Salo; People v., App.	167	P.2d	267
Salo; People v., App.	167	P.2d	269
Sandvold v. Perrot, App.	168	P.2d	995
San Francisco Hotel Owners Ass'n; Otten v., App.	168	P.2d	739
Sayre; Langdon v., App.	168	P.2d	57
Schulstad v. City and County of San Francisco, App.	168	P.2d	68
Screen Cartoonists Guild, Local 852, v. Walt Disney Productions, App.	168	P.2d	983
Scudder; Hall v., App.	168	P.2d	990
Seydel; Whittemore v., App.	168	P.2d	212
Siegel v. Lewis, App.	168	P.2d	50
Silva v. Linneman, App.	167	P.2d	794
Simpson; Botts v., App.	167	P.2d	231
Siwel & Co. v. Los Angeles County, Sup.	167	P.2d	177
Slevin; Ettlinger v., App.	167	P.2d	738
Smith; Crenshaw v., App.	168	P.2d	752
Southern Cal. Tel. Co.; Los Angeles County v., App.	168	P.2d	207
Sozzi v. Merchants' Ice & Cold Storage Co., App.	167	P.2d	503
S. Siwel & Co. v. Los Angeles County, Sup.	167	P.2d	177
State; Wall v., App.	167	P.2d	740
Steinberg v. Buchman, App.	167	P.2d	207
Steve, In re, App.	167	P.2d	243
Stevens v. Dillon, App.	168	P.2d	492
Stevens v. Mostachetti, App.	167	P.2d	809
Stewart; Long Beach City High School Dist. of Los Angeles County v., App.	167	P.2d	515
Sunseri; People v., App.	168	P.2d	735
Superior Court in and for Los Angeles County; Lori, Ltd. v., App.	168	P.2d	982
Superior Court in and for City and County of San Francisco; McCarthy v., App.	167	P.2d	744
Superior Court in and for City and County of San Francisco; People v., App.	168	P.2d	177
Superior Court in and for San Diego County; Rosicrucian Fellowship v., App.	167	P.2d	213
Superior Court of City and County of San Francisco; Pacific Greyhound Lines v., Sup.	168	P.2d	665
Superior Court of Los Angeles County; Lord v., Sup.	168	P.2d	14
Swarthout v. Gentry, App.	167	P.2d	501
Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., App.	167	P.2d	825
Taylor; People v., App.	168	P.2d	736
Thomas' Estate, In re, App.	168	P.2d	773
Trabue Pittman Corp. v. Los Angeles County, Sup.	168	P.2d	156
Truck Ins. Exchange v. Industrial Acc. Commission, Sup.	167	P.2d	705
Twentieth Century Lites v. California Dept. of Employment, Sup.	168	P.2d	699
United Auto. Aircraft and Agr. Implement Workers of America Local 904; Consolidated Vultee Aircraft Corp. v., Sup.	167	P.2d	725
United Ben. Life Ins. Co.; Amaral v., App.	168	P.2d	70
U. S. Machinery Co. v. International Metals Development, App.	168	P.2d	37
Vollmann; People v., App.	167	P.2d	545
Wall v. State, App.	167	P.2d	740
Walt Disney Productions; Screen Cartoonists Guild, Local 852, v., App.	168	P.2d	983
Ward; Hatch v., Sup.	168	P.2d	22
Warne; Ruddell v., App.	167	P.2d	811
Watson; Hall v., App.	167	P.2d	210

	Vol.		Page
Weiss; Redsted v., App.	167	P.2d	735
Wells v. Wells, App.	168	P.2d	73
West v. Evans, App.	167	P.2d	491
Western Coal & Mining Co. v. Jones, Sup.	167	P.2d	719
Wheeler v. Citizens Nat. Trust & Sav. Bank of Los Angeles, App.	168	P.2d	727
White v. Los Angeles Ry. Corp., App.	167	P.2d	530
Whittemore v. Seydel, App.	168	P.2d	212
Williams v. Davis, Sup.	167	P.2d	189
Williams; People v., App.	167	P.2d	488
Wilson; People v., Sup.	168	P.2d	683
Wolfe; Knox v., App.	167	P.2d	3
Yearout v. American Pipe & Steel Corp., App.	168	P.2d	174
Yosemite Growers Co-op. Ass'n v. Case-Swayne Co., App.	167	P.2d	541
Zaslow; Kroenert v., App.	168	P.2d	779
Zaslow v. Kroenert, App.	168	P.2d	780

†

CALIFORNIA REPORTER

167 PACIFIC REPORTER

SECOND SERIES

73 Cal.App.2d 715

PROUT v. PROUT.

Civ. 3504.

District Court of Appeal, Fourth District, California.

March 28, 1946.

1. Divorce ⇐249(3), 252

Where wife was granted divorce on ground of extreme cruelty, trial court was authorized to award an undivided one-half interest in community residence property to each of the parties, but subjecting husband's interest to wife's exclusive right of occupation.

2. Divorce ⇐254

Where award of exclusive use of community residence had previously been made to wife in connection with division of community property, the further phrase in the decree that exclusive use of residence would be granted to wife "as and for support and maintenance of said minor child" could be regarded as surplusage.

3. Divorce ⇐254

Where phrase "in lieu thereof" clearly indicated that provision in interlocutory judgment granting wife exclusive use of community residence "as and for support and maintenance of said minor child" was intended to provide use of home in lieu of an allowance for support of child, and not as a direct allowance for that purpose, the provision was neither an abuse of discretion nor beyond jurisdiction of the court.

4. Divorce ⇐254

The disposition of property issues in divorce cases should be made in such manner as not to become effective until entry of final decree, but an immediate disposition of property upon an interlocutory divorce decree is within trial court's jurisdiction.

5. Divorce ⇐254

Where interlocutory divorce decree contained provision for immediate and final division of community property, any error in such regard could be corrected by modifying language used in portion of decree relating to disposition of property in such a manner as not to become effective until entry of the final decree.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action for divorce by George H. Prout against Ruth I. Prout, wherein the defendant filed a cross-complaint. From interlocutory decree in favor of defendant on her cross-complaint, the plaintiff appeals.

Affirmed as modified

West & Vizzard, of Bakersfield, for appellant.

Mack, Werdel & Bianco, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an interlocutory decree of divorce. Each of the parties had been previously married and each had some separate property. All of this property had been placed in joint tenancy, and some two years before this action was started it was divided by agreement, the defendant receiving some property which had been the separate property of the plaintiff. At least some of the property she received was rental property.

The parties also had a residence which was community property. The court entered an interlocutory decree in favor of the defendant on her cross-complaint, gave her the custody of a minor child, and divided the residence property by giving a one-half interest therein to the plaintiff, subject to the exclusive use and occupation thereof by the defendant until the further order of court, and giving the other half

interest to the defendant, with the exclusive use and occupation of the entire property, and the rents, issues and profits therefrom, until further order of the court. From this decree the plaintiff has appealed.

[1] The appellant contends that the judgment should be reversed because the award of an undivided one-half interest in the community residence property to each of the parties as tenants in common is inconsistent with the further award to the respondent of the exclusive use and occupation thereof. It is argued that a tenancy in common implies the right of each cotenant to equally occupy and use the property and that the award, as made, is inconsistent with such a tenancy in common. The decree does not purport to create a tenancy in common and whether or not the situation thus created technically constitutes such a tenancy is immaterial. The court awarded one-half of this property to the appellant, subject to this right of occupation, and awarded one-half, together with such an exclusive right of occupation, to the respondent. The divorce was granted on the ground of extreme cruelty and the court was authorized to make such a division of the community property. Price v. Price, Cal.App. 163 P.2d 501. No error appears in this regard.

[2, 3] It is also contended that the court lacked jurisdiction to award to the respondent an allowance for the support and maintenance of the minor child in any way other than by awarding a certain sum in money. In addition to granting the respondent the exclusive use and occupancy of the community residence, as a part of the division of the community property, the decree contains the further order "that as and for support and maintenance of said minor child, and in lieu thereof, and until the further order of the court" the respondent be granted the exclusive use and occupation of the home of the parties. The respondent had testified that as long as present conditions prevail she would be able to support herself and the child on the rentals being collected from her separate property if she was given the use of the home. It may be conceded that the award of the use of the home as a provision for the support of the child standing alone, would be erroneous. See Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214; Simpson v. Simpson, 80 Cal. 237, 22 P. 167. However, the award of the use of the home had previously been made in connection with the division of the community property, and the same was merely repeated in the clause here in question. It seems clear that the real intent of this clause was to provide that this award of the use of the home was in lieu of an allowance for support and maintenance of the child, and that it was not intended as a direct allowance for that purpose. The phrase "as and for support and maintenance of said minor child" may be regarded as surplusage. Greenlee v. Greenlee, 7 Cal.2d 579, 61 P.2d 1157. The phrase "in lieu thereof" clearly and sufficiently indicates the purpose the court had in mind. The appellant had previously abandoned his family without provision for its support and it cannot be said as a matter of law that the order here made, as properly interpreted, was either an abuse of discretion or beyond the jurisdiction of the court.

[4, 5] The only other point raised is that the judgment should be reversed because the court exceeded its jurisdiction by making an immediate and final division of the community property in the interlocutory decree. The portion of the decree covering this matter starts out as follows: "It is further ordered, adjudged and decreed that the community property of the parties be and the same is hereby set aside and divided as follows; to wit:" (here follows a description of the property and a division as above indicated). The respondent concedes that this is error. However, as pointed out in Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697, the court does not lack jurisdiction to make such an order; if made, it may be attacked on appeal; and it has been held in a number of cases that the disposition of property issues in divorce cases should be made in such manner as not to become effective until the entry of the final decree. Any possible error in this regard may be corrected by modifying the language used in this portion of the decree. Lo Vasco v. Lo Vasco, 46 Cal. App.2d 242, 115 P.2d 562; Strupelle v. Strupelle, 59 Cal.App. 526, 211 P. 248; Remley v. Remley, 49 Cal.App. 489, 193 P. 604.

The interlocutory decree is modified by striking therefrom the first clause of the fourth paragraph thereof which reads: "It is further ordered, adjudged and de-

creed that the community property of the parties be and the same is hereby set aside and divided as follows, to wit:" and by inserting in lieu of the part so stricken, the following: "It is further ordered, adjudged and decreed that the community property of the parties should be, and upon the entry of a final decree shall be, set aside and divided as follows, to wit:".

As so modified the interlocutory decree is affirmed as of the date of its entry, February 15, 1945. The appellant to recover costs.

MARKS and GRIFFIN, JJ., concur.



73 Cal.App.2d 494

KNOX v. WOLFE.

SAME v. WOLFE et al.

Civ. 14993.

District Court of Appeal, Second District, Division 2, California.

March 12, 1946.

Hearing Denied May 9, 1946.

1. Landlord and tenant ⇐37

In construing written lease, portion of printed form would be disregarded in any particular in which it was repugnant to typewritten portion of lease. Civ.Code, § 1651.

2. Landlord and tenant ⇐37

A written lease must be so interpreted as to make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without violating the intention of the parties. Civ. Code, § 1643.

3. Landlord and tenant ⇐37

Particular clauses in a lease are subordinate to the general intent of the lease. Civ.Code, § 1650.

4. Landlord and tenant ⇐37

Where lease is partly typewritten and partly printed, the typewritten parts control the printed parts, and any part either written or printed with a special view to the intention of the parties will control those portions which appear in the printed form. Civ.Code, § 1651.

5. Landlord and tenant ⇐37

Repugnancies in a lease must be reconciled, if possible, by an interpretation that will give some effect to the repugnant clauses, subordinate to the general intent and purpose of entire contract. Civ.Code, § 1652.

6. Landlord and tenant ⇐37

The language of a lease prepared by and under the direction of lessor must be interpreted most strongly against lessor and any doubt or ambiguity must be resolved against lessor. Civ.Code, § 1654.

7. Landlord and tenant ⇐37

A lease must be construed as a whole and must be interpreted in such manner as to give effect to the intention of the parties as indicated by contents of the document.

8. Landlord and tenant ⇐115(3)

Where a lease provides that tenant may remove fixtures which it installs and tenant remains in possession with permission of landlord from month to month after expiration of lease, the continued occupancy is regarded as an extension of the lease, and parties are deemed to have assented to terms of original lease, including right to remove fixtures.

9. Fixtures ⇐27(2)

Under typewritten provision attached to printed form of five-year lease of premises for cocktail and restaurant business that upon request by tenant, if not in default, and restoration of premises at tenant's expense to condition existing before commencement of term, landlord should reconvey to tenant interest in bar, backbar, and equipment attached to premises by screws, bolts, or otherwise acquired under preceding printed and typewritten provisions of lease, tenant having fulfilled conditions of provision for reconveyance was entitled without hindrance from landlord to remove from premises all equipment, including that attached to premises by screws, bolts or otherwise. Civ.Code, §§ 1643, 1650–1652, 1654.

10. Fixtures ⇐27(2)
Landlord and tenant ⇐115(3)

Tenant's holding over after expiration of five-year written lease under oral agreement with landlord for continued posses-

sion under lease on month to month basis at same rental was a continuation of possession under lease which provided that tenant holding over should become tenant from month to month upon all terms and conditions of lease and could exercise privlege to remove fixtures at expiration of lease or any extension or renewal thereof, in view of acceptance of rent after expiration of term and recognition of possession under lease by notice terminating tenancy. Civ.Code, § 1945.

11. Landlord and tenant ⇐115(3)

Where tenant remains in possession with permission of landlord from month to month after expiration of term under lease, a new tenancy is not created, but original tenancy is deemed to have been extended. Civ.Code, § 1945.

12. Landlord and tenant ⇐91

Where lease gives tenant option to renew lease for a specified term without requiring execution of a new lease, the extension is a continuation of the tenancy under the original lease. Civ.Code, § 1945.

13. Trover and conversion ⇐61

Award of $250 per month for wrongful detention of cocktail and restaurant business equipment worth $3100 was not excessive, in view of owner's inability because of war restrictions to obtain similar equipment for use in his establishment.

14. Evidence ⇐543(4)

A witness, who for 20 years had acted as receiver and trustee in bankruptcy and in state court receiverships, appraisements, insurance adjustments, and various forms of liquidation, and had handled cocktail and restaurant business equipment such as that involved in action and had examined the property involved and knew its condition, was qualified to express an opinion as to reasonable rental value of such property as basis for assessing damages for its wrongful detention.

15. Appeal and error ⇐971(2)
Evidence ⇐546

The qualification of an expert witness is a matter within sound discretion of trial court, whose ruling will not be disturbed on appeal unless a manifest abuse of such discretion is shown.

16. Fixtures ⇐35(6)
Landlord and tenant ⇐161(3)

Where landlords by intimidation and threats of violence wrongfully prevented tenant from removing attached fixtures and unattached personal property to which landlords had no claim whatever, tenant was entitled to exemplary damages on ground that landlords were guilty of oppression, intimidation, and malice. Civ. Code, § 3294.

17. Fixtures ⇐35(6)
Landlord and tenant ⇐161(3)

Award of $500, as exemplary damages against landlords for wrongfully preventing tenant by intimidation and threats of violence from removing attached fixtures and unattached personal property to which landlords had no claim whatever, was not excessive. Civ.Code, § 3294.

18. Action ⇐6

In action for declaratory relief, an injunction ancillary to relief sought is appropriate and may issue to preserve the rights of the parties. Code Civ.Proc. § 1060.

19. Action ⇐6

Both declaratory and coercive or executory relief may be granted in the same action. Code Civ.Proc. § 1060.

20. Action ⇐6

In action for declaratory relief, future rights may be determined when a declaration of present and actual controversy is dependent upon an adjudication of such future rights. Code Civ.Proc. § 1060.

21. Action ⇐6

Where actual controversy in declaratory relief action was whether tenant was entitled under lease to remove fixtures and equipment, trial court, in addition to declaring rights of the parties, properly proceeded to determine disputed issues of fact, and having assumed jurisdiction of equitable controversy, it rightly administered complete relief and made final disposition of the litigation. Code Civ.Proc. § 1060.

22. Judgment ⇐252(5)

Under prayer for general relief in equitable proceeding, after answer has been filed, court may grant any relief conformable to the case made by the pleadings and evidence, though such relief is not asked by special prayer.

23. Judgment ⇐252(5)

Where consolidated claim and delivery and declaratory relief actions involved tenant's right to possession of personal prop-

erty and right under lease to remove trade fixtures which depended under terms of lease upon restoration of premises by tenant to condition existing before commencement of term and tenant alleged and proved he was prevented from removing property from leased premises by threats by landlord, order restraining landlord from interfering with tenant in restoration of premises was properly included in judgment under prayer for general relief, though pleadings did not ask for an injunction. Code Civ.Proc. § 1060.

24. Injunction ⇐203

Where injunction was part of final judgment which adjudicated all of the rights of parties, a notice or order to show cause, required before issuance of an injunction, if issued before trial, was unnecessary. Code Civ.Proc. §§ 527, 528.

25. Appeal and error ⇐190(2)

Any objection to terms of injunction or propriety of its issuance should be presented to trial court in the first instance instead of being raised for the first time on appeal.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by A. H. Knox against Jean Wolfe for a declaratory judgment as to rights and liabilities of the parties under a lease, and claim and delivery action by A. H. Knox against Jean Wolfe and others to recover possession of personal property, damages for its detention, and exemplary damages. By stipulation the actions were consolidated, and, from a joint judgment in favor of plaintiff, defendants appeal.

Judgment affirmed.

Robert F. Shippee and Benjamin, Lieberman & Elmore, all of Los Angeles, for appellants.

Sherman & Sherman, Chas. R. Thompson, and Glenn M. Still, all of Los Angeles, for respondent.

WILSON, Justice.

Bank of America National Trust and Savings Association, the owner of the premises in question, leased the same to respondent for five years ending December 15, 1943, for the purpose of operating a cocktail and restaurant business. The lease was prepared by the bank's attorney under the direction of the officers and agents of the bank. Respondent installed furniture, fixtures and equipment at a cost of more than $22,000. The lease contained a provision that if the lessee held possession after the expiration of the term of the lease with the consent of the lessor the lessee should become a tenant from month to month "at the monthly rental of * * * and upon all of the terms and conditions herein specified." At the expiration of the five year period, and for some months prior thereto, one Philip L. Wilson was the owner of the premises and was the lessor by reason of mesne assignments and transfers from the original lessor. Respondent continued to occupy the premises until the expiration of the term of the lease and thereafter, with the oral consent of the owner-lessor Wilson, to and including August 31, 1944.

The court found that shortly before the expiration of the term of the lease on December 15, 1943, it was orally agreed between respondent and the lessor Wilson that respondent would continue his tenancy of the premises under the lease on a month to month basis at the same rental as specified in the lease; that respondent relied on said oral agreement and the provisions of the lease in continuing the occupancy of the premises after December 15, 1943; that the lessor at all times after said date and to and including August 31, 1944, accepted the monthly rental of the premises from respondent on the same basis as during the term of the lease; that the lease was extended or renewed to and including August 31, 1944; that respondent was at no time in default under the terms of the lease; that by assignments and transfers the premises and the lease were transferred to appellants, Wolfe and Bisno; that they became the owners thereof on or about July 3, 1944, and succeeded to the interest of said Wilson with full knowledge of the lease and all of its provisions and with full knowledge that respondent was in possession of the premises and of respondent's rights under the lease; that appellant Rabuchin is the lessee of the premises under appellants Wolfe and Bisno.

After Wolfe and Bisno became the owners of the property a dispute arose between them and respondent concerning the construction of portions of the lease which will be discussed hereinafter, and respondent filed an action for declaratory relief for the purpose of obtaining a judicial de-

termination of the rights and liabilities of the respective parties.

In addition to fixtures that had been attached to the premises, the right to the removal of which was one of the subjects of controversy in the declaratory relief action, respondent had installed for the necessary operation of his business various detachable and removable equipment such as freezers, refrigerators, stoves, steam tables, dishes and kitchen utensils. While he was in the process of removing these unattached articles and some of the attached fixtures, appellants, by means of force and violence, prevented him from taking possession of both attached and unattached articles and forcibly prevented him from removing the same from the premises. Respondent thereupon filed a claim and delivery action to recover possession of said personal property, for damages for its detention, and for exemplary damages by reason of the malicious and oppressive acts of the appellants in forcibly taking possession of the same. The claim and delivery action was against appellant Wolfe, the nominal owner of the premises, appellant Bisno, for whom she held title, and appellant Rabuchin, who became their lessee after respondent had vacated the premises.

By stipulation the two actions were consolidated and a joint judgment was rendered in favor of respondent from which appellants have taken this appeal.

1. *Construction of the provisions of the lease relating to removal of fixtures.* The lease was on a printed blank form to which were added several typewritten provisions. Paragraph 5 of the printed form provides that all alterations, additions and improvements made in the premises, including fixtures, except unattached movable business equipment, shall be the property of the lessor and shall remain upon and be surrendered with the premises, "except that lessee will ascertain from lessor within thirty days before the end of the term of this lease whether lessor desires to have the premises or any part or parts thereof restored to their condition when the premises were delivered to lessee and if lessor shall so desire then lessee shall restore said premises or such part or parts thereof before the end of the term of this lease entirely at lessee's own cost and expense * * *."

Paragraph 26 of the lease, typewritten, recites that in the operation of lessee's business it will be necessary to install fixtures and equipment, including bar and back bar, and provides that "Anything contained herein to the contrary notwithstanding, it is agreed that upon the installation of said bar and back bar, said bar, back bar and all equipment attached thereto and forming a part thereof, and all other equipment attached to the premises by screws, bolts, nails or otherwise, shall become a part of the premises herein demised, and the property of the lessor, the lessees waiving and relinquishing to the lessor any claim or interest therein. * * *"

This was followed by an unnumbered paragraph stating that by Paragraph 26 it was agreed that certain furniture, fixtures and equipment installed by the lessee should become the property of the lessor, followed by this provision: "It is agreed between the parties hereto that upon the expiration or sooner termination of the within lease, or any extension or renewal hereof, the lessee, may, provided the lessee be not in default under any of the terms, covenants or conditions of this lease, request the lessor to reconvey the right, title and interest acquired by the lessor by virtue of the provisions contained in paragraph 26 of the within lease to the lessee provided however, that in such event the lessee shall at the lessee's own cost and expense, restore said premises and every part thereof to the condition existing prior to the commencement of the term of the within lease, and upon completion of such restoration, the lessor shall reconvey the interest of the lessor in and to said articles to the lessee in accordance with the provisions of this paragraph."

[1] Since Paragraph 5 was a portion of the printed form it will be disregarded in any particular in which it is repugnant to the typewritten portion of the lease. Civ.Code, sec. 1651. The typewritten Paragraph 26, which provides that equipment attached to the premises by screws, bolts, or otherwise, shall become the property of the lessor, is expressly modified by the unnumbered paragraph to the effect that the lessee may request the lessor to reconvey the title thereto, whereupon the lessee shall, at his own cost and expense, restore the premises to their previous condition.

[2-6] The following rules of construction found in the Civil Code are applicable to the lease: It must be so interpreted as to make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating

the intention of the parties. Sec. 1643. Particular clauses are subordinate to the general intent of the lease. Sec. 1650. The lease being partly typewritten and partly printed, the typewritten parts control the printed parts; and any part either written or printed with a special view to the intention of the parties will control those portions which appear in the printed form. Sec. 1651. Repugnancies must be reconciled, if possible, by an interpretation that will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the entire contract. Sec. 1652. Since the lease was prepared by and under the direction of the lessor, its language must be interpreted most strongly against the lessor, sec. 1654, and any doubt or ambiguity, if such there be in the lease, must be resolved against the lessor. Hunt v. United Bank & T. Co., 210 Cal. 108, 116, 291 P. 184; Weil v. California Bank, 219 Cal. 538, 541, 27 P.2d 904; Couture v. Ocean Park Bank, 205 Cal. 338, 344, 270 P. 943, 61 A.L.R. 267; Payne v. Neuval, 155 Cal. 46, 50, 99 P. 476.

[7, 8] By reason of the provisions of Paragraphs 5 and 26 appellants claim title to the bar, the back bar, and all other equipment that had been attached to the premises by respondent by means of screws, bolts or nails. But the lease must be construed as a whole and must be interpreted in such manner as to give effect to the intention of the parties as indicated by the contents of the document (Hunt v. United Bank & T. Co., supra, 210 Cal. at page 115, 291 P. 184), including the unnumbered paragraph. Where a lease provides that the tenant may remove the fixtures which it installs and the tenant remains in possession with permission of the lessor from month to month after the expiration of the lease, the continued occupancy is regarded as an extension of the lease and the parties are deemed to have assented to the terms of the original lease, including the right to remove the fixtures. Woods v. Bank of Haywards, 10 Cal.App. 93, 96, 106 P. 730; Hudson v. Zumwalt, 64 Cal. App.2d 866, 874, 149 P.2d 457.

To assume that the intention of the parties was different from that expressed in said paragraph would be to alter the contract by construction or to make a new contract for the parties. By the plain and unambiguous terms of the lease, considering it in its entirety, respondent had two options and was privileged to exercise either: (1) To vacate the premises and leave the attached fixtures therein, unless the lessor desired otherwise, as provided in Paragraph 5; or, (2) under the terms of the unnumbered paragraph, to request the lessor "to reconvey the right, title and interest acquired by the lessor by virtue of the provisions contained in Paragraph 26." If he exercised option (1) and the lessor did not request otherwise, he was not obligated to do any work on the property but could have surrendered it in the condition in which it existed when he departed. If he chose option (2), he was required to restore the premises at his own expense to the condition existing at the commencement of the term of the lease, and at the completion of the restoration the lessor was obliged "to reconvey the interest of the lessor in and to said articles to the lessee in accordance with the provisions of this paragraph."

If either Paragraph 5 or Paragraph 26 should be construed to vest in the lessor the absolute and incontrovertible title to the attached fixtures, the latter part of the unnumbered paragraph beginning with the words "in such event" would be meaningless. The language following those words requiring the lessee to restore the premises to their previous condition would have no meaning or significance whatsoever if the lessee did not have the option to demand the reconveyance of the fixtures. If the fixtures were not removed there could be no restoration. Likewise, if the lessee were without right to request or to require a reconveyance, the provision obligating the lessor to reconvey said articles to the lessee would be vacuous. The only manner in which the lease may be interpreted so as to give effect to all of its provisions is that the unnumbered paragraph so qualifies Paragraphs 5 and 26 that, notwithstanding said two paragraphs, the lessee may assert the right given him by the unnumbered paragraph.

[9] The lessee was not in default and he gave timely notice that he intended to avail himself of the rights contained in said paragraph to restore the premises to the condition in which he found them at the commencement of the term of the lease and to remove the fixtures and equipment as his property. Having exercised the option afforded to him by the lease he was entitled to remove, without hindrance from appellants, all equipment from the premises, including that which was at-

tached thereto by screws, bolts or otherwise.

2. *Did a new lease or tenancy result from lessee's holding over after the written lease expired?* Several factors assist in answering this question: (1) The lease specifically provided that if the lessee should hold possession after the expiration of the term with the consent of the lessor, the lessee should become a tenant from month to month *"upon all of the terms and conditions herein specified."* (2) The privilege granted to the lessee by the unnumbered paragraph could be exercised by him at the expiration of the lease "or any *extension or renewal*" thereof. (3) Prior to the expiration of the term of the lease an express oral agreement was made between the lessor Wilson and respondent that the latter might continue in possession of the premises under the lease on a month to month basis at the same rental specified in the lease. There was no modification of any of the provisions of the lease and no new agreement was made. (4) Respondent continued the payment of rent to the owners-lessors to and including August 31, 1944, at the same rate as he had paid during the term of the lease, and they (Wilson until he sold and Wolfe and Bisno after they acquired the premises) accepted payment without objection. (5) Appellants' recognition of respondent's possession under the lease is indicated by the notice terminating tenancy given by appellant Wolfe, in which she notified respondent that on August 31, 1944, "your *lease* or tenancy" will terminate.

[10-12] The law as well as the facts sustain respondent's position that his holding over was a continuation of possession under the lease. Civ.Code, sec. 1945. When a tenant under a lease remains in possession of the leased premises with the permission of the lessor from month to month after the term expires, a new tenancy is not created but the original tenancy is deemed to have been extended (Woods v. Bank of Haywards, 10 Cal.App. 93, 96, 106 P. 730); and where a lease gives an option to the lessee "to renew" the lease for a specified term without requiring the execution of a new lease, the extension is a continuation of the tenancy under the original lease. Howell v. City of Hamburg Co., 165 Cal. 172, 177, 131 P. 130; Realty & Rebuilding Co. v. Rea, 45 Cal.App. 673, 677, 188 P. 621. The case of Earle v. Kelly, 21 Cal.App. 480, 132 P. 262, relied on by appellants, is not in point. In that case the lease was for the period of five years, and the lessee and his assignees continued in possession for 16 years after the expiration of the term, during which time the amount of rental was changed three times. Several important provisions appearing in the instant lease were absent from the lease which was considered in the Earle case: (1) The lessee was not given the right to remove the building which he had placed on the premises; (2) there was no provision that the holding over by the lessee would be on the same basis or under the same rental as under the original lease; (3) no agreement was made between the lessor and the lessee at or before the expiration of the term, as there was here between respondent and lessor Wilson; (4) the lease did not provide that the holding over was a continuing tenancy under the lease. In Wadman v. Burke, 147 Cal. 351, 81 P. 1012, 1 L.R.A.,N.S., 1192, 3 Ann.Cas. 330, there was no provision for the removing of trade fixtures attached to the premises by the lessee, and at the expiration of the lease a new lease was executed upon different terms, without reserving the right in the lessee to remove the fixtures. By reason of the factual differences between the other cases cited by appellants and the case at bar, they fail to sustain appellants' claim that a new tenancy was created by the holding over from month to month after the termination of the lease.

3. *Damages for detention of personal property.* The court found the total value of the personal property detained by appellants to be $3100 and that the rental value was $250 per month. Judgment was rendered for $1500 covering the period between September 1, 1944, and the last day of the month preceding the rendition of judgment, and for $250 per month thereafter as long as the property should be detained.

[13] When respondent ascertained that he would not be permitted to retain the premises, he arranged for another location and intended moving his equipment thereto, and was in the process of removing it when he was prevented from so doing by the actions of appellants. The war restrictions in force at that time made it practically impossible for him to obtain similar equipment for use in his new establishment, and the evidence was to the effect that the rental value of the property was therefore more than it might have been

under normal conditions. Evidence was given by a witness as to the reasonable rental value, his estimate having been based both on a percentage of the value of the property and on a percentage of the volume of receipts of respondent during the time he had occupied the premises. His estimate was more than the amount allowed by the court, and was not contradicted by other evidence. The claim that the amount allowed is excessive is without merit.

[14, 15] Appellants objected to the evidence on the ground that the witness was not qualified to express an opinion upon the subject then before the court. For 20 years he had acted as a receiver and trustee in bankruptcy and in state court receiverships, appraisements, insurance adjustments, and in various forms of liquidation. He had handled equipment such as that involved in the action and had examined the property and knew its condition. While he had not rented similar property, he had discussed rentals with other persons and particularly with persons who purchased similar property from him in his official capacity, and was familar with the profits that purchasers made from such property. There is nothing in the record to indicate a lack of qualification on the part of the witness. The qualification of an expert witness "is a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown." Hutter v. Hommel, 213 Cal. 677, 681, 3 P.2d 554, 556.

[16, 17] 4. *Malice and exemplary damages.* While appellants Wolfe and Bisno were negotiating for the acquisition of the property they led respondent to believe that they would give him a new lease. After they had acquired title they offered him a lease if he would give them a half interest in the business. Upon his refusal to accede to this demand he was served with a notice terminating his tenancy. While he and his employees were engaged in removing his property, both the attached fixtures and the unattached personal property (to the latter appellants had no claim whatsoever), Bisno, with four other men, by intimidation and threats of violence, prevented the removal of the property. The allowance of exemplary damages was justified by the fact that appellants had been guilty of oppression, intimidation and malice. Civ.Code, sec. 3294; Perlick v. Pacific Discount Corporation, 53 Cal.App. 2d 136, 147, 127 P.2d 647; Gilbert v. Peck, 162 Cal. 54, 60, 121 P. 315, Ann.Cas.1913C, 1349. The court found that appellants acted arbitrarily, maliciously and oppressively, employing the use of "strong armed men" to coerce and intimidate respondent, and assessed exemplary damages in the sum of $500. The evidence sustained the findings and, considering all of the circumstances shown by the record, the amount allowed is not excessive. This feature of the case would have been avoided if appellants had resorted to the court for an injunction to prevent the removal of the property instead of engaging in unauthorized procedure of their own fashioning.

5. *Did the court err in issuing the injunction?* Included in the judgment was a clause restraining appellants from interfering with respondent in the restoration of the premises and therefore preventing his acquisition of title to the furniture, fixtures and equipment that he had placed therein. Neither of the complaints prayed for an injunction but each contained a prayer for general relief. In each case injunctive relief was necessary to a complete determination of the controversy. Respondent's tenancy having been terminated, his right to remove the fixtures, if it existed at all, was immediate.

[18-21] In an action for declaratory relief an injunction ancillary to the relief sought is appropriate and may issue to preserve the rights of the parties. Code Civ.Proc. sec. 1060; James v. Hall, 88 Cal. App. 528, 535, 264 P. 516. Both declaratory and coercive or executory relief may be granted in the same action. Coyne v. Spellacy, 12 Cal.2d 284, 286, 83 P.2d 715; Cook v. Winklepleck, 16 Cal.App.2d Supp. 759, 764, 59 P.2d 463; Vaughan v. Roberts, 45 Cal.App.2d 246, 256, 113 P.2d 884. Future rights may be determined when a declaration of the present and actual controversy is dependent upon an adjudication of such future rights. Rolapp v. Federal B. & L. Ass'n, 11 Cal.App.2d 337, 341, 53 P.2d 974. Since the actual controversy in the declaratory relief action was whether respondent was entitled under the terms of the lease to remove the fixtures and equipment from the premises, the court, in addition to declaring the rights of the parties, fittingly proceeded to determine disputed issues of fact, (Tolle v. Struve, 124 Cal.App. 263, 266, 12 P.2d 61); and having assumed jurisdiction of the equi-

table controversy it rightly administered complete relief and made final disposition of the litigation. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 447, 109 P.2d 34.

[22] Under a prayer for general relief in an equitable proceeding, after an answer has been filed, the court may grant any relief conformable to the case made by the pleadings and the evidence although it may not be the relief asked by special prayer. Sonnicksen v. Sonnicksen, 45 Cal. App.2d 46, 52, 113 P.2d 495. When a defendant appears and answers the complaint the court, regardless of deficiencies in the prayer, may grant plaintiff any relief consistent with the evidence and the issues embraced within the pleadings. Martin v. Pacific Southwest Royalties, 41 Cal.App. 2d 161, 172, 106 P.2d 443; Nathan v. Diersen, 164 Cal. 607, 611, 130 P. 12; Goldsmith v. Board of Education, 63 Cal.App. 141, 145, 218 P. 296; Johnson v. Polhemus, 99 Cal. 240, 244, 33 P. 908; Zellerbach v. Allenberg, 99 Cal. 57, 68, 33 P. 786.

[23] The judgment was not alone upon the controversy pleaded in the action for declaratory relief, but it determined the ownership and right to possession of the personal property which was the issue in the claim and delivery action. The allegations of force and oppression contained in the complaint in the latter case and the evidence of intimidation and threats of violence made by Bisno and the men who accompanied him, were sufficient, aside from other features of the actions, to warrant the issuance of the injunction. The belligerent attitude of appellants demonstrated the necessity of an injunction to prevent further violence and intimidation in their attempt to prevent respondent from removing his property from the premises.

[24] Since the injunction is a part of the final judgment which adjudicated all of the rights of the parties, a notice or an order to show cause required before the issuance of an injunction, if issued prior to trial, Code Civ.Proc. §§ 527, 528, was unnecessary. Appellants having chosen to resort to other means than an orderly proceeding in a court of law for the purpose of enforcing what they asserted to be their rights, and which the court determined they never possessed, respondent was entitled to an injunctive judgment to protect him from further acts of force at their hands.

[25] Appellants presented a timely motion for a new trial. It does not appear from the record that at the hearing of the motion they complained to the court concerning the terms of the injunction or the propriety of its having been issued. Their objection, if any they had, should have been presented to the trial court in the first instance instead of raising the question for the first time on appeal.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



73 Cal.App.2d 718

BELSON v. CHERNABAEFF.

Civ. 3507.

District Court of Appeal, Fourth District, California.

March 28, 1946.

1. Appeal and error ⇐1151(2)

A judgment which parties' counsel agree should be reduced by specified amount, as indicated in letters to appellate court clerk, will be reduced by such amount and affirmed as reduced.

2. Costs ⇐234

Where error in rendering judgment for excessive amount was not corrected on motion for new trial on such ground, appellant should recover costs of appeal therefrom on reduction of judgment and affirmance thereof as reduced.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Joe Belson against William Chernabaeff for breach of contract and money had and received. Judgment for plaintiff, and defendant appeals.

Reduced, and affirmed as reduced.

Siemon, Maas & Siemon, of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment against defendant in the sum of $21,012.66

in an action where recovery was sought under one cause of action for damages for breach of contract, and under another for money had and received.

The only question presented by appellant is that the judgment is excessive in that a portion of it is not supported by the evidence and is contrary to stipulation of counsel made in the trial court.

Respondent has filed no brief but under date of February 20, 1946, his counsel wrote a letter to the clerk of this court to the effect that the judgment was excessive and should be reduced by the sum of $6,400 to make it conform to the evidence and the stipulations made in open court. Under date of February 26, 1946, counsel for appellant wrote agreeing that the judgment should be reduced by $6,400 to $14,612.66.

[1, 2] As these letters indicate that counsel are in agreement as to the reduction of the judgment we see no need to pursue the matter further. They have not agreed on taxing the costs of appeal, evidently leaving that matter to this court for determination. The judgment was erroneous in a substantial amount. One of the grounds for new trial, specified in the notice of motion, was that the amount of the judgment was excessive. As the error could have been corrected at that time, which was not done, we believe appellant should recover his costs of appeal.

The judgment is reduced by $6,400 to $14,612.66, and as so reduced is affirmed. Appellant will recover his costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



73 Cal.App.2d Supp. 994

PEOPLE v. MINTER.

No. Cr. A. 2164.

Appellate Department, Superior Court, Los Angeles County, California.

March 8, 1946.

1. Statutes ⇐183

Once the intention of Legislature is ascertained, it will be given effect though it may not be consistent with the strict letter of the statute.

2. Statutes ⇐181(2)

A statute is not to be construed in such a manner as to result in a palpable absurdity.

3. Intoxicating liquors ⇐100

Sections 59.6 and 61 of Alcoholic Beverage Control Act and sections 26450, 26490, 26510 of Health and Safety Code, prohibiting a licensee from exercising his privileges under license during certain hours and making it unlawful for any one to sell alcoholic beverage to a child or to sell misbranded liquor, are not to be read as amendments to section 6 of Alcoholic Beverage Control Act, which states what rights and privileges the several licenses authorize the licensee to exercise. Gen. Laws Act 3796, §§ 6, 59.6, 61; Health and Safety Code, §§ 26450, 26490, 26510.

4. Intoxicating liquors ⇐149

One who, having no license, sells whisky, violates section of Alcoholic Beverage Control Act making it a misdemeanor for any person to exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license, though sale is made in a manner, at a time, or to a person which could not lawfully be made by holder of a license. Gen.Laws Act 3796, §§ 1, 3, 5, 6, 59.6, 61; Const. art. 20, § 22.

5. Intoxicating liquors ⇐149

Defendant was guilty of a misdemeanor for selling whisky without a license, though sale was made at a time when a licensee could not legally have made a sale. Gen. Laws Act 3796, §§ 1, 3, 6, 59.6; Const. art. 20, § 22.

6. Criminal law ⇐404(4)

Unopened bottle sold by defendant which was labeled whisky, and whose contents did not look unlike whisky, was admissible in prosecution for selling whisky without a license. Gen.Laws Act 3796, §§ 2(d), 3, 6.

7. Intoxicating liquors ⇐236(13)

Evidence that defendant, in response to inquiry whether he could sell witness some good whisky, produced and sold a pint bottle which was labeled whisky and bore unbroken revenue stamps and whose contents did not look unlike whisky, together with unopened bottle itself, was

sufficient to sustain conviction of selling whisky without a license on question of whether bottle sold actually contained whisky, in absence of evidence that defendant had sold some other liquid as the whisky bargained for. Gen.Laws Act 3796, §§ 2(d), 3, 6; Health and Safety Code, §§ 26450, 26490, 26510.

8. Criminal law ⇐308

Presumptions that a person is innocent of crime and that the law has been obeyed are evidence applicable in criminal actions, and such presumptions are not overcome by the presumption of innocence of the crime charged against defendant. Code Civ.Proc. § 1963, subds. 1, 33; Pen.Code, § 1102.

9. Intoxicating liquors ⇐224

Sale of a bottle labeled as a particular brand of whisky raised a presumption that bottle contained such whisky, since statute makes it unlawful to sell liquor in a container which is falsely labeled and it is presumed that a person is innocent of crime and that the law has been obeyed. Code Civ.Proc. § 1963, subds. 1, 33; Pen. Code, § 1102; Health and Safety Code, §§ 26450, 26490, 26510.

Appeal from Police Court of City of Glendale; Charles R. Dyer, Judge.

William H. Minter was convicted of the misdemeanor of selling whisky without a license, and he appeals.

Judgment affirmed.

Donald S. McMillan, of Glendale, for appellant.

E. L. Weitzel, Acting City Pros., of Glendale, for respondent.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Spencer L. Halverson, Deputy City Atty., all of Los Angeles, amici curiae.

BISHOP, Judge.

The defendant sold a pint of whiskey, and as he had no license, he stands convicted on the charge that, by the sale, he had exercised a privilege and performed an act which a person holding a license might exercise and perform under the authority of his license. In support of his appeal from the judgment of conviction the defendant argues that as the sale took place at an hour when a licensee could not legally make a sale, it follows that he had not done an act which a holder of a license might perform. He further contends that it was not proved that the bottle which he sold contained whiskey, the main evidence on the subject being its label, which reads: "Old Crow Whiskey, 100 Proof." Upon examination we found each of these points to be without merit.

Defendant's first contention is made possible by the backhanded manner in which the legislature has made it a misdemeanor to sell whiskey without a license. The offense is created in section 3 of the Alcoholic Beverage Control Act (Act 3796, Deering's General Laws, Stats. 1935, p. 1123, as amended) by these words: "No person shall exercise the privilege or perform any act or acts which a licensee under this act may exercise or perform under the authority of a license issued under this act unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act. Any person violating any provision of this section shall be guilty of a misdemeanor * * *."

To complete the background necessary to an understanding of defendant's first position, we note that not only in fact but by definition (section 2(d) of the act referred to) "whiskey" is included among the "distilled spirits." Some twenty-five different types of licenses are listed in section 5 of the act, while in section 6 are detailed the "rights and privileges" which the several licenses "shall authorize the person to whom issued to exercise." We pay particular attention to two statements found in section 6: "An off-sale general license * * * authorizes the sale, to consumers only and not for resale, of distilled spirits in packages of not more than one gallon and * * * not less than one-half pint for consumption off the premises where sold." Section 6(h). "Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. * * * An on-sale general license authorizes the purchase and possession of distilled spirits in packages of not more than one gallon capacity and of not less than one-half pint capacity."

Later in the act, in section 59.6, we find that it is made a misdemeanor for an off-sale licensee to sell any alcoholic beverage after 8 o'clock p.m. or before 10 o'clock

a.m. of any day, or for an on-sale licensee to sell his wares after midnight and before 8 o'clock in the morning.

The sale which got the defendant into trouble occurred, all witnesses agreed, about 2 o'clock a.m. One of the witnesses had asked the defendant if he could sell him a bottle of good whiskey. The defendant, who was driving a cab, indicated that he could comply with the request. He drove to a place where two other bottles were later discovered, went to the rear of the premises, and returned with a pint bottle. He then drove a short distance before he stopped at a street light, stated the price was $7.00, and in exchange for marked bills gave the witness a pint bottle, labelled "Old Crow Whiskey—100 Proof."

[1, 2] Defendant's first argument, which is that a sale of whiskey at 2 o'clock in the morning is neither performing an act nor exercising a privilege which a licensee might legally perform or exercise, has just enough foundation in the literal structure of the charge, and in the wording of section 3, upon which the charge was based, to make it plausible. However, to place the interpretation upon section 3 contended for by the defendant would result in permitting an unlicensed person to sell intoxicating liquor with impunity during the hours a licensed person is expressly forbidden to do so. Such an interpretation would be out of harmony with the injunction contained in the first section of the act, that "all provisions of this act shall be liberally construed for the accomplishments of these purposes," one of the purposes referred to having been earlier declared in the section to be "to eliminate the evils of unlicensed * * * selling * * * of alcoholic beverages." In addition to the rule of interpretation expressed in the act itself, we know that "Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute (citing cases). In construing a statute it must be remembered that no law is to be construed in such a manner as to result in a palpable absurdity." People v. Black, 1941, 45 Cal. App.2d 87, 94, 113 P.2d 746, 750.

[3-5] The words employed by the legislature permit of an interpretation which avoids the absurd result of permitting an unlicensed person to sell liquor during the periods when licensed places must be closed. The key to the meaning of section 3 is found in its use of the terms "under the authority of a license" and "authorized to do so by a license." As we have already noted, those things which a license authorizes a person to do, and those things which may be done under the authority of a license, are set forth in section 6 of the act. While it is true that section 59.6 prohibits a licensee from exercising his privileges during certain hours, and another section of the act (section 61) makes it a misdemeanor for anyone to sell an alcoholic beverage to a child, and the Health and Safety Code makes it unlawful to sell liquor if it is misbranded (sections 26450, 26490, 26510), none of these various interdictions read as amendments to the provisions of section 6 which state what rights and privileges are authorized by the various licenses given. That which an on-sale license authorizes, is the sale of the alcoholic beverage specified in the licenses. It is this authority that section 3 has in mind, and one who, having no license, sells whiskey, violates section 3, even though the sale is in a manner, or at times, or to a person, which could not lawfully be made by the holder of a license. The "authority" involved is that set forth in section 6, not the restricted right to operate left when all statutes are considered. This construction of section 3 makes it harmonious with the declaration in section 22 of Article XX of the California Constitution (which is the controlling authority under which the entire act in question operates) that "It shall be unlawful for any person other than a licensee of said board to manufacture, import or sell intoxicating liquors in this State."

Defendant's second argument is that there was no competent proof that the liquid in the pint bottle which he sold was either whiskey or any other intoxicating beverage. As already indicated, the evidence at this point is not extensive. The defendant was asked if he would sell some good whiskey, and he produced a bottle bearing the label "Old Crow Whiskey, 100 Proof," upon which were some unbroken United States Government revenue stamps. The bottle, for some reason, was never opened and sampled, the testimony of the several witnesses to the effect that it contained whiskey being admittedly based upon the label and stamps that it bore and, doubtless, upon the further fact that its contents did not look unlike whiskey. There was no evidence suggesting that the defendant had

sold some other liquid as the whiskey bargained for.

[6, 7] It was not error to admit the bottle into evidence, nor was the proof lacking that it was whiskey which the defendant sold. As stated in Fowler v. State, 1945, Okl.Cr.App., 157 P.2d 222, 223: "As to whether the liquid seized * * * was whiskey as alleged in the information, the proof could be made by circumstantial as well as by direct evidence. The fact that the liquid was in a pint bottle with an unbroken Government seal, that it was red in color and had the appearance of whiskey and was labelled 'whiskey' was a sufficient showing that the liquid transported by the defendant was whiskey, and in the absence of any proof offered on behalf of defendant, was sufficient to sustain the conviction." In the earlier case of Munn v. State, 1911, 5 Okl.Cr. 245, 114 P. 272, the court came to the same conclusion for much the same reasons.

In State v. Wright, 1895, 68 N.H. 351, 44 A. 519, the presence of United States revenue stamps on some kegs was held to lend support to the conclusion that the kegs contained malt liquor. In Tompkins v. State, 1907, 2 Ga.App. 639, 58 S.E. 1111, it was stated that "The jury may infer * * * that a liquid, though not imbibed, is whisky where the purchaser plainly asks for whisky, and the seller furnishes it in compliance with his request." This case was followed approvingly, where peach brandy was in question, in Howard v. State, 1909, 7 Ga.App. 61, 65 S.E. 1076, 1077. To the same effect is Lewinsohn v. United States, 1922, 7 Cir., 278 F. 421, 426. See also 33 Cor.Jur. 774, note 96.

In several cases the presence of labels was held sufficient, in the absence of evidence to the contrary, to determine the character of the contents. In Herring v. State, 1914, 11 Ala.App. 202, 65 So. 707, we find it stated that "The fact that packages delivered by the express company to the defendant were billed and marked 'whisky' was some evidence that they contained whisky." This conclusion was based in part on the authority of Kennedy v. State, 1913, 182 Ala. 10, 62 So. 49, 52, where a conviction of murder was affirmed, and, in considering the effect of a label on a box received in evidence, the Alabama Supreme Court had remarked: "If a defendant is accused of selling alcoholic liquor contrary to law, it cannot be rationally urged that whisky labels on the bottles of liquor dispensed by him would not be some evidence of the nature of the liquor inside."

[8, 9] We find the opinions in Jackson v. State, 1914, 11 Ala.App. 193, 65 So. 708, and Gilliland v. State, 1919, 15 Okl.Cr. 635, 179 P. 786, particularly persuasive because they are founded upon a principle which we deem applicable to this case. In each of these cases, the fact was stressed that by statute labels were required, and were found, upon the bottles which were sold. In this state, too, it is, as we have seen, unlawful to sell liquor in a container which is falsely labeled. Sections 26450, 26490, 26510, Health and Safety Code. It is presumed both that a person is innocent of crime (subd. 1, sec. 1963, Code of Civil Procedure), and that the law has been obeyed. Subd. 33, id. These presumptions are evidence, People v. Le Doux, 1909, 155 Cal. 535, 553, 102 P. 517, 524, applicable to criminal actions, Section 1102, Penal Code; People v. Le Doux, supra; People v. Cockrill, 1923, 62 Cal.App. 22, 38, 216 P. 78, 85; they are not overcome by the presumption of innocence of the crime charged against the defendant, People v. Agnew, 1940, 16 Cal.2d 655, 663, 107 P.2d 601, 604. See also Dunlop v. United States, 1897, 165 U.S. 486, 17 S.Ct. 375, 41 L.Ed. 799, 804. It was to be presumed, therefore, that when the defendant sold a bottle bearing the label "Old Crow Whiskey, 100 Proof," that that is just what it was.

Other matters suggested in the defendant's argument have been considered, but we do not deem that they merit mention.

The judgment is affirmed.

SHAW, P. J., and KINCAID, J., concur.

27 Cal.2d 724

S. SIWEL & CO. v. LOS ANGELES COUNTY et al.

L. A. 18935.

Supreme Court of California, in Bank.

March 19, 1946.

1. Municipal corporations ⇐519(5)

The relief statutes authorizing counties and cities to pay bonds and cancel taxes and assessments, make highway improvement assessments levied by city for payment of bonds unenforceable on purchase and cancellation of bonds by county, since relief statutes are designed to remedy the large number of tax delinquencies, and for land to be subject to lien of delinquent assessments which could not be removed, would be contrary to legislative purpose. St.1925, p. 849; p. 890, § 41; Gen.Laws, Act 3303*l*, §§ 1, 3, 5; Streets and Highways Code, §§ 1625.5 to 1628.

2. Municipal corporations ⇐523(4)

Where highway improvement assessments levied by city for payment of bonds were rendered unenforceable by county's purchase and cancellation of bonds, landowner which subsequently paid assessments under protest could recover amount thereof under statute authorizing refund of taxes erroneously or illegally collected. St.1925, p. 849; p. 890, § 41; Gen.Laws, Act 3303*l*, §§ 1, 3, 5; Streets and Highways Code, §§ 1625.5 to 1628; Revenue and Taxation Code, § 5096.

TRAYNOR, J., and GIBSON, C. J., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by S. Siwel & Company against the County of Los Angeles and another to recover special assessments paid under protest. From a judgment of dismissal after sustaining a general demurrer to the complaint without leave to amend, the plaintiff appeals.

Reversed with directions.

Prior opinion 160 P.2d 789.

Murphey & Davis, by Alex. W. Davis, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, and Clyde Woodworth, City Atty., of South Gate, for respondents.

EDMONDS, Justice.

Under protest the S. Siwel Co. paid special assessments levied by the city of South Gate, and brought this action to obtain a refund. Upon the appeal from the judgment of dismissal entered after a general demurrer to the complaint was sustained and leave to amend denied, the questions presented for decision concern the validity of the assessments and the scope of certain sections of the Revenue and Taxation Code.

The facts alleged in the complaint and a proposed amended complaint may be summarized as follows: The appellant is the owner of land in the city of South Gate bordering on Wright Road, a highway of general county use. The highway was improved pursuant to a proceeding had under the Acquisition and Improvement Act of 1925, commonly known as the Mattoon Act (Stats.1925, p. 849, Deering's Gen.Laws, Act 3276a, repealed by Stats.1933, chap. 346, pp. 948, 949). In 1929, Acquisition and Improvement bonds to the amount of $43,400 were issued and sold. Special assessments were levied against lands in the district, of which the appellant's property constituted a large part. Levies for the years 1929–1933, inclusive, were paid by the Siwel company, but assessments of the four subsequent years, 1934-1937, inclusive, were allowed to become delinquent. Only about 9 per cent of such assessments were paid by the property owners and the district was in economic distress.

Prior to June, 1938, bonds in the principal amount of $4,000 and interest had been paid in full, but of the outstanding bonds in the principal sum of $39,400, approximately $16,000 were delinquent in payment of principal and all were delinquent in payment of interest. The country was passing through a period of severe economic depression and the land values in the district shrank to a point where the total assessed valuation of all the taxable property within the district was at times less than the face value of the amounts outstanding on the bonded indebtedness. Taxes and assessments against a large percentage of the property in the district had been delinquent for five years and unless financial aid was made available, a considerable portion of the property would be stricken from the tax rolls.

Appropriate legislation had been enacted for the relief of districts in distress. Stats. 1935, p. 1250, Deering's Gen.Laws, Act

3303*l*; Streets and Highways Code, §§ 1625.5–1628, as amended by Stats.1935, pp. 2178, 2199, Stats.1937, p. 160. In 1938 acting pursuant to these provisions and prior to the levy of any assessment for that year, the board of supervisors of Los Angeles County adopted a resolution which, after reciting that Acquisition and Improvement District No. 11 of the city of South Gate was in economic distress because of excessive and burdensome special assessments and eligible for relief under sections 1626, 1627 and 1628 of the Streets and Highways Code, ordered that the county should purchase all of the outstanding bonds and deliver them to the city for cancellation. Pursuant to the resolution, all of the outstanding bonds were purchased and delivered to the treasurer of the city of South Gate. By order of the board of trustees of the city, on July 13, 1938, all of the bonds were canceled.

The appellant's demand thereafter made that the assessments for the years 1934-1937 be canceled was rejected by both the city and county. S. Siwel & Co. then made payment under protest, and filed a timely claim for refund, followed by commencement of the present suit.

In challenging the ruling of the trial court that these facts do not state a cause of action entitling the Siwel company to a refund of the amounts paid by it to discharge the assessments levied prior to the retirement of the bonds, the appellant takes the position that these assessments were collectible only for the purpose of meeting the obligation on the bonds, and the right to do so ceased to exist when the bonds were paid and canceled. Therefore, the argument continues, unless the amount paid to satisfy the assessments for the years 1934-1937 is refunded, the city will be unjustly enriched. And the appellant asserts that the procedure specified by the Revenue and Taxation Code may be used by a property owner to obtain a refund of assessments paid under the circumstances related in the complaint.

The city and the county contend that the cancellation of the bonds raised no bar to the collection of assessments theretofore levied. Under section 1626 of the Streets and Highways Code, it is said, the legislative body of the city was given discretionary power to direct the cancellation of any unpaid taxes and assessments, and in the exercise of that discretion decided not to cancel the assessments levied before 1938 against the property of the appellant and other property owners in the assessment district. If assessments levied prior to 1938 are canceled, the respondents assert, the landowners who defaulted in their obligations will obtain a benefit denied to those who paid the assessments placed against their properties.

The Acquisition and Improvement Act, supra, pursuant to which the assessments now challenged by the appellant were levied, provided a method for the construction of street improvements and the acquisition of land therefor. The legislative body of any municipality was authorized by the statute to determine, after appropriate notice and hearing, the improvements which were to be made and the district which would be specially benefited by the improvements.

By the terms of the statute, the cost of an improvement was to be met by the issuance of bonds against the real property to be specially benefited by the improvements. Payment of the bonds was to be made out of a special fund to be constituted by the municipality for each district in which such bonds were issued. Each year, at the time of levying taxes for general municipal purposes, the city was required to levy against all lands within the district, "a special assessment tax in an amount clearly sufficient, together with any moneys which are or may be in said fund, to pay all the principal which has become or will become due and all interest which has become or will become payable on the bonds * * * before the proceeds of another * * * levy of taxes to be collected for general municipal purposes * * * can be made available for the payment of said principal and interest." These special assessment taxes, the statute read, should be "in addition to all other taxes levied for * * * municipal purposes." § 41.

The city of South Gate has delegated its functions relating to the collection of taxes to the county of Los Angeles. By the terms of the Acquisition and Improvement Act, levies for the payment of principal and interest requirements upon the bonds were to be "collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes." Also, the statute specifically adopted the procedure provided by general law for the collection of taxes for general municipal purposes. § 41.

Act 3303*l* declares that city and county legislative bodies are "hereby fully and completely authorized and empowered, on the consent of the owners or holders of such bonds or indebtedness, to purchase, adjust, liquidate or cancel such bonds or indebtedness, or any part of them or it, and to carry out any plan or plans for the purchase, adjustment, liquidation, or cancellation of such bonds or indebtedness, or any part of them or it," and to "adjust, waive or cancel in whole or in part, any tax or taxes, assessment or assessments, penalty or penalties and interest heretofore levied or taxed against any of the property or properties in such special assessment district which have been taxed or levied for the purpose of meeting the bonds or indebtedness of such special assessment districts." § 1. Such legislative bodies are also authorized "to appropriate and use any and all necessary funds, moneys, taxes, assessments and contributions, from whatsoever source derived, for the furtherance, consummation and conclusion of the purchase, adjustment, liquidation or cancellation of any bond or bonds * * * in whole or in part of such districts, and to pay from such funds, moneys, taxes, assessments and contributions all expenses necessary to carry on the furtherance, consummation and conclusion of such plan or plans." § 3.

Section 1626 of the Streets and Highways Code provides that "boards of supervisors in their respective counties may purchase or redeem at a discount, and may at any time in their discretion cancel or retire, bonds of any special assessment district, for the payment of which special assessments * * * have been or are to be levied, if the proceeds of such bonds are or have been used exclusively for the acquisition of rights of way or easements for, or for the construction, maintenance, improvement or repair of highways, bridges or culverts, within such county or any city therein. The board may also pay any portion of the principal or interest of, or transfer such amount as the board deems proper to the interest and sinking fund for the discharge and payment of, any of such bonds."

Section 1626.5 of the Streets and Highways Code reads, in part, as follows: "In accordance with the provisions of sections 1627 and 1628, the boards of supervisors, in their respective counties, may appropriate money to refund, repay and adjust, by any method established by law, the principal, or any portion of the principal, of any special assessments or bonds issued to represent special assessments, which have become liens on lands and which have been levied under the direct or specific assessment method to pay for the acquisition of rights of way or easements for, or the construction, maintenance, improvement or repair of public highways, bridges, or culverts within such county or any city therein."

In enacting legislation for the relief of the property owners in special assessment districts (Stats.1935, chap. 354, Deering's Gen.Laws, Act 3303*l*) the Legislature declared: "During the fifteen years last past hundreds of districts have been organized throughout the State of California under the provisions of the Road District Improvement Act of 1907 and the Acquisition and Improvement Act of 1925. Many of these districts were created during times of great economic prosperity and high land values. In many of such districts, due to the optimism of the times, or other causes, bonds for public improvements were issued in amounts in excess of the ability of the lands of such districts to bear the assessments necessary to pay the principal and interest on such bonds. Millions of dollars in assessed land valuation are located within districts created under these acts. Due to the present economic depression land values throughout the State have shrunk to the point where, in many cases, the total assessed valuation of all lands within a given district is less than the face value of the bonds outstanding in such district. Annual assessments upon individual parcels of land within these districts amount in many instances to more than the assessed value of such land.

"Under present economic conditions property owners are unable to meet these high assessments and hundreds of such districts throughout the State have reached a point of hopeless delinquency.

"Inasmuch as the property owners of these districts cannot, under the law, pay their county or municipal taxes without at the same time paying the district assessments many cities and counties are unable to collect large sums of money badly needed for the purposes of government.

"Many hundreds of properties in these districts are being deeded to the State for delinquent taxes and assessments and unless the financial aid of the counties is immediately made available to assist these

overburdened districts thousands of parcels of lands will be stricken from the tax rolls this year; thousands of property owners will lose their homes, millions of dollars in governmental revenue will be uncollectible and at the same time thousands of bondholders will be unable to realize any return upon their investments." Section 5.

According to the allegations of the complaint, the economic situation of Acquisition and Improvement District No. 11 in the city of South Gate was exactly that which the relief statutes were enacted to remedy. Because of the inclusion of the levy for special assessments in the total amount of municipal taxes standing against a large portion of the property in the district and the sharp reduction in real estate values, the owners were unable to meet their tax obligations and delinquencies for five years were common.

Full relief was given by the board of supervisors which, by its resolution determined that this economic distress was occasioned by the excessive and burdensome special assessments. The county purchased *all* of the outstanding bonds and sent *all* of them to the city of South Gate for cancellation. Pursuant to the county's request, *all* of the bonds were canceled and, as the city and county each declare, these acts were done with the intention of the county to retain no claim for the repayment of any portion of the $29,550 which it expended for the bonds.

Yet, under these circumstances, it is vigorously contended, the property owners who could not meet their taxes because of the excessive and burdensome bond requirements were left by the action of the county with a lien against their property which could neither be enforced nor removed. Such a result runs counter to every principle of equity and fair dealing and does not give the full relief which was given by the county.

[1] Manifestly, the relief legislation was enacted to aid property owners whose taxes were delinquent; the fact of delinquency was stressed by the Legislature and recognized by the board of supervisors as the justification for extending relief. Undoubtedly the county acted in part for the benefit of those property owners who had paid the assessments levied prior to the cancellation of the bonds, but the situation which the relief statutes were designed to remedy was the large number of tax delinquencies. For the county to purchase the bonds and cancel them but to leave the property owner with the same delinquent assessment which he had before would not meet the purpose of the legislation. If the assessments which the owner did not pay because of economic conditions could then be collected from him, the full relief intended by the statute, that is, to get the property back on the tax rolls, would not have been accomplished. For the land to be subject to the lien of delinquent assessments which could not be removed would also be contrary to the legislative purpose.

[2] Under these circumstances, the amount paid by the Siwel company under protest was either "erroneously or illegally collected" from it within the meaning of section 5096 of the Revenue and Taxation Code. The word "taxes" as used in that statute "includes assessments collected at the same time and in the same manner as county taxes." § 4801. Moreover, section 5096 is not limited to the recovery of taxes erroneously or illegally levied but authorizes the refund of taxes "erroneously or illegally collected." Evans v. County of San Joaquin, 67 Cal.App.2d 452, 455, 154 P.2d 468, 469. The use of the word "collected" rather than the term "levied" or "assessed" is most significant. (Compare section 4986 authorizing a cancellation of taxes "levied or charged * * * Erroneously or illegally.")

This conclusion does not allow a property owner to withhold payment of an assessment and escape liability for the amount levied against his land if and when the collections from other owners in the district provide sufficient money to meet the principal and interest requirements upon unpaid bonds. For it is only when the board of supervisors, acting pursuant to the authority granted by the relief legislation and for the purpose of meeting economic distress within an assessment district, purchases and cancels *all* of the outstanding bonds and authorizes their cancellation that the delinquencies of the property owner are forgiven.

The judgment is reversed with directions to the trial court to overrule the general demurrer to the complaint and to proceed in accordance with the views here expressed.

SHENK and SPENCE, JJ., concurred.

CARTER Justice (concurring).

I concur in the judgment of reversal and am in accord with the views expressed in the opinion prepared by Justice Edmonds, but I believe there are other grounds for reversal than those advanced in said opinion.

Briefly put we have a situation in which an improvement was carried out by the city of South Gate in a certain portion or district of that city. To defray the costs of it bonds were issued by the city. Those bonds were not general obligations of the city but their payment was secured by the levy of a special assessment on the property in the district which was benefited by the improvement. Economic conditions impelled the Legislature to enact laws for the relief of the property in the district and for the broad purpose of restoring that property to the tax rolls in order that the general revenue should not suffer. Streets and Highways Code, §§ 1626, 1626.5, 1627, 1628.

The position taken by respondents is that the relief legislation may be interpreted to mean that the county may purchase all of the bonds, cancel them and turn them over to the city. The latter may then cancel all or *no part* of the assessments which have been levied to retire the bonds. *In other words, the city could collect all of the assessments and devote that money to whatever municipal purpose it desired* in spite of the fact that the money enabling the city to so act *came from the county.* Such broad discretion in the city with respect to cancellation of assessments amounts in effect to a *gift by the county to the city,* for the county would have no control over the extent to which assessments were cancelled although it supplied the money for that purpose. The general taxpayers of the county would be compelled to pay for purely municipal activities of the city. To so interpret the act is to render it unconstitutional. Article IV, section 31, of the Constitution of California, provides: "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, *whether municipal or otherwise,* or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." [Emphasis added.] In applying the foregoing provision of the Constitution this court stated in City of Oakland v. Garrison, 194 Cal. 298, 303, 228 P. 433, 435:

"Section 31 of article 4 of the Constitution provides in effect that the legislature shall have no power to authorize the making of any gift of any public money to any *municipal corporation.* It may reasonably be concluded, and we shall assume for the purposes hereof, that this provision would prevent the appropriation of county funds to a municipal corporation even for a public purpose, if that purpose were purely municipal and of no interest or benefit to the county as a political subdivision." There are only two situations here involved in which the county may transfer its funds to a city without violating the Constitution. The first is where the purpose is to restore property to the county tax roll and thus lessen the burden of the general taxpayers of the county. The county thus benefits and the purpose of the transfer of funds and use thereof is a public one and no gift has been made. This ordinarily arises where the county cancels assessments in special assessment districts. Such was the case in San Diego County v. Hammond, 6 Cal.2d 709, 728, 59 P.2d 478, 488, 105 A.L.R. 1155, where this court stated: "Respondents further complain that the improvements for which bonds were issued in some instances included water mains or sanitary sewers, or both, and that the county could not in the first instance have levied a tax for such purposes. It will be noted, however, that we have not based our conclusion that the county may contribute toward the payment of said original bonded indebtedness upon the ground that the county could in the first instance have paid a part of the cost of said improvement, but upon the ground that the *purpose of the payment of a portion of said indebtedness is to relieve the property in said delinquent districts of the heavy burden of taxes existing against it in order that the property may be restored to the tax rolls of the county and thereby and thereafter bear its proportionate share of the expense of maintaining said coun-*

ty." [Emphasis added.] However, in the case at bar, if the city may in its discretion *refuse to cancel any assessments* although the county has with its funds paid or cancelled the bonds, and may collect the assessments, *the property will not be returned to the county tax roll* for it has not been relieved of the assessments. The county and its general taxpayers have not benefited and hence no county public purpose has been served. The only way that the desired result may be accomplished is that the assessments are necessarily cancelled to the extent that the county has used its funds to purchase and cancel the bonds.

The second county public purpose, and hence not a gift, which might be achieved would be where the money spent is used for improvements in which the county has an interest as distinguished from those of purely local city concern. We have no such situation here. There is no restriction upon what use may be made of the assessments collected by the city after the bonds have been retired. The statute under which the bonds were issued provides: "Any money remaining in any acquisition and improvement district interest and sinking fund after all of the bonds of the district have been retired shall be transferred to the general fund of the * * * municipality, as the case may be, whose legislative body has had jurisdiction over the proceeding and may by said body be used in repairing any public way in said district, regardless of whether a portion or all of the district as originally formed may have been included within one or more municipalities which did not include such portion or all of the district at the time the proceedings for the same were initiated." Stats.1925, p. 892, § 41. It is very doubtful that that section has any application to the funds involved in the instant case, but even if it be assumed that it does, the money collected may be used for repairing public ways in the city in which the county has no conceivable interest. Hence there is a gift by the county to the city for a purely municipal purpose.

It is not to be supposed that the Legislature intended to authorize the county to give funds to the city and leave it to the arbitrary power of the latter to use them for other than county purposes, thus violating article IV, section 31, of the Constitution. And what is more, vest in the city the power to completely thwart the sole purpose of the relief statute, that is, to restore the property to the county tax rolls. It must necessarily follow that when the county, acting pursuant to the relief statute, buys the bonds and cancels them, the city must cancel the assessments in a corresponding amount.

The foregoing interpretation of the statute is fortified by the expressions therein that the bonds which may be purchased by the county are those connected with an improvement from which the county benefits. It provides: "It is the intention of this section that the expenditures authorized in section 1625.5 shall not be made, and that the funds specified in section 1627 *shall not be expended* for any of the purposes authorized in sections 1626 and 1626.5, *if the public highways, bridges or culverts* are of only local use." [Emphasis added.] Streets & Highways Code, § 1628. If the city may devote the money to purely local uses, the above safeguard is meaningless.

The relief legislation here involved contains the following provision: "Whenever as the result of the retirement, cancellation or redemption of bonds as in this section provided, the legislative body which conducted the proceedings for the issuance of such bonds by resolution duly passed determines that there is sufficient money in the interest and sinking fund or other proper fund to adequately provide for the retirement or payment of the penalties, interest and principal of all outstanding bonds of such district as the same are or shall fall due, such legislative body may, in its discretion, direct the cancellation or, if its taxes are collected through another legislative body it *may in its discretion by resolution order such other legislative body to direct the cancellation of all or any portion of the unpaid taxes and assessments* and the penalties thereon and the lien thereof levied or to be levied for the payment of such penalties, principal and interest." [Emphasis added.] Streets & Highways Code, § 1626. In view of the foregoing discussion it seems clear to me that should the city exercise its discretion by refusing to cancel all of the assessments when all bonds have been purchased by the county and surrendered to the city for cancellation, and the city should thereafter collect such assessments, it would be required to reimburse the county for the amount so collected. Obviously, this was never contemplated by the framers of the relief legislation.

SCHAUER, J., concurred.

TRAYNOR, Justice (dissenting).

Plaintiff brought this action to obtain a refund of special assessments paid under protest. Plaintiff's land was in a special assessment district within the city of South Gate, established under the Acquisition and Improvement Act (Stats.1925, p. 849, Deering's Gen.Laws 1931, Act 3276a) [1] for the improvement of Wright Road, a highway of general county use. The defendant city undertook the proceedings necessary to form the district and issued bonds totalling $43,400 to cover the cost of the improvement. Annual assessments were levied to cover interest and installments of principal on the bonds. Plaintiff paid the assessments levied against its land each year until 1934. It let the assessments for the years 1934 to 1937 become delinquent. Ninety-one per cent of the lands in the district were delinquent for that period, and the district failed to pay interest and installments of principal on the bonds as they fell due. Bonds amounting to $39,400 face value were delinquent as to interest, and bonds amounting to approximately $16,000 face value were delinquent as to principal.

Throughout that period property values declined, and there was an overwhelming number of delinquencies on special assessments throughout the state, often exceeding the actual value of the lands assessed. Emergency legislation became necessary to rescue the special assessment districts from insolvency and to enable the lands therein to bear their share of the general tax burden. County boards of supervisors were given wide powers to relieve special assessment districts and to liquidate in whole or in part the indebtedness of such districts by purchasing and cancelling their bonds. The legislative bodies that conducted the proceedings for the issuance of the bonds were given discretionary power to cancel delinquent assessments of such districts if they determined that the relief of the district required such cancellation. The pertinent provisions of this legislation are quoted in the margin.[2]

[1] This act was repealed in 1933 (Stats. 1933, p. 948) with a saving clause that the repeal did not affect any bonds theretofore issued or any assessments theretofore levied.

[2] Sections 1626, 1626.5, 1627, and 1628 of the Streets and Highway Code (as amended by Stats.1935, pp. 2178, 2199, Stats.1937, p. 160) provide:

"1626. In accordance with the provisions of sections 1627 and 1628, the boards of supervisors in their respective counties may purchase or redeem at a discount, and may at any time in their discretion cancel or retire bonds of any special assessment district, for the payment of which special assessments, levied wholly or partly in accordance with the assessed value of lands, or levied by direct assessment, have been or are to be levied, if the proceeds of such bonds are or have been used exclusively for the acquisition of rights of way or easements for, or for the construction, maintenance, improvement or repair of highways, bridges or culverts within such county or any city therein. The board may also pay any portion of the principal or interest of, or transfer such amount as the board deems proper to the interest and sinking fund for the discharge and payment of, any of such bonds. Such bonds may be redeemed or purchased at not to exceed eighty per cent of the face value of the unpaid principal and interest of such bonds. Whenever as the result of the retirement, cancellation or redemption of bonds as in this section provided, the legislative body which conducted the proceedings for the issuance of such bonds by resolution duly passed determines that there is sufficient money in the interest and sinking fund or other proper fund to adequately provide for the retirement or payment of the penalties, interest and principal of all outstanding bonds of such district as the same are or shall fall due, such legislative body may, in its discretion, direct the cancellation or, if its taxes are collected through another legislative body it may in its discretion by resolution order such other legislative body to direct the cancellation of all or any portion of the unpaid taxes and assessments and the penalties thereon and the lien thereof levied or to be levied for the payment of such penalties, principal and interest. Such direction to cancel taxes shall be made to and the cancellation shall be made by the officer having control of the record thereof, with the written consent of the district attorney, county counsel, city attorney or other legal advisor of the legislative body directing the cancellation. Whenever only a portion of such taxes, assessments and liens are cancelled, it may be according to any uniform plan which in the discretion of such legislative body is deemed equitable. Where such property has been deeded to the State or other subdivision for such delinquent taxes or

Pursuant to this legislation defendant county purchased the outstanding bonds and delivered them to defendant city for cancellation. The defendant city refused to exercise its power to cancel the delinquent assessments of the district. The county, which collected the city's taxes, therefore collected the delinquent assessments levied against plaintiff's land for the years 1934 to 1937. Plaintiff paid the de-

assessments a credit in similar amount shall be allowed upon the amount necessary to redeem. The officer who makes the cancellation of taxes, assessments and liens as hereinabove provided shall notify the State Controller or corresponding officer of such other subdivision of the credit which shall be allowed upon the right of redemption and such State Controller or such other officer shall thereupon allow such credit; provided, however, that in all respects except the collection and disbursement of redemption money the tax deed shall not be affected and shall remain unimpaired.

"1626.5. In accordance with the provisions of sections 1627 and 1628, the boards of supervisors, in their respective counties, may appropriate money to refund, repay and adjust, by any method established by law, the principal, or any portion of the principal, of any special assessments or bonds issued to represent special assessments, which have become liens on lands and which have been levied under the direct or specific assessment method to pay for the acquisition of rights of way or easements for, or the construction, maintenance, improvement or repair of public highways, bridges, or culverts within such county or any city therein. If the board of supervisors shall appropriate money to refund, repay or adjust assessments or bonds levied or issued by a city, it may delegate to the legislative body of such city the disbursement of the funds appropriated therefor, on such terms and conditions as may be agreed upon by the board and the city.

"1627. The expenditures authorized in sections 1626 and 1626.5 may be made from: (a) The general fund of the county * * *.

"1628. Before any expenditures are made under the authority of section 1625.5 or of sections 1626 or 1626.5 and 1627, the board of supervisors of the county shall, by a resolution adopted by a four-fifths vote of the members of the board, determine that the bonds or assessments, or the portions thereof, under consideration were issued or levied to acquire rights of way or easements for, or to construct, maintain, improve or repair public highways, bridges or culverts of general county use, and not of a purely local use. It is the intention of this section that the expenditures authorized in section 1625.5 shall not be made, and that the funds specified in section 1627 shall not be expended for any of the purposes authorized in sections 1626 and 1626.5, if the public highways, bridges or culverts are of only local use."

Act 3303*l*, Deering's General Laws, Stats.1935, p. 1250, provides: Section 1. "The legislative body of any city or county, or city and county, of the State of California, acting individually or in conjunction with any other such legislative body or bodies, wholly or partly within the boundary of which any special assessment district has been created, and the outstanding bonds or indebtedness of which district are payable by taxes or assessments levied wholly or partly in accordance with the assessed value of lands or property, shall be and it is hereby fully and completely authorized and empowered, on the consent of the owners or holders of such bonds or indebtedness, to purchase, adjust, liquidate or cancel such bonds or indebtedness, or any part of them or it, and to carry out any plan or plans for the purchase, adjustment, liquidation, or cancellation of such bonds or indebtedness, or any part of them or it, and if necessary or advisable to carry out such plan or plans under the bankruptcy laws of the United States of America, and any amendments thereto now or hereafter adopted, or under any law or laws of the State of California, enacted for the purpose of the purchase, adjustment, refunding, liquidation or cancellation of bonds or indebtedness of special assessment districts. In carrying out any such plan or plans the legislative bodies herein mentioned are fully authorized and empowered to adjust, waive or cancel in whole or in part, any tax or taxes, assessment or assessments, penalty or penalties and interest heretofore levied or taxed against any of the property or properties in such special assessment district which have been taxed or levied for the purpose of meeting the bonds or indebtedness of such special assessment districts."

Section 2. "Such legislative body or bodies shall be and hereby are also fully and completely authorized and empowered to enter into any plan, contract, agreement, escrow or trusteeship having for its purpose the purchase, adjustment, liquidation or cancellation of the outstanding bonds or indebtedness of such districts."

Section 3. "Such legislative body or

linquent assessments under protest and filed a claim with the county for a refund on the ground that the assessments were illegally collected. The county denied the claim maintaining that it was under a duty to collect the uncancelled assessments. The trial court upheld general demurrers interposed by both defendants to plaintiff's complaint and entered a judgment of dismissal. Plaintiff appeals.

Plaintiff does not question the legality of the assessments as originally levied or the fact that the assessments on its property were delinquent while the bonds were still outstanding. Nor does it contend that the collections could be refunded had its assessments been paid before the bonds were cancelled. It does contend, however, that there is a fundamental principle of special assessment law that an assessment, even though validly levied and legally collectible when it became delinquent, becomes illegal after the bonds are retired, since its collection is no longer necessary to redeem the bonds. The alleged invalidity under this so-called principle arises, not from any defect in the assessments, but from the fact that a property owner successfully delays payment of his share thereof until others have met the cost of the improvement represented by the bonds. There is no such principle of special assessment law. Nor could such a principle be adopted without repudiating the long established rule that special assessments are to be levied in accordance with benefits. To forgive the delinquent property owners solely because the nondelinquent owners or others have paid enough to meet the cost of the improvement would defeat the very object of making the levies in proportion to benefits and discriminate against those who pay their assessments. At the time of the levy, after the property owners are given notice and an opportunity to be heard, the share of each property owner in the burden is determined. It is impossible at that time to foresee what amount will actually be collected or in what order collections from each owner will be made. If the subsequent existence of funds in excess of the redemption price of the bonds invalidated the collection of delinquencies the shares of the individual property owners in the common burden would be fixed by the accidental course of the collections rather than by the fair distribution of that burden at the time of the levy.

In fixing the amount of an assessment, it is common practice for an assessing body to make the levy higher than it would have to if there were no delinquencies—a practice sanctioned by this court under the very act here in question. American Securities Co. v. Forward, 220 Cal. 566, 572-577, 32 P.2d 343, 96 A.L.R. 1268. Only by anticipating delinquencies at the time of the levy can an assessment district expect to meet the payments on the bonds as they fall due. It does not, however, thereby forgive delinquent owners their share of the common burden. If collections of delinquent assessments became illegal as soon as the bonds were retired enough money was on hand to retire them, delinquent property owners would reap a reward for their delinquency at the expense of those who paid their assessments. There would then inevitably be an overwhelming delinquency in the final years of any bond issue that would play havoc with the orderly collection of assessments. Many owners would soon learn that they could let their special assessments go delinquent without having to let their general taxes go delinquent (Loew's, Inc., v. Byram, 11 Cal.2d 746, 82 P.2d 1) and would depend on the payments of more conscientious owners to relieve them of the necessity of paying their own assessments.

Likewise, delinquent assessments are not forgiven when the money to purchase and retire the bonds comes from the general funds of the county. The relief given the district by the county under the emergency legislation of 1935 did not automatically cancel the delinquent assessments. Such assessments could have been cancelled under that legislation had the legislative bodies concerned, who alone have that authority, considered such can-

bodies are hereby also fully and completely authorized and empowered in connection with the furtherance, consummation or conclusion of any such plan or plans, contracts, agreements, escrows or trusteeships to appropriate and use any and all necessary funds, moneys, taxes, assessments and contributions, from whatsoever source derived, for the furtherance, consummation and conclusion of the purchase, adjustment, liquidation or cancellation of any bond or bonds, indebtedness or indebtednesses, in whole or in part of such districts, and to pay from such funds, moneys, taxes, assessments and contributions all expenses necessary to carry on the furtherance, consummation and conclusion of such plan or plans."

cellation necessary. Streets & Highways Code, §§ 1626, 1626.5; Deering's Gen. Laws, Act 3303*l*, § 1, Stats.1935, p. 1250. That legislation expressly provides that cancellation of the assessments depends not only upon retirement of the bonds but on action of the appropriate legislative body. The authority to cancel assessments upon the retirement of the bonds is given by the same statutory provisions that vest in the legislative bodies the authority to purchase and retire the bonds, and it is a repudiation of those provisions for this court to hold that the assessments are automatically cancelled upon purchase and retirement of the bonds. There are many reasons why the statutes make such cancellation discretionary with such legislative bodies. Careful study must be made of any district before it can be determined which assessments should be cancelled and which not. Delinquencies may vary through the years preceding the last one, when there may be a total delinquency. If assessments for the last year only were cancelled, all property owners would be treated alike. It might be highly inequitable, however, to cancel the assessments of the earlier years when some paid and others did not. If the source of a district's difficulty were an exceptionally large levy for a single year, the property might be rehabilitated by cancelling, not all the assessments, but only the assessment for that year.

The legislative body of the defendant city in the present case decided that the assessments should not be cancelled, and its judgment has been vindicated by the fact that the property was so rehabilitated that the assessments could be and were paid. In the absence of cancellation of the assessments under the relief legislation of 1935, their collection is governed by section 41 of the Acquisition and Improvement Act, which provides that assessments shall be "collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes for state and county purposes * * * and all laws applicable to the levy, collection and enforcement of taxes for state and county purposes * * * (as the case may be) are hereby made applicable to said special assessment taxes." The assessments against plaintiff's property were validly levied and placed upon the tax rolls. Since they were never cancelled, but continued on the rolls as valid liens against the property, section 41 compels their collection unless enforcement of that section violates some constitutional provision.

The contention is advanced that collection of delinquent assessments after the county has purchased and cancelled the bonds would result in an impairment of contracts in violation of the federal as well as the state Constitution. This contention is based on the provision in section 41 imposing upon the municipality the duty to levy a special assessment tax in an amount clearly sufficient "to pay the principal and interest of said bonds as the same shall become payable." The theory is that the language quoted forms part of the contracts of the property owner with the bond holders and the district and does not authorize an assessment except to obtain money to pay the principal and interest of the bonds. It will be noted that the foregoing provision refers to the "levy" of the assessment, and not to its collection. There is no contention that any of the levies in the present case were unnecessary for the purpose defined in the provision quoted; the alleged impairment of contracts cannot therefore result from any failure to observe that provision. Nor has there been any failure to comply with the "collection" provisions of section 41, which, as we have seen, compel the collection of assessments in the same manner as taxes for county purposes generally. The terms of any contract under the Acquisition and Improvement Act have thus been observed both as to the levy of the assessments and their collection. Moreover, the emergency legislation of 1935, pursuant to which the bonds were purchased and cancelled, did not enlarge the burden of plaintiff or other property owners but on the contrary materially reduced it. All the property in the district was relieved of the burden of assessments in subsequent years to meet accruing bond interest and principal. At the outset the property owners were entitled to relief from neither past nor future levies. Solely by virtue of a contribution by the county from its general funds have the owners been given relief from future levies. Such alleviation, which increased the value of their properties, cannot rationally be interpreted as an impairment of contract rights of either the delinquent or other owners. The contract clause of the Constitution is "intended to preserve practical and substantial rights, not to maintain

theories." Faitoute Iron & S. Co. v. Asbury Park, 316 U.S. 502, 514, 62 S.Ct. 1129, 1135, 86 L.Ed. 1629.

It is further contended that the county should have held the bonds instead of cancelling them to prevent the collection of the delinquent assessments from becoming invalid. The asssessments continued on the tax rolls as valid liens against the property involved, however, and no statute or rule of law made their validity dependent on the county's holding the bonds until the assessments were paid. Bonds were essential in the relationship between the city, the bondholders, and the property owners. The redemption of the bonds eliminated all outside creditors and made it unnecessary for the county to retain the bonds, for the rights of defendants depended, not on the county's acquiring the rights of the bondholders, but on the relief legislation under which the bonds were purchased and cancelled and the delinquent assessments continued on the tax rolls. That legislation empowered the legislative bodies granting relief to such districts to determine the extent of the relief and the conditions under which it should be granted. In the present case they determined that the relief should not extend to the cancellation of the delinquent assessments but that such assessments should be collected. The statutory authority to retain the levied but unpaid assessments on the tax rolls after the claims of the bondholders are satisfied enables the agency, which, under authority of the same statute satisfied those claims, to obtain reimbursement for part of its advances. Reimbursement is in order here as in other instances where creditors of insolvent debtors accept payment by third parties in settlement of their claims and such parties are subrogated to the claims of the creditors. See 4 Williston, Contracts, Rev.Ed., 3628, 3664; 4 Pomeroy, Equity Jur. (5th ed.) 640; McClintock, Equity, 210; 50 Am.Jur., Subrogation, §§ 28, 70; 23 Cal.Jur. 920; Meyers v. Bank of America Nat. Trust & Savings Ass'n, 11 Cal.2d 92, 94, 77 P.2d 1084; Brantley v. Kelly, 226 Ala. 47, 145 So. 649. If the purchase and cancellation of bonds by a county, contemplated by the relief legislation, resulted in automatic extinguishment of all delinquent assessments in the district, the legislative bodies involved would have no discretion with respect to the cancellation of such assessments as provided by the Legislature, nor could a county obtain reimbursement through collection of delinquent assessments for any funds advanced to relieve a district in distress. Such a rule would not only discourage advances and thus serve to defeat the purposes of the relief legislation, but would conflict with its express provisions that the legislative bodies may use assessments to effect the relief of the district (Deering's Gen.Laws, Act 3303*l*, § 3) and may cancel them in their discretion. Streets & Highways Code, § 1626; Deering's Gen.Laws, Act 3303*l*, § 1.

The county in the present case has elected not to reimburse its general fund out of the collection of delinquent assessments as it could have done under the provisions of the relief legislation. The provisions of the Acquisition and Improvement Act therefore control the disposition of the money collected. Under section 41 of that act, all collections on assessments are credited to the interest and sinking fund prescribed by that section, and "any money remaining in any acquisition and improvement district interest and sinking fund after all the bonds of the district have been retired shall be transferred to the general fund of the county, or municipality, as the case may be, whose legislative body has had jurisdiction over the proceeding and may by said body be used in repairing any public way in said district, regardless of whether a portion or all of the district as originally formed may have been included within one or more municipalities which did not include such portion or all of the district at the time the proceedings for the same were initiated." Thus if assessments were collected in sufficient amounts to retire the bonds, subsequent collections of delinquent assessments would be credited to the acquisition and improvement district interest and sinking fund and would be money remaining therein within the meaning of section 41. It is immaterial that the excess arises out of advances by the county rather than from the fact that the percentage of delinquencies was lower than anticipated when the assessments were levied. Pursuant to section 41, therefore, the money collected would be transferred to the general fund of the city of South Gate to be used by it in repairing any public way in the district.

It is contended that only money that was paid into the interest and sinking fund before the retirement of the bonds can be regarded as "remaining" therein upon such

retirement. The money collected, however, must be credited to the interest and sinking fund and remains therein if it is not used to pay interest and principal of the bonds, whether or not it was in the fund when the last bond was retired. The meaning of the provision is clear; any money credited to such interest and sinking fund shall be used primarily to pay interest and principal of the bonds, credits in excess of the total amount required shall be transferred to the city's general fund to be used for repairs of public ways in the district. Plaintiff contends that since there are only a few small public ways in the district, excepting state and county highways, the city does not need the money to repair such ways. The statutory provision, however, does not presuppose that at the time of the transfer of the money to the general fund of the city there is any actual need to repair public ways in the district, nor does it provide any time limit within which the money must be used for that purpose. The fact that the predictable expenses for such repairs are low, given the present system of public ways in the district, does not make the transfer invalid. The system of public ways in the district may be changed or the needs for repairs may increase. In any event, even if the cost of such repairs were low, the use of the money by the city would merely extend over a longer period than usual. Furthermore, a court cannot foresee in litigation concerning the collection of delinquent assessments whether the city will make proper use of the amount to be transferred to its general fund. It would be time enough to consider such question if the city's use of this money were challenged in an appropriate proceeding.

Any doubt as to the constitutionality of section 1626 of the Streets and Highways Code is resolved by the constitutional amendment adopted November 3, 1936, adding section 31c to article IV: "No provision of the Constitution shall be construed as a limitation upon the power of the Legislature to provide by general law for the refunding, repayment or adjustment, from public funds raised or appropriated by the United States, the State, or any city, city and county, or county for street and highway improvement purposes, of assessments or bonds, or any portion thereof, which have become a lien upon real property, and which were levied or issued to pay the cost of street or highway improvements or of opening and widening proceedings which may be or may have become of more than local benefit. Any such acts of the Legislature heretofore adopted are hereby confirmed and declared valid and shall have the same force and effect as if adopted after the effective date of this amendment." The county's expenditure in the present case to redeem bonds issued for the improving of a highway of general county use was made pursuant to legislation expressly confirmed and declared valid by this constitutional amendment.

Plaintiff's contentions find no support in the cases on which it relies. There is no question as to the validity of the assessments as originally levied or as to the fact that the assessments were a valid lien upon plaintiff's property when they became delinquent and when the bonds were still outstanding. The cases cited that concern assessments invalid when levied are therefore not in point. Thus, in Connelly v. City and County of San Francisco, 164 Cal. 101, 103, 127 P. 834, the levy was void because no bonds had been sold or contracted to be sold at the time it was made. In Hellman v. Los Angeles, 147 Cal. 653, 82 P. 313, the levy was void because the ordinance providing for it described bonds that were not in existence. In Smith v. Santa Monica, 162 Cal. 221, 223, 121 P. 920, land condemned by the state for a park was held immune from sale under a tax lien on the ground that the lien was "merged and lost in the title which the state itself has taken." See, also, 48 Am.Jur. 644. In the present case no title has been established paramount to the lien of the assessments. Plaintiff relies particularly on two lines of cases that are clearly distinguishable. In the first, the improvement was abandoned before completion. Grimes v. Merced County, 96 Cal.App. 76, 273 P. 839; Bradford v. City of Chicago, 25 Ill. 411, Reprint p. 349; Valentine v. City of St. Paul, 34 Minn. 446, 26 N.W. 457; City of San Antonio v. Peters, Tex.Civ.App., 40 S.W. 827; City of San Antonio v. Walker, Tex.Civ.App., 56 S.W. 952. In the second, the actual cost of the improvement was less than the original estimate. Paving Dist. No. 5 v. Fernandez, 144 Ark. 550, 223 S.W. 24; City of Chicago v. Fisk, 123 Ill.App. 404; In re Schneider, 136 App.Div. 444, 121 N.Y.S. 9; Wolfe v. Edgewood Borough, 58 Pa.Super. 38. Thus in all these cases the assessments exceeded the value

of the improvements. In the present case, however, the plaintiff has received the full benefit of the improvements and has not been assessed beyond its cost. In fact, even with the payments in question, it has paid less than its pro rata share of the cost of the project. All the property owners in the district should be treated alike. The allowance to plaintiff of a refund of the payments of its delinquent assessments creates an unfair discrimination against the other property owners who paid their assessments and who, as plaintiff concedes, are not entitled to a refund, and gives plaintiff a windfall as a reward for its delinquency.

GIBSON, C. J., concurred.



27 Cal.2d 891

Eileen C. HIMES, Appellant, v. COUNTY OF LOS ANGELES et al., Respondents.

L. A. 18936.

Supreme Court of California, in Bank.

March 19, 1946.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action to recover assessments paid under protest. Judgment for defendants on sustaining general demurrer to complaint, reversed with directions.

Murphey & Davis, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, and Clyde Woodworth, City Atty., of South Gate, for respondents.

PER CURIAM.

This case presents for determination the same questions which were decided in S. Siwel & Co. v. County of Los Angeles, Cal. Sup., 167 P.2d 177. It is conceded by counsel that the issues of fact and law in the two cases are identical, and that the Siwel decision will control the disposition of this appeal.

The judgment herein is reversed with directions to the trial court to overrule the general demurrer to appellant's complaint and to proceed in accordance with the views stated in S. Siwel & Co. v. County of Los Angeles.

TRAYNOR, Justice (dissenting).

I dissent for the reasons set forth in my dissenting opinion in S. Siwel & Co. v. County of Los Angeles and City of South Gate, supra.

GIBSON, C. J., concurred.



27 Cal.2d 746

WILLIAMS v. DAVIS.

L. A. 19491.

Supreme Court of California, in Bank.

March 19, 1946.

1. Appeal and error ⇐2, 607(1)

Where appeal was taken in 1938, preparation of record on appeal was governed by former law, rather than under the Rules on Appeal, hence, with respect to such appeal, trial court had jurisdiction to terminate proceedings for preparation of a transcript on appeal. Code Civ.Proc. § 953e; Rules on Appeal, rule 53(b).

2. Appeal and error ⇐607(1)

Prior to adoption of rules on appeal, trial court could terminate proceedings for a record if it found that appellant was not diligent in taking necessary steps to secure the filing of a reporter's transcript. Code Civ.Proc. § 953a; Rules on Appeal, Rule 53(b).

3. Appeal and error ⇐607(1)

Determination of whether an appellant was diligent in preparation of transcript on appeal rests largely in discretion of trial court, and an appellate court will not interfere with trial court's decision unless it appears that trial court abused its discretion. Code Civ.Proc. § 953a.

4. Appeal and error ⇐607(1)

Appellant's failure to file an undertaking with clerk or make a new arrangement with reporter for the filing of a corrected transcript was not negligence if prior order of court directing reporter to prepare and deliver a transcript was still enforce-

able after reporter had once been punished for contempt for failure to deliver such transcript. Code Civ.Proc. §§ 953a, 953e.

5. Appeal and error ⇐371

A reporter, by virtue of appellant's original undertaking or reporter's waiver thereof, is under a duty to work on the transcript without compensation until final approval of transcript by the judge.

6. Contempt ⇐38

Court reporter's punishment for contempt for failure to file a transcript did not make him immune from punishment for subsequent disobedience of the same order if he filed an incorrect and incomplete transcript and failed to correct it, since disobedience of any lawful judgment, order, or process of the court is a contempt and every separate act of disobedience is a separate contempt. Code Civ.Proc. § 1209.

7. Appeal and error ⇐607(1)

Under the law prior to adoption of Rules on Appeal, the mere fact that appellant objected to certification of transcript filed by reporter did not make it incumbent upon appellant to procure a transcript that she would acknowledge as proper for certification, but rather it was duty of court to require reporter to transcribe fully and completely the phonographic report of trial. Code Civ.Proc. § 953a.

8. Appeal and error ⇐607(1)

A transcript prepared by the official court reporter is a transcript made up by an officer of the court whose business it is, when so required at the trial, to make a record of all the evidence and proceedings.

9. Appeal and error ⇐607(1)

Under the law in effect prior to adoption of the Rules on Appeal, both appellant and respondent were afforded opportunity to raise objections to transcript in light of requirement that clerk notify parties of filing of transcript and of time when it would be presented to judge. Code Civ. Proc. § 953a.

10. Appeal and error ⇐607(1)

Although parties may call judge's attention to what they deem inaccuracies in transcript, it is for judge to examine transcript and to determine whether it fully and accurately reflects proceedings reported, and, if it does so reflect the proceeding, judge must certify transcript, but, if it does not, he will require reporter to correct or amend transcript.

11. Appeal and error ⇐607(1)

Where appellant, after transcript was filed by reporter, advised trial judge in writing of her objections to transcript, it was for trial judge to pass upon such objections and direct reporter to make necessary changes or amendments if transcript was found to be incomplete or incorrect, hence court erred in terminating proceedings for preparation of a transcript on appeal when appellant refused to either file an undertaking with clerk or make a new arrangement with reporter. Code Civ. Proc. § 953a.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Edna I. Williams against Everly M. Davis, Sr., to recover reasonable value of services performed, wherein defendant cross-complained and recovered a judgment on the cross-complaint. From an order granting defendant's motion to terminate proceedings for preparation of a transcript on appeal, plaintiff appeals.

Reversed.

Prior opinion 160 P.2d 176.

Edna I. Williams, in pro. per., for appellant.

Edward R. Young, Frank R. Johnston, and E. L. Searle, all of Los Angeles for respondent.

TRAYNOR, Justice.

This appeal is from an order terminating the proceedings for the preparation of a record on appeal. On January 8, 1936, appellant brought an action against respondent for $50,000 as the reasonable value of services she allegedly performed. After an extended trial, judgment was entered in favor of respondent on his cross-complaint in the sum of $25,115.49. Notice of appeal was filed on April 19, 1938, and the appellant gave notice to the clerk of the trial court under section 953a of the Code of Civil Procedure for a transcript of the proceedings before the trial court. The preparation of the transcript was delayed by a controversy between plaintiff and the court reporter, Samuel Rappaport, who served during all but seven of the fifty-nine days of the trial. Under a private arrangement

with appellant Rappaport agreed to furnish the transcript upon a contingent basis. He was to receive compensation at the statutory rate if appellant won her appeal or reached a compromise and to be reimbursed meanwhile for his expenses for the necessary supplies. He refused to perform this agreement on the ground that because it was on a contingent basis, it was contrary to public policy and therefore void. In Williams v. Superior Court, 14 Cal.2d 656, 665, 96 P.2d 334, 339, it was held that, regardless of the validity of the agreement, Rappaport was under a duty to prepare and deliver the transcript by virtue of his statement filed with the clerk, that "appellant * * * having arranged personally with me for the payment of my compensation in connection with the preparation of the reporter's transcript and all exhibits in the case preparatory to appeal and making up said record under section 953a of the Code of Civil Procedure, I hereby waive the necessity of filing an undertaking under the provisions of said Code of Civil Procedure, relying upon the arrangement of said appellant for such compensation." An order entered by the judge of a department of the superior court other than the one in which the case was tried directing Rappaport to prepare and deliver a transcript was therefore upheld. For his failure to comply with that order, Rappaport was held to be in contempt of court. Rappaport v. Superior Court, 39 Cal.App.2d 15, 102 P.2d 526. He was fined $500 and held in custody until the fine was paid. On September 27, 1940, he filed a reporter's transcript. After examining the transcript, appellant asserted that it contained many inaccuracies and omissions. In June, 1941, appellant submitted to the trial judge 177 typewritten pages listing alleged errors in the transcript together with the proposed corrections. She later delivered to the trial judge over 80 typewritten pages covering alleged omissions. Respondent's counsel, after examining the 177 pages of proposed corrections, returned the list to the trial court on May 18, 1943, noting the corrections to which he agreed and those to which he objected. Respondent asserts that the corrections to which he agreed, although numerous, relate to inconsequential errors and that the other proposed corrections were not corrections of mistakes in the transcript but substitutions of plaintiff's phraseology for the phraseology used by the witnesses at the trial. On May 27, 1943, the trial judge issued "Advisory notes to the parties re transcript on appeal, and certain orders in aid of appellant." He declared therein that, in his opinion, this court's decision in Williams v. Superior Court, supra, 14 Cal.2d 656, 96 P.2d 334, established as the law of the case that he could not take any official action with respect to the settlement of the transcript. With respect to the question whether Rappaport was under a duty to make the necessary corrections and amendments in the absence of an undertaking filed by appellant, the trial judge stated: "As to the reporter Mr. Samuel Rappaport * * * we are confronted by the unique situation that he has been once in jeopardy with respect to the preparation and completion of this transcript and, therefore, is no longer amenable to the orders of the court in connection therewith—unless he should enter into a new employment with either the appellant or the Clerk for additional work on the transcript." The trial judge accordingly included in the same document the following order: "Again assuming, but not believing, that under the law of the case I have jurisdiction to make the order, it is ordered, that as to the part of the transcript prepared by Mr. Rappaport, the plaintiff may make arrangements with the clerk * * * for the making of such modifications of the transcript as she believes should be made before presenting it to the court for certification, and he may follow the usual lawful procedure with reference to requiring payment or undertaking for the necessary services and materials required, or she may make private arrangements with Mr. Rappaport himself, if he will, or with any official reporter of the court, for the making of such modifications." Despite this order appellant sought to obtain the allegedly necessary corrections and amendments from Rappaport. Rappaport refused, however, to do any work concerning the transcript without compensation at the statutory rates. Having failed to reach an agreement with Rappaport, appellant made a motion for a new trial on the theory that the recalcitrance of the reporter was equivalent to disability of the reporter within the meaning of section 953e of the Code of Civil Procedure. Her motion was denied and the order denying it was affirmed on appeal. Williams v. Davis, 67 Cal.App.2d 274, 154 P.2d 22. On October 22, 1943, respondent made a motion to terminate the proceedings for the

preparation of the record on appeal. His motion was granted by the trial court.

[1] Appellant contends that the trial court was without jurisdiction to terminate proceedings for a record on the ground that under the new Rules on Appeal a motion to terminate proceedings for a record is no longer part of our procedure. Averill v. Lincoln, 24 Cal.2d 761, 764, 151 P.2d 119. Under rule 53(b), however, the former law governs "the preparation and filing of the record on appeal" if the appeal is taken before July 1, 1943. The appeal from the judgment in the present case was taken in 1938. The preparation of the record on appeal is therefore governed by the former law, which defines not only the procedure to be followed with respect to the preparation of a record but also the jurisdiction of the trial court to supervise proceedings for a record and to terminate them if such termination becomes necessary to obviate injustice and delay.

[2, 3] Under the former law the trial court can terminate proceedings for a record if it finds that appellant was not diligent in taking the necessary steps to secure the filing of a reporter's transcript. Town of Mill Valley v. Massachusetts Bonding & Ins. Co., 189 Cal. 52, 54, 207 P. 253; Des Granges v. Des Granges, 175 Cal. 67, 71, 165 P. 13; Kinkle v. Fruit Growers' Supply Co., 53 Cal.App.2d 706, 709, 128 P.2d 420. The determination of the question whether or not an appellant was diligent in the preparation of a record rests largely in the discretion of the trial court and an appellate court will not interfere with the trial court's decision unless it appears that the trial court abused its discretion. Kinkle v. Fruit Growers' Supply Co., supra, 53 Cal.App.2d at page 709, 128 P.2d 420; Walker v. Etcheverry, 38 Cal.App.2d 611, 613, 101 P.2d 709, and cases there cited. Appellant contends that she was diligent and that the trial judge abused his discretion in terminating the proceedings.

[4] It appears from the record that on May 27, 1943, when the trial court issued its "advisory notes," it was of the opinion that appellant was entitled to continue with the proceedings for a record, for at that time the trial judge advised appellant what she should do to submit a proper transcript for certification. The trial court, however, found appellant negligent on the ground that she refused to proceed to complete the transcript in accordance with the court's advice and orders of May 27, 1943, which were based on the assumption that Rappaport's duty to deliver a transcript as held in Williams v. Superior Court, supra, 14 Cal.2d 656, 96 P.2d 334, had become unenforceable on the ground of double jeopardy and that therefore, in order to have the transcript corrected or amended, appellant would have to file an undertaking or make a new arrangement with the reporter. Appellant's failure to do either was not negligence, however, if the order sustained in Williams v. Superior Court, supra, was still enforceable.

[5, 6] It is settled that by virtue of the original undertaking or waiver thereof a reporter is under a duty to work on the transcript without compensation until the final approval of the transcript by the judge. Gjurich v. Fieg, 160 Cal. 331, 334, 116 P. 745. Rappaport's punishment for failure to file a transcript did not make him immune from punishment for subsequent disobedience of the same order, if he filed an incorrect and incomplete transcript and failed to correct it. "Disobedience of any lawful judgment, order, or process of the court is a contempt (Code Civ.Proc. § 1209), and every separate act of disobedience is a separate contempt." Solano Aquatic Club v. Superior Court, 165 Cal. 278, 279, 131 P. 874; Golden Gate, etc., Co. v. Superior Court, 65 Cal. 187, 3 P. 628; Ex parte Stice, 70 Cal. 51, 58, 11 P. 459; In re Shuler, 210 Cal. 377, 406, 292 P. 481; Lindsley v. Superior Court, 76 Cal.App. 419, 433, 245 P. 212; In re Morris, 194 Cal. 63, 69, 227 P. 914; State v. Kasherman, 177 Minn. 200, 224 N.W. 838; State v. Roby, 142 Ind. 168, 41 N.E. 145, 33 L.R.A. 213, 51 Am.St.Rep. 174; see 22 C.J.S., Criminal Law, § 240, p. 373.

[7-9] In the present case the appeal has been delayed for years by appellant's difficulties with Rappaport in obtaining a transcript. It is the trial court's position that since appellant herself objects to the certification of the transcript filed by the reporter, it is incumbent upon her to procure a transcript that she will acknowledge as proper for certification. Former section 953a of the Code of Civil Procedure, which is applicable to these proceedings, imposes no such duty on an appellant. If an appellant files an undertaking or the reporter waives the filing thereof, it is the duty of the reporter to prepare the transcript, subject to the supervision of the court. Section 953a provided that after an appellant

has filed notice requesting that a transcript be prepared "it shall be the duty of the court to require a stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial and also all proceedings taken on motion for a new trial and all matters to which the same relate." That section also provided: "Upon the transcript being filed, it shall be the duty of the clerk forthwith to set a time (such time to be not more than ten (10) days after the filing of the transcript) for presenting it to the judge for approval, and to give notice of the filing of the transcript, and of the time set for presenting it to the judge, to the attorneys appearing in the cause, not less than five (5) days before the time so set. At the time specified in the notice of the clerk to the attorneys, said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offerred or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate, also all proceedings taken on motion for a new trial and all matters to which same relate. The judge shall thereupon certify to the truth and correctness of said transcript and the same shall, when so settled and allowed, be and become a portion of the judgment roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law." § 953a subd. 5–7. A transcript prepared by the official court reporter is "a transcript made up by an officer of the court whose business it is, when so required at the trial, to make a record of all the evidence and proceedings." Allen v. Conrey, 22 Cal.App. 409, 412, 134 P. 730, 731. The statute affords an opportunity to both parties to raise objections to the transcript, for it provides that the clerk shall notify the parties of the filing of the transcript and of the time when it will be presented to the judge.

[10, 11] Although the parties may call the judge's attention to what they deem inaccuracies in the transcript, it is for the judge to examine the transcript and to determine whether it fully and accurately reflects the proceedings reported. If he determines that it does he will certify the transcript. If he finds the transcript incorrect or incomplete, he will require the reporter to correct or amend it. In the present case appellant advised the trial judge in writing of her objections to the transcript and of the corrections and amendments that she deems necessary to make the transcript "a full, true and fair transcript" for certification as required by section 953a. If the trial judge in the light of those suggestions finds the transcript incomplete or incorrect he must direct the reporter to make the necessary changes or amendments.

The order is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 765

HUEBOTTER v. FOLLETT.

L. A. 19535.

Supreme Court of California, in Banc.

March 26, 1946.

1. Automobiles ⇐181(2)

Where the only consideration given by plaintiff to defendant for riding to work in defendant's automobile was a reciprocal ride by defendant in plaintiff's automobile thus reducing cost of transportation to each, plaintiff gave "compensation" for his ride and was a "passenger" rather than a "guest" within automobile guest statute. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation", "Guest" and "Passenger".

2. Trial ⇐194(7)

Where only consideration given by plaintiff to defendant for riding to work in defendant's automobile was a reciprocal ride by defendant in plaintiff's automobile, and no factual issue was presented on that phase of controversy in plaintiff's action for personal injuries, plaintiff was entitled to instruction that he was a passenger and that defendant owed him a duty to drive with ordinary care. Vehicle Code, § 403.

3. Appeal and error ⇐882(12)

Where automobile occupant requested that court give instruction submitting issue whether occupant was a passenger rather than a guest within automobile guest statute, if, and only if, other instructions proposed by occupant which stated unequivocally that he was passenger were refused, and such other instructions were refused, the occupant was not estopped from urging on appeal that he was entitled to refused instructions and suffered material prejudice by fact that they were not given. Vehicle Code, § 403.

4. Appeal and error ⇐930(4)

The rule that if there is any finding sustained by evidence on which judgment may rest, it will be regarded as one on which judgment did rest should not be applied, where jury returns a general verdict, to cure error of refusing a requested instruction, to which a party was entitled, where the error resulted in submitting to jury as a question of fact, an issue that on the record was one of law. Code Civ.Proc. §§ 591, 592, 2102.

5. Appeal and error ⇐1064(2)

Where evidence on issue of negligence of automobile driver was such that it would support finding for or against driver, in automobile occupant's action for personal injuries, and undisputed facts established as a matter of law that occupant was driver's passenger at time of accident, submitting to jury issue whether occupant was a passenger or guest within automobile guest statute was prejudicial error. Vehicle Code, § 403.

EDMONDS, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Personal injury action by Edwin D. Huebotter against P. T. Follett. Judgment for defendant and plaintiff appeals.

Reversed and remanded for a new trial.

Prior opinion, 161 P.2d 481.

Marion P. Betty, of Los Angeles, for appellant.

Nourse & Jones and Everett W. Thompson, all of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff appeals from a judgment entered upon a verdict for defendant in this action for personal injuries sustained by plaintiff when an automobile in which he was riding struck an illegally parked truck. Defendant owned and was operating such automobile at the time of the collision. Plaintiff urges that asserted errors of the trial court in giving and in refusing various instructions to the jury necessitate a reversal of the judgment. We have concluded that prejudicial error did occur in connection with certain of such instructions and that the judgment must be reversed.

The record shows without contradiction that the collision occurred between the hours of 6 and 6:30 in the morning of March 27, 1942, while it was still dark. Plaintiff, defendant, and one Wilson were, under a share-the-ride arrangement, riding together in defendant's car to their employment at Los Angeles Harbor. Each of the three men drove his own automobile two days of each week and on such days transported the other two with him between their homes and their work. No other compensation was given defendant by plaintiff for the ride here involved.

On the morning in question the men, traveling south on Altantic Boulevard, a state highway in Los Angeles County, were crossing the Los Angeles River bridge. The bridge is about 500 feet long and the highway over the bridge is 60 feet wide with a double white line in the center. On the west side of the double line are two traffic lanes for southbound vehicles and on the east side are two lanes for northbound vehicles. Each of the inside lanes (next to the double line) is 10 feet wide, and each of the two outside lanes is 20 feet wide. Defendant's automobile was traveling in the outside, southbound lane, and another car in close proximity was using the other, or inside, southbound lane. Defendant's headlights were on. The truck with which defendant's car collided was parked at an angle in the outer lane on the west (southbound) side of the bridge, about 189 feet south of the north end thereof. The right front wheel of the truck was about 2 feet away from the west curb, the right rear wheel was about 9 feet from such curb, and the left rear corner of the truck was about 15 feet out in the traffic lane from the curb. As defendant approached the truck he swerved about 5 feet to his left in an attempt to avoid the truck, but was unable to do so without colliding with the automobile in the inner southbound lane. The right side of defendant's car struck

the rear of the parked truck, causing plaintiff's injuries. It is not disputed that the truck was illegally parked and that defendant could not have swerved to the right to avoid striking it without striking the right curb or bridge structure.

The evidence and the inferences to be drawn therefrom are contradictory concerning defendant's speed as he approached and began to cross the bridge, as to the time at which he first saw or had called to his attention the obstruction of the parked truck, and as to his conduct between such time and the collision. Without reciting such evidence in detail, it is sufficient to state that it would support a finding either for or against plaintiff's allegation that negligence on the part of defendant contributed proximately to the collision and to plaintiff's resulting injuries.

Plaintiff contends, first that he was, as a matter of law, a passenger in defendant's car, rather than a guest within the meaning of section 403 of the Vehicle Code, and that the court erred to his prejudice in submitting that issue to the jury. Section 403 provides that "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride, unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the intoxication or wilful misconduct of said driver."

The instructions given by the court on this issue are as follows:

"A guest is one who is invited, either expressly or impliedly, to enjoy the hospitality of the driver of a vehicle; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business.

"Where, however, the driver receives some compensation, which is the chief inducement for the rider's transportation, and which is given and received as compensation and as a business transaction, such a rider is a passenger, not a guest.

"The compensation required to make a person a passenger, rather than a guest, need not be in money and need not be paid directly by the one who thereafter becomes a plaintiff. If, as the chief inducement for the transportation, any benefit is conferred on the driver, which has a then present pecuniary value, the person transported is a passenger, not a guest.

"However, the mere sharing of expenses does not, in and of itself, cause the rider, who pays part of such expense, to be a passenger, rather than a guest.

"If the plaintiff was a passenger while riding with defendant at the time of the accident, the defendant owed to his passenger the duty to exercise ordinary care, and if any negligent conduct on defendant's part was a proximate cause of injury to plaintiff, defendant is liable.

"If, however, plaintiff was a guest of the defendant, you must find for and bring in a verdict for the defendant." (Italics added.)

The court further instructed the jury that "It is the duty of the driver of a motor vehicle, using a public highway, to be vigilant at all times and to keep the vehicle under such control that to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position."

Plaintiff requested the following instructions, which were refused:

"You are instructed that the time of the accident in question, the defendant P. T. Follett was operating his car as a carrier of passengers for hire on a share-the-ride basis, and the plaintiff, Edwin D. Huebotter, was a passenger in said automobile for hire.

"It was the duty of defendant Follett in using the highway to exercise ordinary care at all times to avoid placing himself and the plaintiff Huebotter in danger and to avoid a collision."

[1-3] As stated above, the only consideration given by plaintiff to defendant for riding to work in defendant's car was a reciprocal ride by defendant in plaintiff's car, thus reducing the cost of transportation to each. No factual issue was presented on this phase of the controversy. This court held in Peccolo v. City of Los Angeles (1937), 8 Cal.2d 532, 537, 66 P.2d 651 (adopting in part an opinion of the District Court of Appeal prepared by Mr. Justice Shinn, then acting pro tempore), that one riding in the automobile of another under such an agreement gave compensation for his ride and was a passenger in such automobile within the intent of section 403 of the Vehicle Code, supra. Consequently

plaintiff was entitled to instructions that plaintiff was a passenger and that defendant owed to him a duty to drive with ordinary care. (See, also, Walker v. Adamson (1937), 9 Cal.2d 287, 289, 70 P.2d 914.) Defendant, however, contends, first, that the instructions given by the trial court on the subject were requested by plaintiff and that plaintiff is therefore estopped on appeal to object to such instructions. Such contention is without merit. The record shows that the instructions so given were actually modifications of instructions which plaintiff requested that the court give if, and only if, other instructions proposed by plaintiff which stated unequivocally that plaintiff was defendant's passenger were refused. Such other instructions are quoted hereinabove and, as already noted, were refused. Under the circumstances plaintiff is not now estopped to urge on appeal that he was entitled to the refused instructions and suffered material prejudice by the fact that they were not given. (See Dowd v. Atlas Taxicab etc. Co. (1924), 69 Cal.App. 9, 14, 230 P. 958.)

[4] Defendant contends, also, that the instructions given were an adequate and correct statement of the law concerning passengers, guests, compensation, and the duty owed to one who is a passenger, and that the jury must be presumed to have correctly followed such instructions to the extent of concluding that plaintiff was a passenger rather than a guest. If the jury did so conclude that plaintiff was a passenger, it necessarily follows that in order to bring in the verdict for defendant, as was done, the jury also found that defendant did not breach the duty of care owing by him to his passenger. It is argued in this connection that upon appeal from a judgment based on a general verdict it must be assumed that, as to each issue of fact submitted, the jury found in favor of the verdict (citing Shahabian v. Najarian (1936), 14 Cal.App.2d 435, 443, 58 P.2d 396) and that if there is any finding sustained by the evidence upon which judgment may rest it will be regarded as the one upon which the judgment did rest (citing American National Bank v. Donnellan (1915), 170 Cal. 9, 15, 148 P. 188, Ann.Cas.1917C, 744; Thayer v. Tyler (1915), 169 Cal. 671, 147 P. 979; Bowers v. Union Trust Co. (1931), 117 Cal.App. 259, 265, 3 P.2d 614. The last-cited cases state the rule applicable on trials by a court where specific findings are made. It may also have application in non-jury trials where findings have been waived and in jury trials where special verdicts have been returned. But we think that the rule should not be applied in such a case as this (jury trial, general verdict) to cure the error of refusing a requested instruction, to which the party was entitled, where the error resulted in submitting to the jury as a question of fact an issue that on the record was one of law. (See Code Civ.Proc., §§ 591, 592, 2102.) The situation is analogous to that presented when upon undisputed facts a contract must be construed by the court. (See 24 Cal.Jur. 784, § 65; O'Connor v. West Sacramento Co. (1922), 189 Cal. 7, 18, 207 P. 527; see, also, Ball v. Rawles (1892), 93 Cal. 222, 226, 227, 28 P. 937, 27 Am.St.Rep. 174.)

[5] We are of the view that where, as here, the evidence upon the issue of negligence is such that it would amply support a factual finding either for or against defendant upon that issue, and where the undisputed facts establish as a matter of law that plaintiff was defendant's passenger at the time of the accident, it constitutes prejudicial error to also place in the hands of a jury of laymen the question as to whether or not plaintiff was a passenger within the meaning of section 403 of the Vehicle Code. Actually, the proposition that one being carried to his employment, in the automobile of another, on a share-the-ride basis is as a matter of law a passenger of the latter was established only after litigation which was brought to this court on appeal (see Peccolo v. City of Los Angeles (1937), supra, 8 Cal.2d 532, 66 P.2d 651). Consequently, to presume that a jury of laymen without positive and unequivocal instructions to the effect that plaintiff was defendant's passenger, nevertheless concluded that he was such, would be to indulge in a legalism unwarranted by the realities of human experience.

Inasmuch as the judgment must be reversed for the reasons already stated it is unnecessary to discuss other asserted errors in instructions, complained of by plaintiff, which need not occur on a new trial.

The judgment is reversed and the cause remanded for a new trial.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, Justice (dissenting).

I cannot agree with the conclusion reached by Justice Schauer that where there are two issues of fact, it is prejudicial error justifying a reversal for the trial judge to correctly instruct the jury in regard to the one upon which the evidence is uncontradicted, if the verdict is consistent with and supported by all of the evidence in the case. An issue upon which there is no contradictory evidence and concerning which only one reasonable inference can be drawn should be ruled upon by the court as a question of law (Bibb v. Allen, 149 U.S. 481, 493, 13 S.Ct. 950, 37 L.Ed. 819; Upton v. Tribilcock, 91 U.S. 45, 23 L.Ed. 203; see 16 R.C.L. 189, note 10 and cases cited thereunder; 53 Am.Jur. 150). To submit it to the jury constitutes error (Poncino v. Sierra Nevada Life & C. Co., 104 Cal.App. 671, 286 P. 729; Stewart v. Erskine-Bolst, 66 Cal. App. 461, 226 P. 644; Morris & Co. v. Fels & Co., 3 Cir., 278 F. 172; see 24 Cal. Jur. 794), but such action is not necessarily prejudicial.

In the present case, the record shows that the jury was correctly instructed upon the issue as to whether the plaintiff was a passenger or a guest. It must be presumed that the jurors were intelligent persons who correctly applied the instructions of the court to the undisputed evidence and found the plaintiff to have been a passenger. Henderson v. Los Angeles Traction Co., 150 Cal. 689, 697, 89 P. 976; Dermer v. Pistoresi, 109 Cal.App. 310, 314, 293 P. 78; Robinson v. McKnight, 103 Cal. App. 718, 728, 284 P. 1056; see 24 Cal. Jur. pp. 795, 796.

The general rule which carries the presumption that, as to each of the facts submitted, the jury found in favor of the verdict is also applicable here. As stated in Shahabian v. Najarian, 14 Cal.App.2d 435, 443, 58 P.2d 396 (petition for hearing denied), in considering an appeal from a judgment based upon a general verdict it must be assumed that the jury passed upon every material issue of fact submitted to them, and that the findings thereon were such as to support the verdict. In accord: Wladyka v. City of Waterbury, 1922, 98 Conn. 305, 119 A. 149; see, also, People v. Gorman, 69 Cal.App.2d 54, 158 P.2d 267; Cornell v. Hollywood Turf Club, 32 Cal.App.2d 204, 208, 89 P.2d 449; Mau v. McManaman, 29 Cal.App.2d 631, 636, 85 P.2d 209; Streicher v. Battles, 29 Cal. App.2d 526, 527, 84 P.2d 1049; Astor v. Safeway Stores, Inc., 26 Cal.App.2d 163, 166, 79 P.2d 146; Hamilton v. Ferguson, 26 Cal.App.2d 390, 402, 79 P.2d 427; Ramsey v. Furlott, 14 Cal.App.2d 145, 148, 57 P.2d 1007. And submission to the jury of a question of law is harmless error where the jurors followed correct instructions applicable to the issue. Sutter v. Associated Seed Growers, Inc., 31 Cal.App. 2d 543, 88 P.2d 144; Poncino v. Sierra Nevada Life & C. Co., supra, 104 Cal. App. page 676, 286 P. 729; Stewart v. Erskine-Bolst, supra, 66 Cal.App. page 473, 226 P. 644; Morris & Co. v. Fels & Co., supra, 3 Cir., 278 F. page 174; Moore v. People's State Bank of White Water, 1923, 114 Kan. 100, 217 P. 299; Fordney v. King County, 1914, 9 Wash.2d 546, 115 P.2d 667; Fosgate Co. v. Spokane Valley Growers' Union, 263 Mass. 15, 160 N.E. 297; Heaton v. Nelson, 1921, 69 Colo. 320, 194 P. 614; Longcor v. Detroit Homeopathic College, 1920, 210 Mich. 575, 178 N.W. 222; Wladyka v. City of Waterbury, supra; Patten v. Chicago & N. W. R. Co., 32 Wis. 524.

Accordingly, in my opinion, as the evidence upon the issue of negligence supports the verdict in favor of the defendant and it must be presumed that the jury found Huebotter to have been a passenger at the time of the accident, the assigned error was not prejudicial.

27 Cal.2d 773

RAISCH v. MYERS et al.

S. F. 17099.

Supreme Court of California, in Bank.

March 26, 1946.

Rehearing Denied April 22, 1946.

1. Municipal corporations ⇐519(6)

In the absence of statute establishing a rule of priority, street assessment lien which was last in point of time was superior in rank and first in priority.

2. Municipal corporations ⇐485(2)

Where street improvement bond contained all that ordinance required, the fact that bond incorrectly stated that assessment, diagram, and warrant were issued to assignee instead of assignee's predecessor in interest, did not invalidate the bond.

3. Municipal corporations ⇐564

A street improvement bond providing that in event of default holder could foreclose assessment lien, which should continue until paid, and that lien was thereby created and acknowledged, did not waive statute of limitations. Code Civ.Proc. § 329.

4. Municipal corporations ⇐519(5)

Under ordinances, adopted pursuant to charter, providing that lien of street improvement bond should continue until assessment was fully paid and that, if bond for any reason was invalid, the lien of assessment should continue until original assessment was fully paid, the lien of assessment continued to exist though remedy by foreclosure was barred by limitations, notwithstanding statute providing that a lien is extinguished by lapse of time within which action can be brought upon principal obligation. Code Civ.Proc. § 329; Civ.Code, § 2911.

5. Municipal corporations ⇐79

The city charter of San Francisco superseded state law in the matter of improvement of streets and the collection of the cost therefor.

6. Municipal corporations ⇐300

The provisions of street improvement ordinance adopted pursuant to authorization of city charter of San Francisco had the same sanction and effect that they would have had if incorporated in the charter itself.

7. Municipal corporations ⇐78

Street improvement ordinances authorized by city charter will prevail over general laws inconsistent therewith.

8. Limitation of actions ⇐165
Municipal corporations ⇐490

The owner of property would not be able to quiet title without discharging existing lien of assessment, though limitations barred foreclosure of lien by holder of street improvement bonds. Code Civ. Proc. § 329; Civ.Code, § 2911.

9. Municipal corporations ⇐519(6)

Equitable principles would be applied in the adjustment of the conflicting claims of street assessment lien holders.

10. Limitation of actions ⇐166

The statute of limitations, when invoked to maintain the status quo, applies to protect a property owner from foreclosure of a lien, but should not apply to the prejudice of a subordinate lien claimant when the status quo is disturbed by foreclosure of a superior lien.

11. Limitation of actions ⇐170
Municipal corporations ⇐584

The holder of street improvement bonds was entitled to satisfaction of his lien out of the proceeds of foreclosure sale which was ordered to satisfy the lien of a superior lien holder, before any of proceeds were paid to property owner, though bondholder's remedy by direct action for foreclosure of his own lien was barred by limitations. Code Civ.Proc. § 329; Civ. Code, § 2911.

CARTER and SCHAUER, JJ., dissenting.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by A. G. Raisch against Alma M. Myers and the Federal Construction Company to foreclose the lien of a street assessment, wherein the Federal Construction Company filed a cross-complaint. From an adverse judgment, the cross-complainant appeals.

Reversed with directions.

Prior opinion 160 P.2d 147.

Henry F. Wrigley, of San Francisco, for appellant.

Alma M. Myers, of San Francisco, in pro per., for respondent.

SPENCE, Justice.

Plaintiff brought an action to foreclose the lien of a street assessment issued in 1939 for work performed under the San Francisco Street Improvement Ordinance of 1934. Defendant Myers is the owner of the real property assessed. Defendant Federal Construction Company, by way of answer and cross-complaint, asked the court to declare a lien upon the property for street work done and a bond issued in 1928 under the San Francisco Street Improvement Ordinance of 1918, and that in the event the property "be ordered sold," it be adjudged to have "a lien upon the proceeds of such sale." Following a trial of the issues as raised by the parties in their respective pleadings, judgment was entered whereby (1) sale of the property was decreed in satisfaction of plaintiff's lien and certain expenses claimed by him; (2) any proceeds from said sale in excess of the payments directed in favor of plaintiff were ordered to be paid to the owner of the property, defendant Myers; and (3) the lien of defendant and cross-complainant Federal Construction Company was denied, its bond was declared void, and it was held "not entitled to any relief whatever." Federal Construction Company has appealed "from the whole of said judgment insofar as said judgment denies any relief" to it.

[1] Appellant does not seriously question the priority of the lien of plaintiff Raisch, who has not appeared on this appeal; but, in any event, it is clear that in the absence of any statutory enactment establishing a rule of priority, plaintiff's lien, being the last in point of time, is superior in rank and first in priority. Cullinan v. Grey, 18 Cal.2d 247, 249, 115 P.2d 460.

The principal point presented for consideration is the effect of the assessment and bond issued in recognition of the street work which is the subject of appellant's claim. Respondent Myers maintains that appellant's bond is void and that, in any event, any cause of action based on the bond or the assessment is barred by the limitations in the ordinance and the statutes. On the other hand, appellant maintains that its bond is valid; that execution of the bond constituted a waiver of all limitations of action; and further, that though the right to foreclose the bond or assessment lien be barred by any ordinance or statute, the assessment lien itself still continues. Thus, appellant distinguishes between the lien itself and the right to foreclose that lien; and so maintains that even if the right to foreclose is barred, the lien of the assessment itself is not extinguished.

There is no dispute as to the facts concerning the assessment and bond in question. The assessment, diagram and warrant were issued by the Board of Public Works on January 3, 1928, to A. E. Hennessey, and assignment was made by the latter on January 6, 1928, to appellant, Federal Construction Company. On April 2, 1928, pursuant to the San Francisco Street Improvement Ordinance of 1918, respondent Myers, as owner of the property, executed the bond in question. It was for the sum of $579.85, the amount of the assessment against the property, and it provided for payment in twenty installments, ten of which were made, with a balance of $289.85, plus interest, remaining due. The validity of the bond is challenged upon the ground that the bond refers to an assessment and diagram issued to Federal Construction Company rather than to A. E. Hennessey, as was the actual fact. Appellant argues that this inaccurate recital is a minor error; that section 34 of the 1918 ordinance sets forth the form of the bond and that such form does not require any mention of the person to whom the assessment and diagram are issued, but merely requires reference to the amount of the assessment imposed and a description of the real property; and that the bond here sufficiently complies with such particulars in specification. The bond in this respect refers to the assessment and diagram issued by the Board of Public Works on January 3, 1928, and recorded in "Volume numbered 25-A at pages * * * numbered 2204 of the Record of Assessments for Street Improvements, in the office of said Board of Public Works."

[2] Said section 34, prescribing the form of the bond, only requires reference to two matters: (1) A description of the property; and (2) the amount of the assessment. Giving due regard to the definite reference made in appellant's bond to both the assessment and diagram, and the number thereof in the Board of Public Works record, and the fact that full compliance has been made with the essential specification of section 34 as to the description of the property and the amount of the assessment, the error in the name as above noted

would not appear to be of sufficient consequence to invalidate the bond. Consistent with this view is the language of section 47 of the ordinance: "The provisions of this Ordinance shall be liberally construed to promote the objects thereof, and no error, omission, or irregularity in connection with the proceedings thereunder not affecting a substantial right of a party shall invalidate any of such proceedings." Certainly no substantial right of the property owner was affected by the surplusage in the bond referring to the Federal Construction Company.

[3] But the execution of such valid bond did not, as appellant contends, constitute a waiver of the statute of limitations as to its right to bring foreclosure proceedings. Appellant relies upon the following language of the bond engrafted from section 34 of the ordinance: "The person in legal ownership of this bond, shall, in the event of such default, have the right to foreclose the lien created by the said assessment for any unpaid portion thereof, as in the case where no bond had been made or executed, *and such lien shall continue until such assessment is fully paid.* It is hereby expressly provided that a lien for the full amount * * * is hereby created and acknowledged upon, in and to the real property described herein. * * *" (Emphasis added.)

In this connection appellant unavailingly cites a number of cases upon the general subject of waiver, none of them relating to street improvement bonds. Typical of these is Dexter v. Pierson, 214 Cal. 247, 251, 4 P.2d 932, holding that the express waiver of the statute of limitations incorporated in the terms of a mortgage was valid and precluded the successful interposition of such defense in an action to foreclose. But there is no such express waiver in the bond here in question, and appellant has not cited any case which holds that the general language of the bond should be so construed. The language to the effect that the lien shall continue until the assessment is fully paid does not mean that any limitation provided by law in the code shall not apply; and accordingly, appellant's right to foreclose by virtue of the execution of the bond is barred by the provisions of section 329 of the Code of Civil Procedure. Woods v. Hyde, 64 Cal.App. 433, 222 P. 168; Griffith Co. v. Kelly, 52 Cal. App.2d 739, 126 P.2d 909.

Having determined that appellant's bond is valid but that appellant's remedy by way of an action for foreclosure is barred, two questions remain for consideration in the determination of this appeal: (1) Does the lien of the assessment continue to exist despite the fact that appellant's remedy by way of an action for foreclosure is barred? (2) If the lien of the assessment does continue to exist, is appellant entitled in this proceeding, in which foreclosure is ordered to satisfy the lien of a superior lien holder, to have an adjudication to that effect and to have a further adjudication that appellant is thereby entitled to the satisfaction of said lien out of the proceeds of the foreclosure sale before any of the proceeds may be paid to respondent Myers? In our opinion, both questions must be answered in the affirmative.

[4] It is expressly provided in section 34 of the ordinance, as engrafted into appellant's bond, that "such lien shall continue until such assessment is fully paid." This purpose to continue the existence of the lien until the assessment is paid is further emphasized by section 40 of the ordinance, which provides that should it appear at any time that the bond "for any reason was invalid," the lien of the assessment "shall continue until such original assessment is fully paid." Despite these express provisions for the continued existence of the lien, respondent nevertheless contends that the lien is extinguished under section 2911 of the Civil Code, which provides: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." In support of this contention, respondent cites and relies upon Clark v. City of San Diego, 144 Cal. 361, 77 P. 973, holding that where the right of action for the collection of delinquent taxes was lost, the lien therefor was also lost. That decision was rested squarely upon the provisions of said section 2911. But neither the cited code section nor the cited case is applicable here. Assuming, without deciding, that said section 2911 would be applicable in the absence of the controlling provisions of the ordinance expressly providing for the continued existence of the lien (see, however, Lantz v. Fishburn, 17 Cal.App. 583, 588, 589, 120 P. 1068), the ordinance provisions prevail in the determination of the question under discussion.

[5-7] The improvement of streets and the collection of the costs therefor are municipal affairs. Admittedly San Francisco being a charter city, its charter supersedes state law in this field, and the provisions of a street improvement ordinance "adopted pursuant to the authorization of the charter have the same sanction and the same effect that they would have had if incorporated in the charter itself." Mardis v. McCarthy, 162 Cal. 94, 100, 101, 121 P. 389, 392; see, also, Hayne v. San Francisco, 174 Cal. 185, 162 P. 625; Larsen v. San Francisco, 182 Cal. 1, 186 P. 757. And ordinance provisions relating to such municipal affairs will prevail over general laws inconsistent or in conflict therewith. 19 Cal.Jur., § 739, p. 411; Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 567, 171 P. 304; Smith v. Lightston, 182 Cal. 41, 47, 186 P. 769.

[8] Having determined that the lien of the assessment continued to exist, we come to a discussion of the second remaining question above stated. It is clear that if respondent Myers were seeking affirmative relief through a quiet title action, she could not prevail against appellant unless she were willing to satisfy its existing lien, even though appellant's remedy by way of foreclosure be barred. Hayne v. San Francisco, 174 Cal. 185, 197, 162 P. 625; Warden v. Barnes, 111 Cal.App. 287, 292, 295 P. 569. In such case, her cause of action would be strictly equitable in character, and her rights and remedies would be measured by equitable principles. As was said in Warden v. Barnes, 111 Cal.App. 287, at page 292, 295 P. 569, 571: "The judgment, however, must be reversed and sent back for the following reasons: The respondents Barnes asked for and obtained affirmative relief as against the plaintiff Grace P. Warden, and judgment was entered in favor of the defendants Barnes quieting their title as against all claims of the plaintiff. To this relief respondents Barnes are not entitled. The Statutes of 1893, page 36, so far as the bond involved herein is concerned, reads as follows: 'Said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid.' While the foreclosure sale and deed based upon the proceedings therein had availed the plaintiff nothing, the lien of the bond was not extinguished. This being an action in equity, title cannot be quieted in favor of a party, extinguishing a valid lien upon real property, without requiring the person in whose favor the judgment is entered, to do equity. The foreclosure proceedings in this case only being held invalid, the property is still subject to the lien of the bond and the trial court should have entered judgment in favor of the respondents Barnes, quieting their title thereto, upon payment of the amount due the plaintiff Grace P. Warden, as the owner of the bond, including such costs as she was entitled to collect. This question is settled, we think, by the following cases: Sawyer v. Berkeley Securities Co., 99 Cal.App. 545, 279 P. 217, and the authorities there cited; Green v. Palmer, 68 Cal.App. 393, 229 P. 876."

[9] As between appellant Federal Construction Company and respondent Myers, this action is neither a foreclosure proceeding by the former as lien claimant nor a quiet title proceeding by the latter as the property owner. Rather this is a foreclosure action timely brought by plaintiff Raisch for enforcement of his street improvement lien and in which appellant, made a party defendant herein along with respondent Myers, injected its cross-complaint seeking a judicial declaration of its lien as a subsisting claim and its superior right as against respondent Myers to the proceeds of a foreclosure sale in the event such sale should be decreed in satisfaction of plaintiff Raisch's lien. Respondent Myers has pleaded the bar of the statute of limitations as a defense to appellant's claim; and while she has not expressly asked for affirmative relief, she has impliedly asked for affirmative relief in that there is implicit in her answer the request that in the event that the trial court, in determining this equitable proceeding, should decide that plaintiff Raisch is entitled to foreclosure of his superior lien, the proceeds of the foreclosure sale, over and above the amount required to satisfy the Raisch lien, be ordered paid to her without regard to the rights of appellant as the holder of the subordinate lien. Such request places respondent Myers in a position more closely akin to the position of the property owner who attempts to take advantage of the statute of limitations in the property owner's action to quiet title than to the position of the property owner who pleads the bar of the statute of limitations merely for the purpose of defeating foreclosure and maintaining the status quo. In determining in this equitable pro-

ceeding the relief to be awarded the respective parties, equitable principles must be applied in the adjustment of the conflicting claims.

[10] While the statute of limitations, where used to maintain the status quo, applies in its full vigor to protect a defendant property owner from the successful prosecution of a foreclosure action in enforcement of a lien against the premises, the pleading of such statute should not avail a property owner to the prejudice of a subordinate lien claimant in the extinguishment of a valid lien where the status quo is disturbed by foreclosure of a superior lien. Cf. Goldwater v. Hibernia Sav. etc. Soc., 19 Cal.App. 511, 516, 126 P. 861, 863. In the state of the record as analyzed, equally applicable here are the equitable principles governing cases where the property owner seeks affirmative relief in a quiet title action against an outstanding lien that cannot be foreclosed by reason of the bar of the statute of limitations. In the one as in the other situation, the property is still subject to the lien and the lien claimant will be protected as against a property owner seeking an affirmative advantage without doing equity as the circumstances require. Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 336, 58 P.2d 194.

[11] Respondent Myers argues that the only method for enforcement of a street improvement lien contemplated by the ordinance is an action for foreclosure, and that the court is without power to decree a lien as a subsisting claim against the property through any other mode of procedure. In this connection she cites the case of Boskowitz v. Thompson, 144 Cal. 724, 730, 78 P. 290, for the proposition that the enforcement of a statutory lien "can be only in the mode provided by the statute." But such principle has no bearing on the distinguishable situation here where appellant's lien is only protected as against respondent Myers' attempt to obtain an affirmative advantage over appellant with respect to the proceeds of the sale ordered in an action brought to foreclose a superior lien. The fact that appellant's remedy by action to foreclose its lien is barred by the statute of limitations does not affect its right to the surplus proceeds of sale on foreclosure of plaintiff's lien. Cf. Batten v. Jurist, 306 Pa. 64, 158 A. 557, 81 A.L.R. 625.

In line with the views hereinabove expressed, the judgment is reversed and the trial court is directed to modify its findings and judgment to provide:

1. That Raisch has a lien on the premises in the amount as fixed by the judgment and that a foreclosure sale is ordered to satisfy said lien;

2. That the Federal Construction Company has a lien on the premises in the amount shown by the evidence;

3. That the Raisch lien is prior in right to the Federal Construction Company lien;

4. That the remedy to foreclose the Federal Construction Company lien has been lost by the limitation of time, but the lien still exists; and Federal Construction Company is entitled to the satisfaction of said lien, plus costs and expenses, before any of the proceeds of the foreclosure sale are paid to Alma M. Myers;

5. That upon the foreclosure sale of said premises any of the parties to this action may bid and become the purchaser of said premises; that the money realized from such sale be applied first to the satisfaction of all sums due Raisch, then to the satisfaction of all sums due Federal Construction Company, and the excess, if any, to go to Alma M. Myers.

SHENK, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. The obvious error in the majority opinion is that it refuses to apply to this case the provisions of section 2911 of the Civil Code to the effect that a *lien* is *extinguished* by the lapse of the time within which an action may be brought under the statute of limitation upon the principal obligation. The question is, as admitted by the opinion, whether or not the provision of the city ordinance that the lien endures until the assessment is paid, deals with a municipal affair. It is conceded that if it does not the state law controls. It is clearly not a municipal affair. It *does not* deal with an issue *between the city and a taxpayer.* The assessment is made a lien *for the benefit of the contractor* performing the improvement work, either directly as a method of paying him, or indirectly by securing the payment of a bond *given by the property owner to the contractor.* The matter of the continuation of the lien and the issue of the statute of limitation which is inseparably tied thereto is *between private individuals,* and whether it is substan-

tive or procedural law, it is a matter of the general administration of justice which cannot be other than a state-wide affair. That proposition is clearly demonstrated by the cases. The issue of the *tort liability of a city*, a matter of substantive law, is not a municipal affair. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118. Matters relating to limitation of actions (the term within which claims must be filed for tort damage) is not a municipal affair. Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal. App.2d 215, 82 P.2d 216. Certainly it would not be contended that the statute of limitation is a municipal affair, at least where the action is between two individuals. To so hold would permit the city to regulate the procedure in the courts, the scope of whose jurisdiction is clearly a matter of state concern. It necessarily follows that the effect upon a lien of the statute of limitation on the principal obligation is not a municipal affair. The regulation of garnishment of the salaries of judges of municipal courts is not a municipal affair. Wilson v. Walters, 19 Cal.2d 111, 119 P. 2d 340. Even if it be assumed that the development of a city's improvements and city taxation are municipal affairs, the statute of limitation and life of the lien is a statewide affair and only incidentally affects the development. Such incidental effect does not impair the home rule doctrine. Wilson v. Walters, supra; Department of Water & Power v. Inyo Chem. Co., 16 Cal. 2d 744, 108 P.2d 410. Hence the provision in the ordinance relating to the duration of the lien is for naught and the case must be viewed as if it did not exist.

This brings us to the question of whether or not, under those circumstances, section 2911 of the Civil Code applies to the lien of assessment of the character here involved. The majority opinion, while not deciding the issue, intimates that it has no application, citing Lantz v. Fishburn, 17 Cal.App. 583, 120 P. 1068. Regardless of that case the law is settled by Clark v. City of San Diego, 144 Cal. 361, 77 P. 973, where it was held that the defense of a lien for delinquent taxes would not lie in an action against the city to quiet title to the property where the right of action for the taxes is barred by the statute of limitation. That right being barred, the lien fell with it by virtue of section 2911 of the Civil Code. See to the same effect: Chambers v. Gibson, 178 Cal. 416, 173 P. 752; Dranga v. Rowe, 127 Cal. 506, 59 P. 944.

In my opinion the judgment should be affirmed.

SCHAUER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



27 Cal.2d 753

In re ETIE.

Cr. 4665.

Supreme Court of California, In Bank.

March 19, 1946.

Rehearing Denied April 15, 1946.

1. Pardon ⇐14

An order suspending petitioner's parole pending investigation of written charges of willful violation of parole, revoking previous order fixing term of imprisonment at six years and redetermining his sentence until further order at maximum term of 14 years, was not void on ground that it failed to state cause with particularity required by statute, notwithstanding that it was not shown that written charges being investigated were in connection with petitioner's prosecution for grand theft while on parole. Pen.Code, §§ 1404, 3063.

2. Pardon ⇐10

Under statute, Adult Authority under whose legal custody paroled prisoner remained had broad power to suspend or revoke parole without notice. Pen.Code, §§ 3056, 3060.

3. Constitutional law ⇐203

Where statutory amendment which changed procedure for redetermining length of time of imprisonment within minimum and maximum terms by authorizing Board of Prison Terms and Paroles to make redetermination without notice or hearing was enacted before petitioner's parole violation occurred, Board's action pursuant to amendment was not an ex post facto application, notwithstanding that original sentence had been fixed before the amendment. Pen.Code, § 3020.

Habeas corpus proceeding in the matter of Robert A. Etie to secure petitioner's release from the state prison at Folsom.

Writ discharged.

Alexander L. Oster, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The petitioner seeks his release from the State Prison at Folsom by this proceeding in habeas corpus. The writ was issued. The petition and the return show the following:

On June 9, 1938, in Los Angeles County, the petitioner pleaded guilty to a charge of violation of section 476a of the Penal Code (issuance of checks without sufficient funds with intent to defraud) and admitted a prior conviction of a felony (forgery). He was committed to the State Prison at San Quentin. Subsequently the Board of Prison Terms and Paroles fixed his term of imprisonment at six years which, unless redetermined, would expire on June 9, 1944. The maximum term would be fourteen years.

On June 24, 1940, the petitioner was released on parole. On May 18, 1942, charges of violation of parole conditions were filed against him and a hearing was had at which he was present. He admitted the charges, and on May 27, 1942, the Board of Prison Terms and Paroles revoked his parole with a recommendation to the State Board of Prison Directors that all credits earned or to be earned be forfeited. On July 8, 1942, the State Board of Prison Directors declared forfeited all statutory credits earned or to be earned by the petitioner.

On December 12, 1942, the petitioner was again released on parole. On May 15, 1944, written charges were again filed against him for the violation of the conditions of parole in that on May 4, 1944, he had been arrested and was confined in the Los Angeles county jail on a charge of grand theft. On May 23, 1944, the Adult Authority suspended his parole pending investigation of the charges, revoked the previous order fixing his term of imprisonment at six years, and redetermined his sentence until further order at the maximum term of fourteen years.

The petitioner contends that the order of May 23, 1944, was void because it was not in conformity with the provisions of section 3063 of the Penal Code which reads: "No parole shall be suspended or revoked without cause, which cause must be stated in the order suspending or revoking the parole." Since that order was void, he contends, the six-year term originally fixed to run from June 9, 1938, expired on June 9, 1944, and before any valid order was made revoking his parole. An order admittedly valid in form revoking his parole was made by the Adult Authority on June 18, 1945, further reference to which will presently be made.

The order of May 23, 1944, was pursuant to a written report of the chief state parole officer to the Adult Authority that the petitioner had been arrested on May 4, 1944, was in the custody of the authorities in Los Angeles County on a grand theft charge, and recommending "that the parole of Robert Etie be suspended pending final disposition of the Grand Theft, Money Charge by the Los Angeles authorities." Upon the presentation of that report and recommendation the Adult Authority made the challenged order at its meeting at the State Prison at San Quentin on May 23, 1944. The order reads as follows:

"Paroles Suspended

"The Chief State Parole Officer presented separate reports in writing in each case * * * charging that the below listed prisoners had wilfully violated the terms and conditions of their paroles and Tickets of Leave, and recommending that the parole in each case be suspended, cancelled and/or revoked: * * * SQ 62096—Etie, Robert. * * *

"Due cause being shown by the Chief State Parole Officer, it is ordered that the paroles heretofore granted the above named and numbered prisoners be cancelled, suspended and/or revoked pending investigation of the complaints filed, and it is ordered that they be retaken and returned to actual custody to abide the further disposition of this Authority.

"It is further ordered, in accordance with a resolution adopted by the Board of Prison Terms and Paroles on December 28, 1943, and re-adopted by this Authority, that the above listed prisoners who have terms set at less than Maximum shall have such actions fixing terms rescinded, and these prisoners shall be considered as

serving the Maximum until further order of this Board."

Under the provisions of this order the term of petitioner would expire on June 9, 1952, if the maximum be served.

The petitioner continued to be in the custody of the authorities at Los Angeles from May 4, 1944, until his return to the State Prison at Folsom. During that period the grand theft charge pending against him was brought on for trial in the Superior Court at Los Angeles. On January 16, 1945, he entered in that case a plea of guilty to the crime of criminal conspiracy to cheat and defraud by criminal means, etc., and was sentenced to serve a term of six months in the county jail. Before the expiration of that term the Adult Authority, on June 18, 1945, made an order revoking petitioner's parole and directing that he be returned forthwith to Folsom Prison as a parole violator. That order reads: "It is hereby ordered that the parole of said Robert Etie be and is hereby revoked for the following cause: 1. On January 18, 1945, subject was convicted of the crime of Criminal Conspiracy and received a six months county jail sentence therefor. 2. On or about December 23, 1944, subject violated strict orders of the Bureau of Paroles by engaging in a business enterprise. 3. On or about December 23, 1944, he continued to associate with one George Riley, a person of known bad reputation, and in violation of strict orders of the Bureau of Paroles. 4. On or about December 23, 1944, subject indulged in the use of intoxicating liquors contrary to specific instructions of this Bureau."

[1] The foregoing order of revocation was in strict compliance with section 3063 of the Penal Code. It also appears beyond question that good cause existed for the order of suspension of May 23, 1944. That cause was the wilful violation of the terms and conditions of parole. The question then is, Did that order state the cause as contemplated by section 3063? It must be noted that the order was an order of suspension pending investigation of the charge of violation in connection with the prosecution of the petitioner for the crime of grand theft and his incarceration on May 4th of the same year and of which the chief parole officer of the Adult Authority had been advised. It was in the nature of a preliminary order of suspension pending the investigation and outcome of the prosecution in Los Angeles. It is assumed that such an order should state the cause of suspension as provided in the Code section, but the subject of the matter presented to the Adult Authority for action on the report of the Chief Parole Officer should be kept in mind in order to determine the particularity with which the cause for suspension should be stated and the prejudice, if any, suffered by the petitioner because of any lack of it. Here the subject matter was the charge of the Chief Parole Officer of a wilful violation of the terms and conditions of the parole. When this report was made by its Chief Parole Officer, and the prior record of violation of parole conditions by the petitioner was before it, the Adult Authority properly exercised its power and duty to take appropriate action. This it did by ordering the immediate suspension of the petitioner's parole, and his rearrest. The cause might have been stated with greater particularity, as was done in the order of revocation of June 18, 1945, but it was sufficient to show even to the casual reader that the cause of suspension pending investigation was the charge of the chief parole officer that the petitioner "had wilfully violated the terms and conditions" of his parole. This was not only good cause for suspension but was a sufficient statement of the cause in the order when considered in the light of all the circumstances of the case, and in view of the provisions of section 1404 of the Penal Code which provides: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Certainly no prejudice was suffered by the petitioner by the claimed insufficiency in the order. This court, in Ex parte Basuino, 22 Cal.2d 247, 138 P.2d 297, applied section 1404 in holding that an omission or misrecital in the mandatory form of a judgment would not invalidate it where the accompanying record supplied the omission or correction.

The petitioner relies on In re Knaesche, 22 Cal.App.2d 667, 72 P.2d 216, and the later case of Ex parte Payton, 67 Cal.App. 2d 835, 155 P.2d 837. The Knaesche case was concerned with an order of revocation signed by the governor which admittedly contained a statement of the cause, namely, alleged invalidity of the parole because of noncompliance with provisions of section

1168(4) of the Penal Code then in force. It was held that the parole was valid and that the cause stated for its revocation did not exist; therefore, since there was in reality no cause for revocation, the order revoking the parole was invalid. In that case the failure of compliance with section 3063 concerned the failure of the existence of the cause, and not as here the failure to state the cause. That case is of no assistance to the petitioner in this proceeding. Furthermore, it is difficult to see how it could support the conclusion in the Payton case. Anything in the latter case which is contrary to our present determination is necessarily disapproved.

[2] There is no statutory requirement that the parolee have notice or a hearing before his parole may be suspended or revoked. The authority under whose legal custody a paroled prisoner remains (Pen. Code, § 3056), has broad power to suspend or revoke a parole without notice. Pen. Code, § 3060, Ex parte Soldavini, 64 Cal. App.2d 677, 680, 149 P.2d 193. But the petitioner contends that the order of May 23, 1944, redetermining his sentence at the maximum is void for the reason that he was not given notice and granted a hearing in accordance with the law as it existed in 1938 when he was convicted and in 1940 when his sentence was fixed at six years. He argues that the application of the law as amended in 1941 would render its operation ex post facto. From 1929 to 1931 the law provided that a sentence, once fixed, could not be changed. Under that law the board could determine but it could not redetermine a sentence. From 1931 to 1941 section 1168 of the Penal Code gave the Board of Prison Terms and Paroles the power to redetermine a sentence, and a redetermination on the ground of the infraction of the rules of the prison or the violation of the terms of parole could not be made except after a hearing, at which the prisoner was entitled to be present and produce evidence and witnesses in his behalf. In 1941, Stats. 1941, p. 1080, the provision for a hearing in the event of such a redetermination was eliminated, and under section 3020 of the Penal Code the board had power to redetermine the length of time of imprisonment within the minimum and maximum terms in any case without notice or hearing. The petitioner cites Ex parte Korner, 50 Cal.App.2d 407, 123 P.2d 111. That case did not involve a violation of the rules or the conditions of parole. The court rejected the contention that a redetermination was restricted to such cases. The redetermination of the term of imprisonment was upheld although it was made without reference to an infraction of the rules or the conditions of parole and without a hearing.

The petitioner also relies on language in Re Hicks, 28 Cal.App.2d 671, 674, 83 P.2d 73, 75, to support his contention that the law in effect at the time the sentence was fixed by the board was controlling. In that case the petitioner was convicted before, but his sentence was fixed after the effective date of the 1931 law which gave the board power to redetermine as well as determine a sentence. It was held that inasmuch as the term was fixed after that law became effective, the board had power to increase the term. It was said: "We may concede that if the board had been authorized to and did fix his term at seven years before the [1931] amendment of section 1168 became effective, it would have been powerless to change that order as the law then stood," that is, the law which prohibited a change in a sentence once fixed. But in that case, involving a violation of parole, the petitioner was unable to sustain his contention that the law in force at the time of his conviction was controlling and that the board could not change the term. The case recognized that a sentence which was fixed when the law restricted the board's authority, by expressly withholding power to redetermine a sentence, could not be changed after the enactment of an amendment removing the restriction.

[3] The Korner case did not involve a violation of parole. In the Hicks case both the fixing of the sentence and the violation of the parole occurred under the law in force prior to the 1941 amendment. Therefore the question presented here is not determined by either of those cases. Here the sentence was fixed before, but the parole violation occurred after the 1941 amendment which continued the power to redetermine under changed procedure. It does not follow that the action pursuant to the law as amended renders it ex post facto in the petitioners' case. An ex post facto application may arise where a violation of parole occurs prior to an amendment and it is sought then to apply the law as amended. But that result does not flow in the case where, as here, the law is applied

which was in force at the time the violation occurred. In this case the application of the law in force at that time did not aggravate nor increase the punishment for the original crime, which was confinement in prison for a term between the minimum and maximum prescribed by law. In the absence of any such result, and in the absence of a restriction against the change of a sentence once fixed, the rules govern which apply in the case of the violation of a penal statute, namely, that the punishment for the violation shall be pursuant to the law in force at the time the violation was committed. The petitioner had no constitutional guarantee against a change in the law relating to punishment for future offenses or violations of parole. His rights under the facts were determined by the law in force at the time he committed the violation of his parole. The order refixing the petitioner's sentence was based on that law. It was therefore a valid exercise of the power of the Adult Authority.

The writ is discharged and the petitioner is remanded.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



73 Cal.App.2d 605

STEINBERG v. BUCHMAN.

Civ. 15080.

District Court of Appeal, Second District, Division 3, California.

March 21, 1946.

Rehearing Denied April 16, 1946.

Hearing Denied May 20, 1946.

1. Brokers ⇐74

A prospective purchaser who did not complete purchase of realty was not liable to broker for commissions, where vendor engaged broker and purchaser did not by terms of purchase contract assume personal obligation to pay a commission and did not agree with broker to purchase the property or to pay broker a commission. Civ. Code, § 1624, subd. 5.

2. Contracts ⇐187(2)

A prospective vendor's direction to escrow holder that a commission be paid to broker engaged by vendor from proceeds of sale was not assumed or joined in by prospective buyer by buyer's placing his signature beneath a specification of things which buyer agreed to do so as to constitute as to such buyer a "third-party beneficiary contract," and did not entitle broker to recover commissions from buyer not completing the purchase. Civ.Code, § 1559.

See Words and Phrases, Permanent Edition, for all other definitions of "Third-Party Beneficiary Contract".

3. Contracts ⇐187(1)

A party seeking to recover as a third-party beneficiary of a contract must prove a contract which was made expressly for such party's benefit and a contract in which it clearly appears that such party is the beneficiary. Civ.Code, § 1559.

4. Brokers ⇐74

A prospective purchaser not engaging broker and not assuming payment of commissions in purchase contract, and not agreeing with broker to pay commissions, owed no duty to broker to consummate the purchase of the property and incurred no liability to broker in refusing to go through with the purchase.

5. Brokers ⇐74

A broker who is employed by and acts for only one of the parties to a transaction, and who is unable to collect a commission from his principal because of the failure of the other contracting party to complete the transaction, cannot recover damages from such other contracting party with whom the broker has no contract.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by S. H. Steinberg against H. K. Buchman for damages allegedly arising out of defendant's failure to conclude purchase of realty. From the judgment, the plaintiff appeals.

Affirmed.

Samuel Mirman, of Los Angeles, for appellant.

Newby, Holder & Newby, of Los Angeles, for respondent.

SHINN, Justice.

Appeal by plaintiff from a judgment on a directed verdict for defendant. It was alleged in the complaint that plaintiff, a real estate broker, had been engaged by one Epstein to find a purchaser for certain real estate and personal property belonging to Epstein and was to receive a commission of five percent of the first $115,000 of the selling price and fifty percent of any additional sum received for the property. It was alleged that plaintiff procured defendant as a purchaser, that defendant entered into a written agreement with Epstein to purchase the property for $125,000, and that defendant repudiated the agreement and refused to conclude the purchase. The prayer of the complaint was for damages in the sum of $10,750. The answer admitted the making of the contract of purchase, denied that defendant had repudiated it, and alleged that he had rescinded the contract for good cause.

Plaintiff offered in evidence an agreement by which Epstein appointed him exclusive agent to find a purchaser for the property. It was excluded from evidence upon defendant's objection. It was not offered for identification and is not contained in the record. We may assume, as counsel do, that it conformed to the agreement alleged in the complaint, which described the property to be sold as "a building, bowling alley, cafe, cocktail room, licenses, good will, fixtures, equipment, and merchandise." The agreement of sale, hereinafter referred to, shows that the land also was included. The complaint alleged that under the employment agreement, "said Morris Epstein agreed to pay to the Plaintiff as commission for his securing a purchaser for said property five per cent (5%) of $115,000.00, plus 50% of all the amounts received by Epstein in excess of $115,000 for the sale of the aforementioned property."

The agreement between Epstein and defendant was in the form of escrow instructions, copy of which was attached to defendant's answer, and the agreement as pleaded was received in evidence. Defendant moved for a directed verdict upon the ground that plaintiff had not proved any agreement in writing subscribed by defendant, employing plaintiff to purchase the property for compensation or a commission, as required by section 1624(5) of the Civil Code, and a direction to the jury to return a verdict for defendant followed the granting of that motion.

Plaintiff, while conceding that it was necessary for him to prove a written agreement of employment subscribed by defendant, relies solely upon the escrow instructions for proof of such an agreement. Those of defendant stated that he was depositing $2500 cash, would deposit $7500 within 10 days, $50,000 when the escrow was ready to close, together with his note and trust deed for $65,000, and also a chattel mortgage covering the furniture and other personal property, and they called for a bill of sale of the personal property and a deed to the real property. Taxes and insurance were to be prorated and defendant was to pay the buyer's customary charges, including one-half of the escrow fee. Epstein signed instructions which called for the payment to him of $60,000 in cash and the delivery of the note, trust deed and chattel mortgage. They provided that he would pay his proper recording fees, the cost of procuring evidence of title, and stated, "and you are hereby authorized to pay any bonds, assessments and/or taxes and any encumbrances of record to show title as called for/or necessary to comply with same. Pay to S. H. Steinberg, a licensed real estate broker, No. —— whose address is 756 South Broadway, Los Angeles, Calif as a commission the amount called for in agreement to be handed you by him. From funds accruing to my account in this escrow you are instructed to pay to California Bank, 6th & Western Branch, the amount of its demand for reconveyance of deed of trust of record on said property. Issue check for proceeds to Morris Epstein and mail to address below."

[1, 2] Plaintiff's theories are stated as follows: "(1) Appellant is entitled to recover on the basis of the purchase contract itself as a direct promise of the respondent to pay appellant a commission; (2) appellant is entitled to recover his commission as a third party beneficiary of the purchase contract under the provisions of section 1559, C.C.," which provides that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Neither of these theories finds support in the facts. Defendant did not by the terms of his purchase contract directly or at all assume a personal obligation to pay plaintiff a commission. Defendant did not engage or receive any services of plaintiff as broker and did not agree to pay a commission; he did not agree with plaintiff that he would

purchase the property and he was under no moral or legal obligation to pay a commission or to see that plaintiff received one. All defendant agreed to do was to pay the purchase price and his share of the incidental expense. It was of no concern of his what Epstein did with the money after it was held to his account by the escrow holder. Epstein's direction that a commission be paid to plaintiff from the proceeds of the sale was no part of the agreement of sale. It could have been stricken from the instructions of Epstein without affecting in the slightest his agreement with defendant. Plaintiff and defendant were complete strangers as to any contractual relationship or duty. Defendant's obligations were distinctly and separately stated in the escrow instructions, and the payment of a commission to plaintiff was not among them. Defendant did not, by the mere act of placing his signature beneath a specification of the things which he agreed to do, assume or join in the separate undertakings of Epstein which were set out in the latter's instructions. Epstein directed disbursement of his money for different purposes, which we have already mentioned. Defendant no more assumed an obligation for the payment of a commission to plaintiff than he assumed obligations to other creditors of Epstein, such as the company which would write the policy of insurance, the holders of encumbrances on the property, etc. Epstein's direction to the escrow holder for the payment of the commission was expressly for plaintiff's benefit but it was in no sense a contract to which defendant was a party.

[3] No agreement was made expressly or at all for the benefit of plaintiff. It appears from what we have said that defendant deposited his money in escrow with instructions to pay it to Epstein; that was the extent of his agreement and of his responsibility. In otherwords, he made no agreement with anyone for the payment of plaintiff's commission. Certainly there was nothing in the agreement of purchase which would indicate that defendant agreed to purchase the property expressly or at all for the benefit of plaintiff. It is not enough for plaintiff to show that he would incidentally have been benefited by performance. He was required to prove a contract which was made expressly for his benefit and one in which it clearly appeared that he was the beneficiary. Van DerHoof v. Chambon, 121 Cal.App. 118, 131, 8 P.2d 925; Wilson v. Shea, 29 Cal.App. 788, 157 P. 543; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, 52 Am.St.Rep. 88. In this he failed completely.

[4] It would be idle to discuss the rules of law that would be applicable to the case if defendant had engaged the services of plaintiff to assist him in acquiring the property, and had thereby impliedly agreed with plaintiff that he would buy the property if plaintiff could get it for him upon the agreed terms. See 8 Am.Jur. sec. 148, p. 1072. Traxler v. Katz, 116 Cal.App. 226, 2 P.2d 553, and Herman v. Savage, 17 Cal. App.2d 238, 61 P.2d 1195, which are relied upon by plaintiff, were cases in which the broker had acted as the agent of the party who had refused to carry out a contract of exchange and who was held liable to the broker in damages. The opinion in the last case does not state that the broker, plaintiff's assignor, had been employed by and had rendered services to the defendant, but that fact is shown in the briefs, which set forth the agreement of exchange in which it was stated that one of the considerations for defendant's agreement to make the exchange was the services which had been performed by the brokers. The defendant here owed no duty to plaintiff to consummate the purchase of the property and incurred no liability to plaintiff in refusing to go through with the deal.

[5] The case is governed by another rule, which is that a broker who is employed by and acts for only one of the parties to a transaction, and who is unable to collect a commission from his principal because of the failure of the other contracting party to complete the transaction, cannot recover damages from the latter, with whom he has no contract. 8 Am.Jur., sec. 149, p. 1073; Brockway-Mecklenburg Co. v. Hilderman, 90 Mont. 317, 2 P.2d 1018; Goff v. Adelson, 229 App.Div. 802, 242 N.Y.S. 278; Hokar Products Corporation v. Griscom & Co. Inc., Sup., 40 N.Y.S.2d 54; Giovannoni v. Waple & James, 70 App.D.C. 229, 105 F. 2d 108.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

73 Cal.App.2d 735

HALL v. WATSON et al.

Civ. 15083.

District Court of Appeal, Second District, Division 3, California.

March 29, 1946.

1. Partnership ⇐306

Generally, a partner using partnership assets in continuing partnership business after partnership's dissolution is accountable to retiring partner for profits acquired after dissolution and before termination of partnership. Civ.Code, §§ 2423, 2424.

2. Partnership ⇐306

A partner having no interest or only negligible interest in firm's assets or capital after its dissolution is not entitled to share in profits earned by continuation of partnership business after dissolution. Civ. Code, §§ 2423, 2424.

3. Partnership ⇐306

A partner, who was paid weekly salary for managing partnership business during firm's existence of about one month, made no payment on capital investment, was obligated to pay his share thereof only from his profits, and was in no position to pay from such source after partnership's dissolution, had no such interest in partnership assets as to entitle him to accounting of profits earned by other partners from dissolution until termination of partnership. Civ.Code, §§ 2423, 2424.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Richard D. Hall against C. W. Watson and another for termination of a partnership and an accounting. From a judgment for plaintiff in an unsatisfactory amount, he appeals.

Affirmed.

Robert M. Miller, of Los Angeles, for appellant.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondents.

WOOD, Justice.

Action for termination of partnership and for an accounting. Judgment was in favor of plaintiff for $438.20. He appeals therefrom upon the ground that the court erred in not requiring defendants to account for profits acquired from the operation of the business during the period of time from the dissolution to the final winding up of the partnership affairs.

The appeal is upon the judgment roll. The court found as follows: About December 19, 1943, plaintiff and defendants entered into a partnership agreement for the purpose of purchasing and operating a cafe. They were to be equal partners, each owning a third, except that plaintiff was to receive $75 per week for operating and managing the business, and defendants were not required to devote any time thereto. All were to contribute equally in the purchase of the business, except that defendants were to advance plaintiff's portion and he agreed to repay such advances from his share of the profits. There was no definite period of time for the existence of the partnership. On December 19, 1943, the partners purchased the cafe, together with the good will, trade name, fixtures, lease and other assets, paying therefor $3000, and thereafter they paid $695.70 for additional assets, making a total investment of $3695.70. The defendants contributed all of said sum, the plaintiff agreeing to pay his one-third thereof from his profits. They commenced operating the cafe on December 19, 1943, and plaintiff received $75 per week for his services until January 17, 1944, at which time the defendants dissolved the partnership and thereafter continued to operate the business. The court further found that from the commencement of the partnership until January 17, 1944, the business was operated at a loss of $185.40, and plaintiff was indebted to the partnership for one-third thereof, being the sum of $61.80; that on January 17, 1944, the assets of the partnership had appreciated in value $1500 more than the amount of the purchase price, making the value of the assets $5195.70 on January 17, 1944. That plaintiff was entitled to one-third thereof, that is, $1731.90. That from said sum there should be deducted $1231.90, the amount advanced by defendants for plaintiff's part of the purchase price, and the sum of $61.80, his share of the losses.

The court concluded that defendants were indebted to plaintiff in the sum of $438.20, and that plaintiff was not entitled to an accounting for profits arising from the use of the assets after January 17, 1944.

The dissolution of the partnership on January 17, 1944, was not termination of it. Section 2423, Civil Code, provides that: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Section 2424 of that Code provides: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

[1, 2] Plaintiff contends that he was entitled to an accounting of profits from the time of the dissolution to the time of the winding up of the partnership affairs by rendition of judgment. He relies principally upon the case of Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715, which held that the plaintiff therein was entitled to an accounting of profits after the dissolution of the partnership. In that case the partnership had been in existence about seven years prior to dissolution, each partner had paid his share of the capital investment, and the partner who continued the business after the dissolution used the assets in which the retiring partner had a substantial interest. The liquidation therein following dissolution was an involved matter, and, although some of the accounting matters were settled by the partners, a disposition of assets was necessary in order to wind up the partnership. It is the general rule that where the assets of a partnership are used by one partner in continuing the business after dissolution, he is accountable to the retiring partner for profits acquired after dissolution and before termination of the partnership. 40 Am.Jur. 388. "The right of a partner to share in the profits earned by the continuation of a partnership business after the dissolution of the firm is founded upon the use to which such partner's interest in the capital of the firm has been put in earning these subsequent profits, and if the partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the firm after dissolution, he is not entitled to share in the profits earned. The same result is reached where the complaining partner's interest in the capital is negligible." 40 Am.Jur. 398, sec. 390. It is also said therein at page 399 that: "It would seem that if, by reason of * * * the excessive indebtedness of the partner to the firm, the partner has no interest, or at least only a nominal interest, remaining in the firm, he should not be entitled to a share of the subsequently earned profits."

[3] The partnership herein had been in existence about one month, during which time plaintiff was paid $75 per week for his services. The defendant had paid all the money for the purchase of the assets. The plaintiff had made no payment on the capital investment, he was under no obligation to pay for his share thereof except from his profits, and after the dissolution he was not in a position to pay from that source. There were no partnership liabilities. As above stated, there was no provision that the partnership should exist for a definite time. The court rendered an accounting up to the time of the dissolution, allowing plaintiff his share of the appreciated value of the assets, and no question is raised on this appeal concerning that accounting. After dissolution the interest of plaintiff in the assets was not such that he was entitled to an accounting of profits from the dissolution to the termination of the partnership.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.



73 Cal.App.2d 825

PEOPLE v. FITCH.

Cr. 2380.

District Court of Appeal, First District, Division 2, California.

April 3, 1946.

1. Burglary ⇐41(4)

In burglary prosecution, evidence that defendant was found in restaurant at night after closing and that window was broken and the door was open justified conclusion that defendant forcibly broke into and entered the premises.

2. Burglary ⇐41(3)

In burglary prosecution, evidence that box containing gum had been moved from its place under the counter justified in-

ference that defendant intended to commit theft in restaurant where he was found at night after closing.

3. Burglary ⇐41(3)

In burglary prosecution, fact that defendant had forcibly and unlawfully entered restaurant at night after closing justified inference that he intended to commit theft therein.

4. Burglary ⇐41(1)

Evidence sustained conviction of second-degree burglary.

5. Criminal law ⇐260(11)

A conviction supported by substantial evidence could not be disturbed.

6. Criminal law ⇐1137(5)

In burglary prosecution, defendant could not complain of the fact that trial judge examined defendant's record showing convictions of misdemeanors, where defendant's counsel expressly consented thereto.

7. Criminal law ⇐1035(3), 1153(3)

In burglary prosecution, defendant could not complain that trial court had interrupted defendant's cross-examination to take some testimony from other witnesses where defendant was not prejudiced thereby and had not made any objection thereto, since trial judge has wide discretion in controlling order of proof.

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

John Ernest Fitch was convicted of burglary in the second degree and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

DOOLING, Justice.

Defendant appeals from a judgment of conviction of burglary in the second degree, after trial before the court, a jury having been waived.

The evidence for the prosecution showed that on the night of February 28, 1945, a special police officer making his rounds in San Francisco found the lights on in a restaurant at 85 Natoma Street and a padlock on one of the doors broken. The officer tried the door and found it locked by the Schlage lock which was fitted into the door. He went to summon his partner and some thirty-five minutes later returned with two other special officers. They found a window broken, the door open and the lights extinguished. Upon entering they found the defendant lying behind the counter with some vomited matter on the floor near his head, "either drunk or sick." A can containing gum was found on the counter. The restaurant owner testified that when he left the restaurant the night before this can had been under the counter.

A police inspector who interviewed the defendant on the following morning testified that defendant, who was on parole from the State prison, told him that he had met a man named Hathaway who, he believed, could give him information as to the person who had actually committed the robbery of which defendant claimed he had previously been wrongfully convicted. That he got into a car with Hathaway and two negroes and they gave him a drink from a bottle which must have been a "micky finn"; that he got sick and dizzy and tried to get out of the car; that the other occupants beat and kicked him and then took him to 85 Natoma Street, broke into the premises and threw him inside; and that he heard them say "that they would frame him on his parole."

The defendant on the stand gave substantially similar testimony except that he testified that when he was beaten he "passed out" and remembered nothing thereafter until he recovered consciousness after his arrest. The defendant admitted that he had previously been convicted of several felonies.

[1-4] The evidence, although entirely circumstantial, was ample to support the judgment of conviction. The defendant's presence in the restaurant, with the window broken and the door open, supports the trial judge's conclusion that defendant forcibly broke and entered the premises. The intent to commit theft could reasonably be inferred from the fact that the box containing the gum had been moved from its place under the counter. People v. Swenson, 28 Cal.App.2d 636, 83 P.2d 70. Indeed it could be inferred from the forcible and unlawful entry alone. People v.

Martone, 38 Cal.App.2d 392, 101 P.2d 537; People v. Davis, 24 Cal.App.2d 408, 75 P. 2d 80; People v. Soto, 53 Cal. 415; People v. Winters, 93 Cal. 277, 28 P. 946.

[5] The trial judge was not bound to believe defendant's testimony. It was impeached by his admission of his conviction of other felonies and by the inconsistencies with his admissions to the police inspector. The transcript shows that the trial judge concluded that defendant while intoxicated broke and entered with the intention of committing theft. We cannot reweigh the evidence further than to determine that there is substantial evidence to support that conclusion. People v. Quinn, 12 Cal.App.2d 752, 754, 55 P.2d 1277.

[6] Appellant cannot complain of the fact that the trial judge examined his record showing certain convictions of misdemeanors since his counsel expressly consented thereto.

[7] Nor was he in any way prejudiced by the interruption of his cross-examination to take some testimony from other witnesses. Not only was no objection made, but the trial judge has a wide discretion in controlling the order of proof.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



73 Cal.App.2d 824

ROSICRUCIAN FELLOWSHIP v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 3615.

District Court of Appeal, Fourth District, California.

April 2, 1946.

1. Courts ⇐207(4)

Generally, where a writ of mandamus is sought in a case pending on appeal, the petition should be filed in the court in which the appeal is pending.

2. Courts ⇐207(4)

District Court of Appeal would not grant writ of mandate directed to superior court to command it to take a certain action in a case in which an injunction was issued, where petition stated that appeal from judgment of superior court was pending in Supreme Court.

Petition by the Rosicrucian Fellowship against the Superior Court of the State of California, in and for the county of San Diego, and another, for a writ of mandate directed to the respondent court to command it to take a certain action in a case in which an injunction was issued.

Petition denied without prejudice.

Elmer J. Walther, of Los Angeles, for petitioner.

Thomas Whelan, Dist. Atty., of San Diego, and Stewart, Shaw & Murphey, of Los Angeles, for respondents.

PER CURIAM.

Petitioner is here asking for a writ of mandate directed to the respondent court to command it to take a certain action in a case in which an injunction was issued. It is an equitable action in which original appellate jurisdiction is in the Supreme Court. Petitioner states in its petition that the appeal from the judgment is now pending in that court.

[1, 2] The rule generally followed in this State is that where a writ is sought in a case pending on appeal the petition should be filed in the court in which the appeal is pending. See, Collins v. Superior Court, 147 Cal. 264, 81 P. 509; In re Estate of Turner, 39 Cal.App. 56, 177 P. 854; Gunder v. Superior Court, 100 Cal.App. 334, 279 P. 822; Foster v. Superior Court, 4 Cal.App.2d 466, 41 P.2d 187; Waidley v. Superior Court, 51 Cal.App.2d 690, 125 P. 2d 507. It follows that the application for the writ should have been made to the Supreme Court.

The petition is denied without prejudice to applying for the writ in the proper court.

73 Cal.App.2d 675

PEOPLE v. GREENBERG.

Cr. 3927.

District Court of Appeal, Second District, Division 3, California.

March 27, 1946.

As Modified on Denial of Rehearing April 10, 1946.

Hearing Denied April 25, 1946.

1. Constitutional law ⇐268
Criminal law ⇐12

The code and constitutional provisions permitting court and counsel to comment upon failure of a defendant to explain or deny by his testimony any evidence or facts against him and which allow the same to be considered by court or jury do not violate due process clause of Fourteenth Amendment. Pen.Code, § 1323; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

2. Criminal law ⇐787(2)

Requested instruction that failure of a defendant to take witness stand does not constitute evidence in the case was properly refused since it is failure of defendant to explain or deny evidence or facts against him, when it appears that he could do so, if innocent, not his mere failure to take witness stand, which may be commented upon and considered by jury. Pen.Code, § 1323; Const. art. 1, § 13.

3. Criminal law ⇐787(2)

Instruction that failure of a defendant to explain or deny evidence or facts which are against him may be considered by jury is not enough, and instruction should further embody substance of rule that such failure to deny or explain does not create a presumption nor warrant an inference of guilt, but should be considered only in relation to evidence that defendant failed to explain or deny and that if defendant could reasonably be expected to explain or deny certain evidence jury may consider failure to do so as tending to indicate truth of such evidence. Pen.Code, § 1323; Const. art. 1, § 13.

4. Criminal law ⇐1173(2)

Where court instructed that failure of defendant to personally take witness stand and testify was not evidence in case, but that his failure to explain or deny by his own testimony evidence or facts in case against him could be commented upon by counsel and could be taken into consideration by jurors, failure to give a more comprehensive instruction, under circumstances, was not reversible error. Pen. Code, § 1323; Const. art. 1, § 13.

5. Criminal law ⇐787(2)

In prosecution for grand larceny of a fur coat where two witnesses identified defendant as the thief and two other witnesses testified to an alibi, it would have been proper to instruct that defendant's failure to deny that he stole coat was a circumstance which tended to strengthen testimony of witnesses who identified him as the thief. Pen.Code, § 1323; Const. art. 1, § 13.

6. Criminal law ⇐834(1)

The court, in giving defendant's requested instruction on alibi, did not err in modifying instruction by striking out statement that defendant is not bound to prove his defense of an alibi.

7. Criminal law ⇐775(3), 829(7)

Where jury had to chose between conflicting testimony as to alibi, instruction defining alibi and telling jury that defendant had a right to such defense and that if evidence created a reasonable doubt in jurors' minds as to defendant's presence at time and place where offense was alleged to have been committed jury should acquit was a sufficient instruction on alibi and court was authorized to reject other requested instructions on that subject.

8. Criminal law ⇐393(3)

In prosecution for grand theft, where whole case hinged on ability of one prosecution witness to identify defendant as the thief, court erred in directing defendant to stand for purpose of identification.

9. Criminal law ⇐1166½(12)

Where court, during cross-examination of witness who had identified defendant as the thief, at request of prosecutor erroneously directed defendant to stand for purpose of identification, but defendant's counsel declined to permit him to stand, and it did not appear that defendant was pointed out to witness in courtroom or that there was any question of her ability to identify him, error was not prejudicial.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Herman Greenberg was convicted of grand theft and from the judgment and

from an order denying a motion for a new trial, he appeals.

Order and judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHINN, Justice.

By information, appellant Herman Greenberg was accused of the crime of grand theft and of having suffered a prior conviction of a felony; he admitted the prior conviction, was tried by a jury and found guilty of grand theft. He was sentenced to State Prison, made a motion for new trial, which was denied, and he appeals from the order and from the judgment.

[1] Appellant did not take the stand at the trial. The prosecutor commented upon that fact in his arguments to the jury and the court gave an instruction upon it. As one of the grounds of the appeal it is argued that section 1323 of the Penal Code and Article I, section 13, of the State Constitution, as amended in 1934, which permit the court and counsel to comment upon the failure of a defendant to explain or deny by his testimony any evidence or facts in the case against him, and allow the same to be considered by the court or jury, are in violation of the 14th Amendment to the Constitution of the United States, in that such procedure deprives the defendant of due process of law. Since the briefs were filed, it has been decided that the Penal Code section and the 1934 amendment to the Constitution do not violate the due process clause of the 14th Amendment. The identical question and the same arguments were presented to the Supreme Court in People v. Adamson, Cal., 165 P.2d 3, and were decided adversely to the contentions of appellant.

[2] The court gave the following instruction: "The failure of a defendant to personally take the witness stand and testify is not evidence in the case but the failure of a defendant to explain or to deny by his own testimony any evidence or facts in the case against him, may be commented upon by counsel, and may be taken into consideration by you as jurors." The court refused to give defendant's offered instruction as follows: "You are instructed that the failure of a defendant to take the witness stand does not constitute evidence in the case. You are further instructed that the defendant can only be convicted upon legal, competent evidence presented in court, and not on the absence of any evidence." The requested instruction was properly refused. It is the failure of the defendant to explain or deny evidence or facts against him, when it appears that he could do so, if innocent, not his mere failure to take the witness stand, which may be commented upon and taken into consideration. The substance of the requested instruction was covered by those which were given.

[3, 4] It is not enough to instruct the jury that the failure of a defendant to explain or deny evidence or facts which are against him may be taken into consideration by the jury. An instruction should embody the substance of the rule, as stated in People v. Adamson, supra, Cal., 165 P.2d at page 10, "that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." The failure to give a more comprehensive instruction was not an error which would justify a reversal of the judgment. Two witnesses for the prosecution identified the defendant as one of two men who committed the theft; two witnesses testified for defendant that he was at a place far removed from the scene of the theft at the time of its commission. The subject of the theft was a fur coat of a value in excess of $1,900 and it was taken from a display window on Wilshire Boulevard in Los Angeles. A maid who was working at the front of the store testified that she first saw defendant and a male companion outside the store at about 10 o'clock a. m. Defendant was described as a small man, his companion as a large one. The two were seen to pass the door and stand on the sidewalk 20 or

30 feet from it for about an hour; defendant carried a shopping bag and a brief case. Defendant came into the store through the right-hand door and the other man through the left-hand door. Defendant stood in the store for about 10 minutes and the other man for a longer time. Defendant left and took a stand outside, closer to the door than formerly, and the maid a little later from the mezzanine floor saw defendant enter the store again for a few minutes, return to the sidewalk, where he conversed with the other man, and again enter the store at about 11:50 and take the coat from the center window and immediately walk out of the store and disappear around the end of the building. The maid reported the occurrence to the store manager. Another witness, a grocery clerk, was resting in a truck on a vacant lot close to the store from which the coat had been taken. He testified that he saw a large man running past the truck with a brown fur coat under his arm; that he saw him throw the coat into a car which was standing on a side street and facing Wilshire Boulevard and saw him then walk over by an alley where he met defendant on the sidewalk. He testified that defendant was carrying a brief case, that the two men stood about 50 feet from him, that the large man walked away and defendant entered the car, turned it around and drove away. This witness took down the car number and later gave it to the police. It was by means of this car number that defendant was located, and after his arrest he admitted owning a car bearing that number. One of defendant's witnesses testified that defendant was in his garage on the day of the theft at approximately 12 o'clock, and another witness testified that defendant was in his automobile repair shop from about 12 until 12:45 or 1 o'clock, discussing repairs on the car, which was brought back later on in the afternoon.

[5] The evidence of the prosecution was direct. The sole question was one of credibility of the witnesses and the accuracy of their recollection. It would have been proper to instruct that the failure of defendant to deny that he stole the coat was a circumstance which tended to strengthen the testimony of the witnesses, who identified him as the thief. From a consideration of the entire evidence, we believe the jury would have taken this view of the matter and we cannot believe that they would have given any other effect to the failure of defendant to testify in his own behalf. The instruction which was given was not misleading and a fuller instruction was not required for the protection of the substantial rights of the defendant.

[6, 7] Defendant requested the following instruction: "To the information in this case, the defendant has interposed the plea of not guilty, which puts in issue every allegation of the information, and entitles the defendant to the defense known in law as an alibi, that is, that the defendant was not at the place where the crime charged is alleged to have been committed, when it is alleged to have been committed, but at another place, and I instruct you that such a defense is as proper and legitimate, if proved, as any other. [The defendant is not bound to prove his defense of an alibi, but if his] If the evidence creates a reasonable doubt in your mind as to his presence at the time and place where the crime is alleged to have been committed, it is your duty to acquit him." It was given after being modified by striking out the words in brackets and inserting the words "If the" in the second sentence. Another instruction requested by defendant called attention to the fact that the witnesses for the prosecution had fixed the time of the theft as between noon and 1 p. m., and was otherwise substantially the same as the one given. There was no error in modifying the first instruction or in refusing the second one. The jury had to choose between the testimony of the two witnesses for the prosecution and those for the defense. If defendant was at the garage and repair shop at the time of the theft, he could not have committed it. The jury believed the witnesses for the prosecution. The instruction on alibi that was given was sufficient.

[8, 9] During the direct examination of one of the witnesses who had identified defendant as the thief, defendant, at the request of the prosecutor, was directed by the court to stand for the purpose of identification. Defendant's counsel declined to permit him to stand and assigned the request and the direction of the court as misconduct. When so much depended upon the ability of the witness to identify the defendant as the man she had seen take the coat, she should not have been aided in any way in making such identification. But she had identified him in jail a few

days after the theft, and it does not appear that defendant was pointed out to her in the court room or that there was any question as to her ability to identify him. No error or irregularity occurred at the trial which would justify a reversal of the judgment.

The order denying the motion for new trial and the judgment are affirmed.

DESMOND, P. J., and WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



73 Cal.App.2d 573

HEARE v. O'REILLY.

Civ. 15046.

District Court of Appeal, Second District, Division 3, California.

March 19, 1946.

1. Vendor and purchaser ⇐204

Where holder of legal title subject to installment contract of purchase resold realty with consent of first purchaser on terms satisfactory to vendor and advantageous to him in that he would receive interest on unpaid balance of purchase price, the transaction could properly be regarded as a sale for cash as respects vendor's liability to account to first purchaser for proceeds of sale.

2. Vendor and purchaser ⇐44

Agreement for purchase of realty and evidence that on date of its execution plaintiff commenced performance by making first monthly payment on the purchase price warranted finding that on such date plaintiff purchased the property as against contention that he merely agreed to purchase it.

3. Vendor and purchaser ⇐204

Finding that plaintiff was to pay defendant purchase price for realty at the rate of $15 per month was not objectionable on ground that written agreement expressly provided that $15 monthly payments included interest, since finding referred to total amount payable each month by plaintiff under agreement.

4. Vendor and purchaser ⇐204

Finding that purchaser agreed to pay vendor stated sum was not objectionable as contrary to express terms of written agreement which provided that purchaser was to pay in addition to such sum interest, taxes and insurance premiums, since finding related to purchase price which did not include interest, taxes and insurance.

5. Vendor and purchaser ⇐204

Finding that vendor and installment purchaser orally agreed that vendor should resell realty for stated price and deduct from purchase price, money due vendor on account of purchase price under installment contract and additional advancements to purchaser for improvement of property was not contrary to the evidence merely because purchase price on second sale was not paid in cash.

6. Vendor and purchaser ⇐204

Finding that vendor and installment purchaser orally agreed that vendor should resell realty to named person for stated sum was not lacking in evidentiary support merely because name of purchaser may not have been known at time agreement was entered into.

7. Vendor and purchaser ⇐204

Vendor being sued by installment purchaser for portion of proceeds of resale of realty under oral agreement between vendor and installment purchaser for resale and division of proceeds thereof failed to establish affirmative defense that purchaser had abandoned written contract of sale by default in payments thereunder.

8. Frauds, statute of ⇐74(1)

Oral agreement between vendor and installment purchaser that vendor should resell realty for stated sum and deduct from purchase price amounts paid by vendor to purchase and improve the realty with interest thereon was not invalid under statute of frauds as an oral agreement for sale of an interest in realty.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Wade Heare against Thomas J. O'Reilly to recover proceeds of sale of realty, except the amounts advanced by de-

fendant, with interest thereon, in the purchase and improvement of the property. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Hugh E. McManus, and Marley Fisher, both of Los Angeles, for appellant.

Hiram T. Kellogg, of Los Angeles, for respondent.

WOOD, Justice.

Defendant appeals from a judgment in favor of plaintiff. Plaintiff claimed the proceeds of the sale of a house and lot, except the amounts advanced by defendant, with interest thereon, in the purchase and improvement of the property. Defendant, who held the legal title to the property, also claimed the proceeds. The court awarded plaintiff $2,085.17, which represented the difference between the selling price of the property and the amounts paid by defendant to purchase and improve said property, with interest on said amounts.

In August, 1942, plaintiff entered into negotiations for the purchase of a house and lot. The house had been partially burned, and the owner offered to sell the property for $1,400. About September 2, 1942, plaintiff told defendant that he planned to purchase the property. Plaintiff testified that the conversation took place in front of said property; that defendant told him it was worth "twice" as much as the purchase price asked and said, "let me buy that, you pay me, and I will put some of my money on that"; and that defendant also told him to see the owner and he would pay cash and get the property "cheaper," and save plaintiff some money. According to defendant, plaintiff came to his home and told him about the property, said that he had $400 with which he could repair the house and make it a home, and asked defendant if he would be interested in financing it; that defendant replied if it could be "bought right" he would finance it for plaintiff and he would make the payments so plaintiff "would only owe" him rent. Subsequently, plaintiff and defendant talked with the owner of the property who agreed to sell it for $1,350. Defendant paid the purchase price and the property was conveyed to him. He and plaintiff then entered into a written contract, dated September 10, 1942, whereby defendant agreed to sell and plaintiff agreed to purchase the property for $1,350 to be paid at the rate of $15 "or more" per month "including interest at six per cent on the first day of each month beginning on the first day of October, 1942." Time was of the essence of the contract. At the time of executing the contract plaintiff paid defendant $15, and $6 to reimburse defendant for escrow expenses. Plaintiff commenced repair work on the house and on September 17, 1942, while repairing the roof he fell therefrom and sustained injuries which confined him to his bed. He made no further payments on the property, and in November or December, 1942, while he was still confined to his bed, defendant called at his home and for the first time learned of the accident. Plaintiff testified that defendant then told him that he would release him from making the payments until he got on his feet—to "make no more payments"; that defendant said if plaintiff "ever got" on his feet for him to continue the repair work. Defendant testified that at that time plaintiff told him the "doctors and hospital" had his money and he was "broke," and that defendant would have to take the property back and they would "fix it up" so defendant could get his money out of it; that he told the plaintiff he would take the property back and if plaintiff wanted to supervise the repair work he would "take care" of him. In February, 1943, plaintiff resumed repair work on the house, and thereafter defendant periodically advanced money for payment of labor and materials. Plaintiff performed some of the work, hired the workmen and purchased the materials, but received no compensation for such services. Defendant visited the premises at various times, and both plaintiff and defendant had keys to the house. Plaintiff performed services to improve the premises until the middle of November, 1943. While he was so engaged, he inserted an advertisement in a newspaper offering the property for sale, and as a result received a letter from a prospective buyer, John S. Milburn. Plaintiff delivered the letter to defendant who, on or about November 8, 1943, sold the property to Milburn for $5,500. Plaintiff was present when the purchase price was discussed and agreed upon.

Plaintiff further testified that he and defendant discussed the matter of payments on the property at various times while the repair work was being done and defendant

said there was no reason for plaintiff to hand defendant money while he was giving plaintiff money for repair work; that defendant said the payments could be easily made after the repair work was done; that defendant said he would advance the money to improve the property and plaintiff could have it for $15 per month, and could either live in it or sell it, and he (defendant) "was doing it out of friendship"; that between April and June, 1943, defendant refused to pay some of the bills, and plaintiff borrowed $300, and used $255.09 of it to pay for labor for the repair work; that he used about 4000 feet of second-hand lumber, which he owned, in repairing the house; that defendant at no time served notice upon him that the written agreement had been terminated; that he worked on the property until November 22, 1943; and that he lived in the house while he worked there.

Defendant testified that his occupation was buying and selling property, and he had done nothing else since he had been living in California, which was about 15 years; that he had known plaintiff about 10 years; that he told plaintiff to advertise the property for sale and if he could find any "clients" to send them to defendant "and we will deal with them"; that he let one prospective purchaser know he would advance money on the property if it were sold, and he "very likely" told her if she would make a deal with plaintiff regarding the property that he would carry the paper on it; that he sold the property for $5,500 with $1,500 as a down payment and the balance was to be paid at the rate of $35 or more per month; that he arranged the terms himself; that he paid the taxes for 1942–43; that the only agreement he had with plaintiff was the written one dated September 10, 1942; that plaintiff did not tell him he had to borrow money to pay some of the bills for the repair work; that he did not refuse to pay any of the repair bills; that he had expended $1,823 to improve the property; and that, considering the $1,350 for which he purchased the property and 6% interest provided for in the agreement with plaintiff, he thought he had $3,458 invested in the property.

A witness called on behalf of plaintiff testified that she had been interested in buying the property and made an offer to plaintiff which plaintiff "thought" was all right, and he told her they would talk about it with defendant; that she talked with defendant in May, 1943, and he told her if she made any deal with plaintiff, it would be all right with defendant and that he "would carry the paper."

Plaintiff's wife testified that in 1943 defendant told her if she and her husband sold the property they could have whatever they made on it as all he wanted was his money back with interest; and that during 1943 plaintiff did not live at the property.

[1-6] Appellant contends that the evidence is "insufficient to sustain the findings necessary to the judgment." In support of this contention he asserts that Findings II, III, V, and VI are contrary to the evidence. He objects to the statement in Finding II, that appellant "received the sum of $2120.07" from the purchaser of the property for the use of plaintiff. He states that the uncontradicted evidence shows that the property was sold on terms —$1,500 as a down payment and the balance at the rate of $35 per month—and that he, therefore, did not receive the sum of $2,120.07. The evidence shows that appellant sold the property for $5,500, and, although he testified that the whole amount was not paid in cash, the terms for payment were arranged by him and were satisfactory to him. It does not appear that he made any effort to obtain the selling price in cash, and apparently it was to his advantage to take part of it in monthly payments and receive interest on the unpaid balance. Under the circumstances herein the form of security which he did accept should be regarded as the equivalent of cash. Appellant objects to the recital in Finding III that plaintiff "purchased" the property "on or about the 10th day of September, 1942," and that plaintiff was to pay defendant the purchase price at the "rate of $15.00 per month." He asserts that there is no evidence that plaintiff purchased the property "on September 10, 1942"; that plaintiff did not receive a deed to the property; and that "on said date" he only agreed to buy. This contention is not sustained. The contract is captioned "Agreement of Sale and Purchase," and the evidence shows that on that date plaintiff commenced performance under the contract by paying $21 thereunder, $15 of which represented the payment for October 1, 1942, on the purchase price, and $6 for the escrow charges. Appellant also asserts that the statement in said finding that

plaintiff was to pay the purchase price at the rate of $15 per month is contrary to the express terms of the written agreement which provided that plaintiff was to pay $15 per month, including interest at the rate of six per cent per annum. It is apparent that said finding referred to the total amount payable each month by plaintiff under the agreement—which amount included the interest. In Finding VII, the court found that appellant was entitled to receive from the selling price the sum of $3,414.33, which included the purchase price of $1,350, together with interest thereon at "the rate of six per cent per annum." Appellant's objection to Finding V is not sustained. That finding was as follows: "That it is true the plaintiff agreed to pay the defendant Thomas J. O'Reilly the sum of $1350.00; that he paid on account of said purchase price the sum of $21.00." Appellant contends that the finding that plaintiff agreed to pay defendant the sum of $1,350 is contrary to the express terms of the written contract which provided that plaintiff was to pay interest, taxes and the fire insurance premiums. That finding related to the purchase price plaintiff agreed to pay appellant. The interest, taxes and insurance were not included in the purchase price. There was no finding that plaintiff agreed to pay appellant $1,350 *only,* as is apparently appellant's interpretation of said finding. Appellant also objects to the following portions of Finding VI: "that it is true that the plaintiff and defendant * * * entered into an oral agreement under * * * which the defendant * * * was to sell the said property to John S. Milburn for said sum of $5,500.00, and that as part of said agreement it was understood and agreed between plaintiff and defendant * * * that said defendant would deduct from the amount of the purchase price the sum of money due * * * him on account of the balance of the purchase price of the aforesaid premises * * * and all additional advances made to plaintiff on account of * * * improvement of said premises." He contends that the portion of the finding relating to the purchase price and the deductions therefrom to be made by appellant is contrary to the evidence since the purchase price was not paid in cash. That portion of the finding was not contrary to the evidence. It is undisputed that the purchase price was $5,500, and that amount was not altered by the terms for the payment of same. Appellant also asserts that there is no evidence whatever to support that part of the finding which recites that there was an oral agreement between appellant and plaintiff "involving the sale to John S. Milburn." The evidence is sufficient to support the finding that appellant and plaintiff entered into an oral agreement to sell the property and that defendant would deduct from the amount of the purchase price the sum of money due him for amounts expended on the property, including the original purchase price. The evidence does not show that at the time of entering into the oral agreement John S. Milburn was specifically named as the purchaser. The parties intended to sell the property to some one, and the finding was not unsupported because the name of the purchaser may not have been known at the time the agreement was entered into. The evidence shows that pursuant to said oral agreement, plaintiff inserted the advertisement in a newspaper for a buyer, and that he was present and entered into the negotiations for the sale of the property. The name of the purchaser was not a material part of the finding.

[7, 8] Appellant also contends that the court's failure to make findings on affirmative defenses raised by his answer was reversible error. By that answer he affirmatively alleged that plaintiff's first and second causes of action were founded upon an oral agreement, that an oral agreement for the sale of an interest in real property is invalid under the statute of frauds, and that there was an entire lack of consideration as a ground of plaintiff's claim. He argues that by reason of plaintiff's default in payments under the written agreement, he abandoned said agreement and terminated all right to the property thereunder, and is now claiming ownership of the property under an unexecuted oral agreement for which he gave no consideration. The evidence was not such that it must necessarily be concluded that the written agreement was abandoned by plaintiff. The evidence does not disclose that appellant terminated the agreement, or that he took any steps to terminate it, or that he gave notice to plaintiff that he intended to terminate it. On the contrary, there is evidence that defendant had no intention of terminating the agreement, or of requiring strict performance thereunder by

plaintiff. The evidence shows that, as above indicated, when appellant learned of plaintiff's accident he told him that he would release him from making payments until he got on his feet. There was also evidence that, while the repair work was being done, appellant told the plaintiff the payments could be made after the repair work was completed—and that they agreed it "was an option" whether plaintiff lived on the property or sold it. Appellant told plaintiff's wife all he wanted was his money back with interest. Plaintiff, in reliance upon appellant's representations that payments need not be made, secured a permit to make the repairs, devoted about 10 months to making repairs and other improvements, used his own lumber in some of the repair work, borrowed money to pay for some of the labor, and procured the purchaser who bought the property. There is sufficient evidence that the written contract was in force and effect until the sale of the property to Milburn. The oral agreement between the parties did not relate to an interest in the real property, but related principally to the disposition of the proceeds from a sale thereof.

In view of the foregoing, it is unnecessary to discuss the other contentions.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.



73 Cal.App.2d 621

ISAACS v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12992.

District Court of Appeal, First District, Division 1, California.

March 23, 1946.
Hearing Denied May 20, 1946.

1. Appeal and error ⇐854(5)

If trial court's action in entering a judgment of nonsuit may be sustained on any ground, such action must be affirmed.

2. Automobiles ⇐244(1, 2, 26, 36)

Under statute regarding liability for injuries sustained through negligently operated city and county vehicle, to establish prima facie case all facts that plaintiff must prove are that on or about date of alleged accident plaintiff was riding in automobile at or near place designated in complaint, that automobile was struck by municipal vehicle under control of employees of city and county in actual performance of their duties, that municipal vehicle was operated in negligent manner, that plaintiff sustained injuries as result of such negligence, and that claim had been filed and rejected prior to filing of complaint. Vehicle Code, §§ 44(a), 400, 401, 554(1).

3. Automobiles ⇐242(3)

In action for injuries sustained when automobile in which plaintiff was riding was struck by fire apparatus of defendant city and county, in absence of explanation, an inference of negligence on part of defendant could be drawn from fact that red stop sign was against fire apparatus and that no siren was being sounded. Vehicle Code, §§ 44(a), 400, 401, 554(1).

4. Automobiles ⇐175(2)

The driver of an emergency vehicle of city and county may be guilty of willful misconduct, but it is not necessary to prove any more than negligence, giving due regard to particular circumstances involved, in action for personal injuries under statute regarding liability for injuries sustained through negligently operated county and city vehicle. Vehicle Code, § 400.

5. Automobiles ⇐175(5)

Under statute exempting driver of emergency vehicle from necessity of obeying traffic laws but requiring driver to drive with "due regard" for safety of all persons using highways, the quoted phrase means that he should, by suitable warning, give others a reasonable opportunity to yield right of way. Vehicle Code, § 454.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Regard".

6. Trial ⇐165

In action by automobile occupant for injuries sustained when automobile was struck by fire apparatus of defendant city and county at intersection, where there was evidence that the red stop signal was against the fire apparatus and that siren was not heard, whether a siren signal was given and necessity of giving signal were questions of fact which on motion for non-

suit must be determined in plaintiff's favor. Vehicle Code, §§ 44(a), 400, 401, 454, 554(1).

7. Trial ⇐139(1)

The weight to be given negative testimony, where it is claimed that signals were not given, is a question for jury, and such evidence is sufficient to sustain a verdict even though it conflicts with other evidence that a warning was actually given.

8. Automobiles ⇐245(19)
Trial ⇐139(1)

In automobile occupant's action for injuries sustained when automobile was struck by fire apparatus of defendant city and county at intersection, where automobile driver testified that he did not hear a signal by the fire apparatus and there was evidence that the red stop signal was against the fire apparatus, negligence of defendant was for jury. Vehicle Code, §§ 44(a), 400, 401, 454, 554(1).

9. Automobiles ⇐208, 217(6)

A pedestrian or a motorist, who is aware of approach of a vehicle about to cross an intersection in a manner or under such circumstances as to cause a reasonable person to perceive that danger is imminent, and who persists in an onward course, is guilty of negligence as matter of law.

10. Automobiles ⇐208, 217(2)

A pedestrian or an automobilist crossing an intersection is under a continuing duty to use ordinary care, but the amount of care to be used depends on facts of particular case.

11. Automobiles ⇐245(80)

Where there was evidence that automobile stopped near curb because of red traffic signal, that fire chief in official car crossed intersection with siren sounding, that when signal changed each automobile occupant looked to right, saw no vehicle approaching, and heard no siren, but that automobile was hit approximately midway in intersection by fire truck, question of contributory negligence was for jury. Vehicle Code, §§ 400, 454, 554(1).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Personal injury action by Sylvia Isaacs against the City and County of San Francisco. From a judgment of nonsuit, the plaintiff appeals.

Reversed.

Joseph A. Brown, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thos. C. Ryan and Reynald J. Bianchi, Deputy City Attys., all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment of nonsuit entered at the close of plaintiff's evidence in a suit for personal injuries sustained when the automobile operated by plaintiff's husband, in which plaintiff was riding, was struck by a fire apparatus of defendant city at the intersection of Fourth and Bryant Streets in San Francisco. The accident occurred on October 12, 1939. The complaint was filed January 18, 1940. The date of the trial was April 25, 1945. The transcript on appeal was filed June 20, 1945; appellant's opening brief on October 10, 1945; respondent's brief on December 21, 1945, and appellant's reply brief on January 14, 1946.

Plaintiff rested her case on her own testimony and that of her husband. In substance, the husband and wife testified that they were proceeding in the wife's automobile south on Fourth Street. At the intersection of Bryant Street, the red stop light showed on the "stop-and-go" automatic signal, which caused them to stop next to the curb and near the signal. A large building interfered with the view west on Bryant Street except for a space of less than one of the city blocks located in that area. The chief of the fire department in his official car crossed the intersection with the siren sounding, traveling on Bryant Street toward the east. The only open window in plaintiff's car was the one to the left of the driver. The vehicular sign turned to green and showed the word "Go." Each occupant looked to the right, saw no vehicle approaching and heard no bell nor siren and the driver started south, with eyes ahead, in low gear to cross the intersection. The automobile was hit approximately midway in the intersection by a fire truck. Plaintiff, as the result of the accident, suffered certain injuries.

The motion for nonsuit was presented as follows:

"May it please your Honor, the defendant City and County of San Francisco at

this time makes a motion for a non-suit on the ground that the plaintiff has failed to prove any wilful misconduct on the part of the defendant City and County of San Francisco, which is necessary to be proved in the type—in a case of this type before liability can be fastened on the city;

"And secondly, on the ground that the evidence affirmatively shows as a matter of law that the plaintiff was guilty of contributory negligence which proximately contributed to her own injuries at the time of the accident."

It is conceded that any negligence on the part of the driver husband would be imputable to the wife who was in the car at the time of the accident. Moore v. Miller, 51 Cal.App.2d 674, 125 P.2d 576.

[1] Respondent does not seek to sustain the trial court's action on the first ground of the motion for nonsuit urged in the court below. However, in view of the conclusion reached hereinafter with respect to the second ground, and the general rule that if the trial court's action may be sustained on any ground, such action must be affirmed, it is necessary to consider what acts on the part of a county employee must be proved by a plaintiff in order to establish a prima facie case under sec. 400 of the Vehicle Code.

In 1939 the pertinent portions of the Vehicle Code with respect to liability for injuries sustained through negligently operated county vehicles provided:

Sec. 400. "The State, and every county, city and county, municipal corporation * * * owning any motor vehicle is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment; and such person may sue the State, county, city and county, municipal corporation * * * in any court of competent jurisdiction in this State in the manner directed by law. In every case where a recovery is had under the provisions of this section * * * [the] subdivision of the State shall be subrogated to all the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment and costs recovered against the State, county, city and county * * *."

Sec. 401. "No members of any * * * fire department maintained by a county * * * is liable for civil damages on account of personal injury to * * * any person * * * resulting from the operation in the line of duty, of an authorized emergency vehicle while responding to an emergency call * * * or when responding to but not upon returning from a fire alarm."

Sec. 44(a). "An 'authorized emergency vehicle' is a * * * vehicle publicly owned and operated * * * by a * * * fire department * * * in responding to emergency calls * * *."

Sec. 554. "Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren * * *: (1) The driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right hand edge or curb of the highway clear of any intersection and thereupon stop and remain in such position until such authorized emergency vehicle has passed, except when otherwise directed by a police or traffic officer."

[2-4] To establish a prima facie case under these sections, all the facts that plaintiff was called upon to prove in support of the allegations of the complaint were that on or about the date of the alleged accident the plaintiff was riding in an automobile at or near the place designated in the complaint, and that the automobile was struck by a municipal vehicle under the control of employees of the City and County of San Francisco in the actual performance of their duties, and that the municipal vehicle was operated in a negligent manner; that plaintiff sustained injuries as the result of the negligence of the municipality or its agency; and, finally, that a claim had been filed and rejected prior to the filing of the complaint. This last allegation is admitted in the answer. That the fire apparatus was owned by the City and County of San Francisco and "was being operated in the capacity of an authorized emergency vehicle and was responding to an alarm of fire" is specially made an issue to be proven as an affirmative defense based upon the allegations of the answer. There was introduced testimony supporting the allegations of the complaint. In the absence of any explanation an inference of

negligence on the part of defendant may be drawn from the fact that the "Go" sign was on for vehicles running north and south; that the "Stop" sign was against the fire apparatus, and that no siren was being sounded. It is possible that the driver of an emergency vehicle may be guilty of "wilful misconduct," but it is not necessary to prove any more than negligence, giving due regard to the particular circumstances involved, in a suit under Vehicle Code, sec. 400. By sec. 454 of the Vehicle Code negligence could not be predicated on breaches of traffic laws when the "vehicle is * * * responding to but not upon returning from a fire alarm" and "when the driver of said vehicle sounds a siren as may be reasonably necessary," but this exemption from the necessity of obeying traffic laws "shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."

[5] "If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his 'due regard' for the safety of others means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended." Lucas v. City of Los Angeles, 10 Cal.2d 476, 483, 75 P.2d 599, 603. "It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public' only in so far as such 'due regard' affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus." Balthasar v. Pacific Elec. R. Co., 187 Cal. 302, 311, 202 P. 37, 41, 19 A.L.R. 452. "The expression 'arbitrary exercise of the privileges' has also caused some confusion. Since the vehicles are excluded from the restrictions of speed and right of way, negligence cannot be predicated on those elements if proper warning has been given. These are among the 'privileges' which are granted by the statutes. An arbitrary exercise of them may rest upon the question whether an emergency in fact existed. The statute has determined this question in part by the limitation in section 120 to cases where the emergency vehicle is engaged in the chase of violators of the law or in response to a fire alarm." Lucas v. City of Los Angeles, supra, at pages 483, 484 of 10 Cal.2d; at page 603 of 75 P.2d. "In such cases speed, right of way, and all other 'rules of the road' are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, whether there was an arbitrary exercise of these privileges." Lucas v. City of Los Angeles, supra, at page 486 of 10 Cal.2d, at page 604 of 75 P.2d.

[6-8] In the present case whether a siren signal was given, and the necessity of giving a signal, are questions of fact which on motion for nonsuit must be determined in plaintiff's favor. Plaintiff's husband testified that he did not hear a signal by the truck or engine that hit the automobile. In Rogers v. City of Los Angeles, 6 Cal.App.2d 294, 296, 44 P.2d 465, 466, the court said: "'The weight to be given negative testimony, where it is claimed that signals were not given, is a question for the jury; and such evidence is sufficient to sustain a verdict even though in conflict with other evidence that a warning was actually given. Thompson v. Los Angeles [& S. D. B.] R. Co., 165 Cal. 748, 134 P. 709; Keena v. United Railroads [of San Francisco], 197 Cal. 148, 239 P. 1061.'" See, also, Stone v. City and County of San Francisco, 27 Cal.App.2d 34, 80 P.2d 175. From the foregoing it is concluded that on the first ground for a nonsuit the evidence introduced was sufficient to justify a denial of the motion.

The question of contributory negligence as a matter of law presents the further question which is mainly relied on by respondent to sustain the trial court's action.

[9] In considering the merits of the respective contentions of, and cases relied on by, appellant and respondent, certain general principles are to be noted. A pedestrian or an automobilist who is aware of the approach of a vehicle about to cross an intersection in a manner or under such

circumstances as to cause a reasonable person to perceive that danger is imminent, and who persists in an onward course, is guilty of negligence as a matter of law. McHugh v. Market St. R. Co., 29 Cal.App. 2d 737, 85 P.2d 467; Glickman v. Pacific Electric R. Co., 54 Cal.App.2d 454, 129 P. 2d 132; Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 59 P.2d 856; Weissman v. Seehusen, 55 Cal.App.2d 391, 131 P.2d 10; Jonas v. Los Angeles Railway Corp., 57 Cal.App.2d 824, 136 P.2d 39; Anderson v. Western Pacific R. Co., 17 Cal. App.2d 244, 61 P.2d 1209; Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200.

[10] A pedestrian or an automobilist crossing an intersection is under a continuing duty to use ordinary care. The amount of care to be used depends upon the facts of the particular case, though definite guides are available covering certain circumstances. In Hamlin v. Pacific Electric R. Co., 150 Cal. 776, 780, 89 P. 1109, 1111, the court said: "Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care." See, also, Wright v. Los Angeles R. Corp., 14 Cal.2d 168, 93 P.2d 135; Nederveld v. Bohlander Truck Co., 52 Cal.App.2d 539, 126 P. 657. The "ordinary care" may not consist in all cases in looking in a certain direction. In Young v. Tassop, 47 Cal.App.2d 557, 118 P.2d 371, the court distinguished the facts in that case from the facts in Flores v. Los Angeles Railway Corp., supra, as follows, at pages 564, 565 of 47 Cal.App.2d, at page 374, of 118 P.2d: "But a pedestrian crossing under such circumstances is not under a continuing duty to look to the left; he is only under a continuing duty to use ordinary care. * * * Here the plaintiff did look before leaving the curb, saw no cars coming and heard no horn sounded, and saw other pedestrians crossing to her left, who would naturally tend to slow the progress of any approaching car. She then started across, walking only eight feet, and, as she said, 'the first thing I knew I was knocked down.' It does not appear that the automobile was in plain sight when she looked; other people crossing the street may have obscured her view of it. At the speed it was going it must have been beyond her clear field of view when she looked. The question whether, under all the circumstances, she was negligent in not looking again to her left while she walked this eight feet is one on which there is room for an honest difference of opinion between men of average intelligence, and it is therefore one of fact on which the jury's finding is conclusive. Salomon v. Meyer, supra, 1 Cal.2d [11] 15, 32 P.2d 631." In Zehnder v. Spaulding, 53 Cal. App.2d 268, 127 P.2d 620, it appears that the driver in crossing an intersection looked to the right and left. At pages 271, 272 of 53 Cal.2d, at page 622 of 127 P.2d, the court said: "In the instant case whether respondents, particularly the driver of the car, John E. Zehnder, exercised reasonable care in keeping a proper outlook and whether he acted as a reasonable man in not again looking to the right before he proceeded across the intersection were questions of fact for the court to determine and, having resolved them in favor of respondents, this court is powerless to interfere." The rule may be stated: "When a person takes no precautions at all for his own safety and is injured, and this conclusion is uncontroverted, contributory negligence is a question to be decided by the court. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086; Stephens v. Kaufmann, 137 Cal.App. 328, 331, 30 P.2d 536. If evidence is introduced relative to the degree of requisite vigilance, and the inferences therefrom are honestly debatable, it becomes a question of fact for the jury to determine. Gore v. Market Street R. Co., 4 Cal.2d 154, 48 P.2d 2; Salomon v. Meyer, 1 Cal.2d 11, 15, 32 P.2d 631; Anderson v. Market Street R. Co., 116 Cal.App. 282, 285, 2 P.2d 529. In the instant case, whether respondent looked in the direction from which appellant was approaching, whether the point from which observation was made was prudently selected, whether respondent should have seen appellant's car within a distance of sixty feet, whether respondent should have looked north and south, or north alone, and whether due vigilance was observed continuously, were disputable questions of fact upon which reasonable minds might legitimately debate and honestly reach different conclusions. The question was properly submitted to the jury and its finding under all the circumstances of the case is conclusive upon appeal." Lavin v. Fereira, 10 Cal.App.2d 710, 712, 52 P.2d 518, 519; see, also, Lang v. Barry, Cal.App., 161 P.2d 949; O'Brien v. Schellberg, 59 Cal.App.2d 764, 140 P.2d 159.

[11] Under all the circumstances in this case, whether either the husband or the wife should have looked or listened a second or third time before starting the automobile into the intersection, or when they were in a position to look farther toward the west on Bryant Street, are questions of fact upon which ordinary jurors might reasonably differ. For the foregoing reasons the motion for a nonsuit should have been denied.

The judgment on the order of nonsuit is reversed.

PETERS, P. J., and KNIGHT, J., concur.



73 Cal.App.2d 746

DE MELLO et al. v. DAIRYMAN'S CO-OPERATIVE CREAMERY.

Civ. 3503.

District Court of Appeal, Fourth District, California.

March 29, 1946.

Hearing Denied May 27, 1946.

1. Appeal and error ⇐110

An order denying motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Eminent domain ⇐2(1)

Where a creamery association attempting to operate a nonprofit co-operative business association reorganized and became a nonprofit co-operative marketing association, dissenting members who only had right under bylaws of former association to receive $100 upon withdrawing and who, under the new association plan, were paid $100 and credited on the books of the association with more than $940 more, were not thereby deprived of vested rights or any property without just compensation. Agricultural Code, § 1191 et seq.; Civ. Code, §§ 362, 362a; Const.Cal. art. 1, § 16, art. 12; U.S.C.A.Const. Amend. 14.

3. Constitutional law ⇐154(2)
Corporations ⇐6, 13, 39

The constitutional and statutory provisions relative to the formation and the powers and rights of corporations formed part of the contract between corporation and its stockholders and, under the Constitution, Legislature has the power to amend the corporate laws and thus change the rights and liabilities of stockholders. Civ.Code, §§ 362, 362a; Const. art. 12.

4. Corporations ⇐68

Changes in the rights of outstanding shares may be valid if they can be justified as an exercise of fair business discretion in meeting the needs and exigencies of the corporate enterprise. Civ.Code, §§ 362, 362a; Const. art. 12.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by A. C. DeMello and others against Dairyman's Co-Operative Creamery, a corporation, for declaratory relief with respect to the interests of plaintiffs in the defendant corporation. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Bradley & Bradley, of Visalia, and Edward M. Selby, of Los Angeles, for appellants.

Maddox & Abercrombie, of Visalia, for respondent.

MARKS, Justice.

[1] This is an appeal from a judgment which denied plaintiffs any relief in an action for declaratory relief. Plaintiffs have also attempted to appeal from an order denying their motion for new trial which is not appealable. Sec. 963, Code Civ.Proc.

In 1909 the Dairyman's Co-operative Creamery, hereafter referred to as the creamery, was organized under sections 653b to 653*l* of the Civil Code and proceeded to operate as a marketing agency for dairy products. Each member paid $100 for his membership and was paid a so-called dividend, not to exceed 8%, or $8 per annum until a reorganization in 1944.

The creamery handled the dairy products of its members and also of nonmembers. Monthly it paid them the going market price of dairy products with the exception that during the early years it paid nonmembers one cent less for whole milk and two cents less for cream than it paid to members. At the close of each year, after deducting what it had expended in plant expansion and betterments, the monthly

payments, the $8 paid each member, and an amount for current operations, the balance remaining was divided among the members and nonmembers in proportions equaling the dairy products delivered.

The by-laws provided that a member should receive back his $100 on withdrawing; that on expulsion he should receive his proportionate share in the net worth of the creamery; that on death the member's estate should be paid the worth of the share, such worth to be determined by the directors. Thus, except in case of death or expulsion, a withdrawing member would receive the $100 paid in by him and the creamery would retain any increase in its capital assets derived from its operations.

In 1931 the Legislature repealed the sections of the Civil Code under which the creamery had been organized and provided that corporations organized under those sections would be deemed to have been organized under the general corporation laws of the State. St.1931, p. 1839. The creamery continued in business and did not change its methods of operation. It is clear that it was at all times attempting to operate as a nonprofit cooperative business association but was not a nonprofit marketing association as those organizations are now known.

Numerous members went out of the dairying business and others marketed their products elsewhere without withdrawing from the creamery and surrendering their certificates, thus retaining their voting rights. In January, 1944, there were 426 members with only about 150 of them delivering their products to the creamery and about 550 nonmembers delivering their milk and cream there. This situation caused internal dissension. Also after 1933, the creamery was compelled to pay federal income taxes.

In January, 1944, the board of directors, with the approval and written consent of two-thirds of the members reorganized the creamery into a nonprofit cooperative marketing association, which we will refer to as the association, under the provisions of Chapter 4 of Division VI of the Agricultural Code. No question is raised as to the regularity and legality of the reorganization proceedings.

Auditors for the creamery determined its net worth. By a method of accounting this was apportioned among the members so that the value of each member's share of the net worth was fixed at $1065, for which amount credit was given to each member on the books of the association. No question is raised as to the correctness of the amount of these credits.

In the by-laws of the association two revolving funds were set up to retire this indebtedness. The first was called the "Revolving Fund" and was intended to retire $400 of this indebtedness to each member, the other was called the "Secondary Revolving Fund" out of which was to be paid the balance of $665 to each member. Interest could be computed and paid on the $400 but the by-laws are silent as to interest on the balance. There is testimony indicating that in setting up the financial affairs of the association it was intended that the indebtedness to each member of the creamery be paid in not more than ten years. There is also testimony to the effect that the members could not be paid in full without the dissolution of the association.

An initial payment of $100 to each member on account of the revolving fund indebtedness was offered at the time of the reorganization. This was refused by the plaintiffs and their assignors who brought this action to compel the association to pay each one of them the full amount of $1,065. Judgment went for defendant and this appeal followed.

The good faith of the association in proceeding to pay its indebtedness to its dissenting members is shown by a stipulation filed here on March 9, 1946, which recites that eleven of plaintiffs' assignors, subsequent to the judgment, voluntarily endorsed their membership certificates and elected to receive payments from the association upon their credits in the revolving fund; that during the years 1944, 1945, and 1946, each of them received payments totaling $300.

[2] It is the theory of plaintiffs that they were forced out of the association by the reorganization; that they had a vested interest in its property of the value of $1,065 each; that the association appropriated these interests to its own use against their will and without their consent and without consideration to any of them; that this procedure violated section 16 of Article I of the State Constitution and the Fourteenth Amendment of the Federal Constitution.

In support of this theory it is argued that the plaintiffs and their assignors had a defined vested interest in the assets of the

creamery; that the articles of incorporation and by-laws evidenced a contract between the creamery and themselves; (Berkeley, etc., Co. v. Kelly, 78 Cal.App. 29, 247 P. 600) that the terms of this contract cannot be violated by the creamery and the majority of its members; that "a majority of stockholders have no right, directly or indirectly, to appropriate or divert to themselves assets of the company to the detriment of other stockholders"; (18 Corpus Juris Secundum, Corporations, § 514) and the "minority stockholders may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company." Geddes v. Anaconda Mining Co., 254 U.S. 590, 41 S.Ct. 209, 212, 65 L.Ed. 425. Numerous other cases are cited as supporting this argument. See, Whicher v. Delaware Mines Corp., 52 Idaho 304, 15 P.2d 610; Jackson Co. v. Gardiner Inv. Co., 1 Cir., 200 F. 113; Meeker v. Winthrop Iron Co., C.C., 17 F. 48; Koehler v. St. Mary's Brewing Co. 228 Pa. 648, 77 A. 1016, 139 Am.St. Rep 1024; Zabriskie v. Hackensack, etc., R. R Co., 18 N.J.Eq. 178, 3 C. E. Green 178, 90 Am.Dec. 617; Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 P. 304, 47 L.R.A. 338, 78 Am.St.Rep. 17; Stanislaus County v. San Joaquin & Kings River C. & I. Co., 192 U. S. 201, 24 S.Ct. 241, 48 L.Ed. 406.

The foregoing arguments overlook two important and controlling facts.

First, plaintiffs and their assignors were not forced out nor were they expelled as that term is used in the by-laws of the creamery. They were given an option and might have continued as members of the association had they desired to do so. In that event they would have retained their full interest in its assets. Should they decide not to remain members they could receive the credit of $1,065 representing their entire interest in the assets of which $100 would be paid in cash.

As they had not been expelled and were living, all that any of them could demand on withdrawing from membership under the by-laws of the creamery was $100. On the reorganization each was offered immediate repayment of $100 and a credit of an additional $965 to be paid over a period of years. Thus under the reorganization plan each member will ultimately receive $965 more than he could have expected had the reorganization not been completed and had he withdrawn from the creamery.

[3] Second, the argument of plaintiffs overlooks the power reserved to the State in section one of Article XII of the State Constitution to alter from time to time or repeal laws for "the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders and members." See Sec. 362 and 362a, Civil Code. It is thoroughly established in California that these provisions of law form part of the contract between the corporation and its stockholders. Schroeter v. Bartlett Bldg. Corp., 8 Cal.2d 12, 63 P.2d 824. The right of the Legislature under the constitutional reservation of power to amend the corporate laws and thus change the rights and liabilities of stockholders is well established. See, Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148; Market Street Railway Co. v. Hellman, 109 Cal. 571, 42 P. 225; Peterson v. Ball, 211 Cal. 461, 296 P. 291, 74 A.L.R. 187; Farbstein v. Pacific Oil Tool Co., Ltd., 127 Cal.App. 157, 15 P.2d 766; Loney v. Consolidated Water Co., 122 Cal. App. 350, 9 P.2d 888; Heller Inv. Co. v. Southern T. & T. Co., 17 Cal.App.2d 202, 61 P.2d 807.

There seems to be a dearth of decision on the precise question presented here. While that exact question was not discussed it was held in Driscoll v. East-West Dairymen's Ass'n, 52 Cal.App.2d 468, 126 P.2d 467, that upon withdrawal of a member it was proper to withhold payment of proportionate assets from the member of a co-operative association until its dissolution.

[4] Mr. Ballantine in his California Corporation Laws (1938 Ed.) at page 9 in section 7, comments on the right of a corporation to change its financial structure as follows: "Changes in the rights of outstanding shares may be valid if they can be justified as an exercise of fair business discretion in meeting the needs and exigencies of the corporate enterprise. The more urgent the need or the emergency the more drastic the amendment or adjustment which fairness will permit, as in changing preferences and financial arrangements according to what the enterprise can carry. The facts and circumstances of each case will enter into the determination of the validity of the exercise of the power in that case."

The evidence in this case indicates that the membership structure of the creamery had caused internal dissension and was hampering the corporation as well as com-

pelling it to pay out unnecessarily, considerable sums in federal income taxes; that it was impossible to repay to members the full value of their interests without winding up its affairs. It also appears that all members were treated alike in the reorganization in so far as the valuation of the individual interests are concerned as well as the repayment of that valuation and that plaintiffs and their assignors, had they consented to the reorganization plan, would have received $100 in cash, which was the same amount they would have received from the creamery upon voluntary withdrawal from it, and in addition will receive $965 in deferred payments. There seems to be nothing unfair in this procedure and it is intended to settle the internal troubles of the association. This brings the case within the rule announced by Mr. Ballantine which we believe is a correct summary of the law applicable here. Certainly the reorganization plan did not violate any vested contract or property rights held by plaintiffs so it cannot be held to be unconstitutional on the grounds urged by them.

The attempted appeal from the order denying the motion for new trial is dismissed. The judgment is affirmed.

BARNARD, P.J., and GRIFFIN, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



73 Cal.App.2d 601

BERNSTEIN v. BERNSTEIN.

Civ. 15054.

District Court of Appeal, Second District, Division 3, California.

March 21, 1946.

Hearing Denied May 16, 1946.

1. Divorce ⇐127(4)

Husband's testimony concerning ill treatment by his wife was sufficiently corroborated by his son by prior marriage and brother to warrant granting interlocutory decree of divorce on ground of extreme cruelty. Civ.Code, § 130.

2. Divorce ⇐179

Wife's claim that there had been an unreasonable lapse of time between acts complained of and husband's filing of suit for divorce on ground of extreme cruelty could not be raised for first time on appeal. Civ.Code, § 124.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by David Bernstein against Rebecca Bernstein for a divorce. Judgment for plaintiff and defendant appeals.

Judgment affirmed.

Milton M. Cohen, of Los Angeles, for appellant.

Freedman & Christlieb, of Hollywood, and Henry J. Merdink, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

David Bernstein obtained an interlocutory decree of divorce from his wife Rebecca on the ground of extreme cruelty, the court finding that she "treated plaintiff in a cruel and inhuman manner, which acts and conduct on the part of the defendant caused plaintiff grievous physical and mental suffering." Defendant appeals claiming that there was no corroboration of the important and material facts relied upon by the plaintiff as a basis for his decree; also, that an unreasonable lapse of time occurred before the commencement of the action. She depends upon the provisions of Civil Code sections 130 and 124 as requiring a reversal. The first mentioned section provides that "No divorce can be granted * * * upon the uncorroborated statement, admission, or testimony of the parties * * * but the court must * * * require proof of the facts alleged * * *." Section 124 provides that "A divorce must be denied: One * * * Two * * * Three. In all other cases when there is an unreasonable lapse of time before the commencement of the action."

No specific acts of cruelty were alleged in the complaint but respondent testified at some length concerning a series of oral onslaughts, criticisms, accusations and misrepresentations directed toward him by his wife. Examples, as related by the plaintiff, follow: nagging continued over a period of years; accusations of misconduct with young women; committing adultery; having abortions performed; paying blackmail to avoid trouble; cheating her in business; and conspiring with others to cheat her. He testified that there was no truth in the charges, but that the defendant made the derogatory statements not only to

him, but to members of his family, to his friends and to people from whom he bought and to whom he sold goods. He stated as to her conduct, "It was continually getting into controversies about all sorts of things, and mainly accusing me of not having any brains, being a bad business man and not listening to her advice, and incidentally it would always come up about the terrible family that I came from." All the grievances concerning which the plaintiff testified occurred before the separation of the parties in 1936 in Portugal, where their business of dealing in antiques had taken them. It was agreed between them at that time that they would liquidate their properties and each take one-half thereof. Evidence was produced at the trial from which the court might have determined that their agreement was substantially carried out. Shortly after January of 1936 respondent went to New York and later to London and Palestine. It appeared that his wife lived with him briefly in each of those places but their conjugal relations were not continued after 1938, according to appellant; after 1936, according to respondent.

The suit was not filed until 1944, eight years after the Portugal separation and, at the trial in 1945, plaintiff produced for corroboration two witnesses, his son by a former marriage and his brother.

The son testified that he had known his step-mother for more than thirty years and "if I recall, she has always made representations that my father cheated her, that she was not getting a square deal, that she was the brains of the business, and she claims she was the one that was supporting my sister and myself over a period of twenty-five years, and she always accused my father of having different women in the different parts of the country and in the world. * * * Well, this has been going on over a period of many years, over thirty years. I remember I lived with them once in Philadelphia, and they used to fight then; that is, for some reason or other, and it was always in the background of her mind, was some other woman, so I cannot say who or why, but that has been over thirty years, as long as I can remember." As to his father's condition, this witness stated: "Well, over a number of years he has become very,—I used to call him a mental wreck. He is very nervous, erratic, a high-tension man, he cannot conduct a business, he has got at a state where I had to bring him out here to bring him under my doctor's care."

The respondent testified that as a result of his wife's continued nagging and accusing him of improprieties over a period of years, "I could not stand it any longer, I got so nervous, lost weight, and I just simply could not stand it any longer, I simply left.

"Q. And have you lived together since that time? A. No, sir.

"Q. And that is the place where the separation took place? A. Yes, sir, in January of 1936.

"Q. And you went back, ultimately, to New York? A. Yes.

"Q. And you have not had any relations as husband and wife since then? A. No, sir.

"Q. How did this course of treatment * * * affect you? A. It affected my health, made me extremely nervous, and it had some physical effect, I don't know what the technical term is, but I am under treatment for the last two years now.

"Q. You are under a doctor's care now? A. I could not carry on my business, and my son told me to come out here to this climate, and incidentally go to his physician.

"Q. Are you under a doctor's care now? A. Yes, I have been for about two years.

"Q. How old a man are you? A. Sixty-seven."

The brother of respondent testified that as late as November, 1944, appellant had made statements to him, accusing her husband of certain happenings which occurred prior to 1936, namely, adultery and dishonesty in business transactions with her. Also, "that he had affairs with girls under age, and that they were blackmailing him, that he was using up the money to pay these women for the trouble that he had got into."

The appellant, in her answer to the complaint, denied the allegations of her mistreatment of her husband and in defense alleged that he deserted her in 1938 and asked that she be awarded a reasonable sum with which to support and maintain herself. At the trial she denied nagging the respondent, but admitted that she had accused him of misconduct with various women and girls. "I accused him under the conditions of what he told me himself, he bragged about them."

On this subject respondent testified as follows:

"Q. Did you brag to her about having improper relations with other girls? A. Definitely not; who would?

"Q. But at least you did not? A. I did not, definitely not.

"Q. Does that apply to girls both in this country and in London? A. In every country.

"Q. You never at any time bragged to her about having improper relations? A. Definitely not."

[1, 2] We are satisfied, in view of the matters brought out at the hearing, that the evidence of respondent concerning ill treatment by his wife was sufficiently corroborated to warrant the decision of the trial judge in his favor. Appellant's claim that there was in this case an unreasonable lapse of time between the acts complained of and the filing of the suit would have been proper for the trial court to consider if it had been submitted, but there is nothing in the pleadings or transcript to indicate that the question was ever raised. In Moffitt v. Moffitt, 1933, 128 Cal.App. 676, at page 678, 18 P.2d 387, at page 388, the following statement is made: "The question whether the lapse of time in bringing an action for divorce or separate maintenance is reasonable or not is one which the trial court must determine." See, also, Strupelle v. Strupelle, 1922, 59 Cal.App. 526, 529, 211 P. 248.

The judgment is affirmed.

SHINN and WOOD, JJ., concur.



73 Cal.App.2d 648

BOTTS v. SIMPSON et al.

Civ. 7192.

District Court of Appeal, Third District, California.

March 26, 1946.

1. Statutes ⇐263

Generally, a statute will be given a prospective effect, unless intention is clearly shown that it should operate retroactively.

2. Colleges and universities ⇐2

The statute providing that a state college employee, not serving in civil service, after serving for three consecutive school years, who "is", meaning "shall be", reappointed for the next succeeding school year, shall be deemed to be reappointed from year to year, has a prospective and not retroactive effect, and hence professor of chemistry in state college who was reappointed for his fourth consecutive school year term several weeks before statute became effective, was not entitled to reappointment as a matter of right under statute for fifth term. Education Code, § 20391.

Appeal from Superior Court, Sacramento County; Dal. M. Lemmon, Judge.

Petition for writ of mandate by Dr. E. D. Botts, petitioner, against Roy E. Simpson, substituted in lieu of Dr. Walter F. Dexter, deceased, and others, as members of the Board of Appeals, and others, for an order to compel the Board of Appeals to review petitioner's dismissal as a member of the faculty of a state college. From order sustaining demurrer to petition and from judgment entered pursuant thereto, petitioner appeals.

Judgment affirmed.

James H. Phillips, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondents.

PEEK, Justice.

This is an appeal from the order of the trial court sustaining respondents' demurrer to appellant's petition for a writ of mandate and from the judgment entered pursuant thereto, the appellant having failed to amend his petition within the time provided in said order.

The pleadings and record before us disclose that on June 30, 1943, and for a period of more than three years continuously prior thereto, appellant was regularly employed as a member of the faculty of the San Jose State College as a professor of chemistry. On that date, upon the recommendation of the respondent President of said college, appellant was reappointed by

respondent Superintendent of Public Instruction and Director of Education for the next succeeding school year of 1943–1944. On December 6, 1943, respondent President of the college notified appellant in writing that it would be necessary to abolish appellant's position at the end of the 1943–1944 school year, and that therefore appellant's employment as a member of the faculty of said state college would terminate as of June 30, 1944. On January 4, 1944, appellant demanded that the termination of his employment be reviewed by respondent Board of Appeals, in accordance with Article 3.5 of Chapter 2, Division 10, of the Education Code, comprising sections 20391 to 20394.11, which article was added to said Code by the Statutes of 1943, Chapter 1032, and became effective on August 4, 1943.

Instead of referring appellant's request for a review to said appeals board, respondent Director of Education referred appellant's demand to an advisory board which had been established by said respondent pursuant to a statement issued by him on April 3, 1941. On April 12, 1944, appellant was notified by respondent Director that said advisory board had reviewed appellant's case in full compliance with his, the Director's, statement of April 3, 1941, that the advisory board had concurred in the action taken by him, and that it was his decision that appellant's employment as a member of the faculty of said state college be terminated as of June 30, 1944.

Appellant thereupon filed a petition for writ of mandate in the Superior Court, asking said court to issue its order for a review by the Board of Appeals of his dismissal as a member of said college faculty in accordance with the provisions of the previously mentioned article and chapter of the Education Code, as amended, relating to dismissal and a right of review before said board. Respondents demurred to said petition on the ground that petitioner was not entitled to the benefit of said code provisions, in that his reappointment for the school year beginning July 1, 1943, was made prior to the effective date of the amendment, and therefore he was not reappointed for the year beginning July 1, 1944, the first school year during which the new tenure provisions would be applicable. It is from the order sustaining such demurrer that petitioner has appealed to this court.

It appears that prior to August 4, 1943, all members of the teaching staffs of the various state colleges were appointed yearly, the contract of employment terminating at the expiration of each school year. However, a faculty member who had served "successfully and acceptably" (sec. 5.43, School Code of 1941, which section still remains in the present code as sec. 20374) could, at the discretion of the State Board of Education, be appointed for a term not to exceed four years.

Section 20391 of the Education Code, the pertinent section involved in this controversy, provides as follows: "Every employee of a State college not serving in the State civil service, including any such employee on leave of absence on June 30, 1943, but excluding any person taking the place of an employee on leave of absence, who, after having been employed full time for three consecutive school years, is reappointed for the next succeeding school year shall thereafter be deemed to be reappointed from year to year unless dismissed in the manner hereinafter provided."

Appellant contends that since he had served during three consecutive school years prior to June 30, 1943, to wit, 1940–1941, 1941–1942, 1942–1943, and since he was reappointed for the school year beginning July 1, 1943, he therefore has acquired permanent status under the provisions of said section 20391.

Contrasted with such contention is the reply of respondents to the effect that petitioner to come within said section would have to have been reappointed for the school year immediately following the effective date of the act, to wit, the year 1944–1945.

Under such circumstances a determination of the correctness of the order of the trial court sustaining said demurrer involves the interpretation of said article 3.5 of the Education Code, and particularly section 20391 which defines its scope—with special reference to the question whether or not the legislature intended that section to be what might be termed retroactive rather than prospective in its operation.

[1] It is a general rule of statutory interpretation that a statute will always be given prospective effect unless the intention is clearly shown that it should be considered to operate retroactively. Berg v. Traeger, 210 Cal. 323, 292 P. 495; O'Dea

v. Cook, 176 Cal. 659, 169 P. 366. Our analysis of the wording of said section, in the light of this fundamental rule, shows no clear indication on the part of the legislature to give the amendment a retroactive effect. The section specifically provides that an employee who "*is* reappointed for the next succeeding school year *shall thereafter* be deemed to be reappointed from year to year." (Italics added.) Had the legislature intended that said section be given the effect contended for by appellant, it is not likely the word "*is*" would have been used, but rather the term "*has been*" or the word "*was*". See State v. Boner, 57 W.Va. 81, 49 S.E. 944.

In a case where a somewhat similar problem of statutory construction was involved, the Supreme Court of Tennessee has held that the word "*is*", when used in a context showing a future intent, is likewise to be read and understood as meaning "*shall be*". Lindsay v. Allen, 112 Tenn. 637, 82 S.W. 171, 172, 173. It is further to be noted that, in the code provision under consideration herein, the expression "shall thereafter" (viz., after the employee is reappointed), undoubtedly gives the term "is reappointed" a prospective quality that even the words "shall hereafter" would not confer.

The case of Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, 1044, cited by appellant and relied upon by him as upholding his contention, does not appear to be in point. An examination of that case discloses that the petitioner therein "was elected * * * without limitation as to time." The court therein further stated that no question relative to a fixed term was present. That such is a proper interpretation at the ruling of said court is supported by the comment in the later case of Marion v. Board of Education, 97 Cal. 606, at page 608, 32 P. 643, 20 L.R.A. 197, where the court stated: "In the Kennedy case, the election of the teacher was for no stated, definite time." See, also, Clark v. Board of Education, 64 Cal.App. 757, at page 763, 222 P. 854.

Appellant also cites the case of Klein v. Board of Education, 1 Cal.2d 706, 37 P. 2d 74, as supporting the ruling in the Kennedy case and as constituting further authority for his contention. However, the Klein case related to a similar situation where a teacher, who had served a probationary period, thereafter "was elected a permanent teacher * * * without limitation as to time." The court there held that, under such circumstances and pursuant to statutory provisions similar to those found in section 1793 of the Political Code as it existed at the time the Kennedy case was decided, the teacher acquired a permanent status.

The case of Owens v. Board of Education, 68 Cal.App. 403, 229 P. 881, 882, appears to be more nearly in point. There, a teacher in an elementary school had been employed under the provisions of section 1609 of the Political Code. Stats.1917, ch. 552, p. 738. She was first employed for the school year beginning July 1, 1919, and was thereafter automatically re-employed for the two successive years following, 1920–1921 and 1921–1922, said section in effect providing that only by giving written notice before the expiration of one school year could re-employment for the next year be prevented. On August 2, 1921, said section of the Political Code was amended by the Teachers' Tenure Act, Stats.1921, p. 1663, at which time she had performed two years of service. Under the 1921 amendment, service for two years entitled one to a permanent status. However, on May 10, 1922, she was informed by the school district she would not be re-employed for the school year 1922–1923. On appeal from a judgment of the trial court denying her petition for reinstatement as a permanent teacher, the reviewing court stated the rule to be that, "where the service has been performed prior to the effective date of the act under a contract which was, under a statute then in force, limited in its duration," no permanent status was acquired, and held that, as she had performed services under a contract executed in accordance with the existing provisions of the code which terminated with the school year 1921–1922, and as said contract had been duly terminated upon notice, it followed that the board had no legal duty to reinstate her.

[2] We therefore conclude, as did the trial court, that the intent of the legislature, as expressed in said section 20391, rather than giving to a state college teacher a permanent status if reappointed at any time after three successive years of employment, as contended by appellant, pertinently added as a condition to the acquisition of tenure a requirement of re-employment for the year following the enactment of said act. Doubtless this was done in order to give the appointing authority

an opportunity to determine whether or not a particular teacher should be given permanent status. As the trial court aptly stated in its memorandum of opinion, "otherwise there would be no occasion or purpose in adding the condition of reappointment."

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



73 Cal.App.2d 610

PEOPLE v. REID.

Cr. 3957.

District Court of Appeal, Second District, Division 3, California.

March 21, 1946.

1. Homicide ⇐254

Evidence was sufficient to establish malice warranting conviction of second degree murder rather than manslaughter. Pen.Code, §§ 187–189, 192.

2. Homicide ⇐22(1), 23(1)

Homicide committed with malice is either first or second degree murder. Pen. Code, §§ 187–189, 192.

3. Homicide ⇐23(1)

"Murder of second degree" is willful act, characterized by presence of malice aforethought and, at least ordinarily, by specific intent to kill, and by absence of premeditation and deliberation. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder of Second Degree".

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Doris Lovella Reid was convicted of second degree murder, and she appeals.

Affirmed.

Harry B. Ellison and Cobb & Utley, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

[1] Appellant, in a jury-waived trial, was found guilty of the murder of William Kenneth Strang. She contends on this appeal that the element of malice was lacking in her perpetration of the crime; that therefore her conviction of second degree murder should not stand and urges this court to modify the judgment by reducing the offense to manslaughter "in the light of all the evidence in this case." We have read the transcript and see no reason to disturb the finding of the trial court. Nor is it necessary or desirable in settling the point raised by appellant to recount in detail the unsavory testimony of all the circumstances leading to and culminating in the tragedy which sent a human soul all unprepared into eternity. It will be sufficient to refer to a few of the incidents which stand out in bold relief and, particularly, to the manner in which the deadly attack was made, first by a stab wound in the back, followed by a fatal stab wound in the chest as deceased turned and twisted in an effort to escape.

This appellant, while married to Harold Reid and making her home with him, received the attentions and frequent amorous embraces of the deceased for a period of several months prior to May, 1945. They both lived in Torrance and on Thursday, May 3, 1945, appellant, at the request of the deceased, left her own home and went to his. She had done this occasionally during their acquaintance. She stayed until the following Sunday. On that afternoon she and deceased went for an automobile ride in the Palos Verdes hills returning to Strang's home toward evening where appellant undertook to prepare a rabbit dinner. When the meal was almost ready Strang's divorced wife and a Mrs. Vaught drove up to the house to make some inquiry about turkeys, saw and talked with Strang and were about to drive away when Strang urged them to come in and stay for dinner. Appellant was introduced by deceased to his former wife and Mrs. Vaught and she joined in extending the invitation to dinner. However, she did not set the table or join the others where they ate. Instead, she took a meal to Strang's father in another room. Several drinks were served during the evening and

Strang danced with some of the women including his ex-wife to whom he was quite attentive.

After dinner adjournment was taken to a nearby bar, known as the Verplais Cafe, the party traveling in Mrs. Vaught's coupe. Mrs. Vaught drove the car, appellant sat in the middle and Mrs. Strang sat in the lap of her former husband. When they arrived at the bar shortly before midnight, the appellant noticed two men standing at the rear of the establishment. She recognized them but did not know their names and when she went to the rear bought them each a drink, while the deceased and the other two women ordered their drinks near the front of the bar. Shortly thereafter appellant stepped out the rear door into an alley but the deceased went after her and caused her to return. As the party later left the cafe through the front door the appellant informed her companions that the two men for whom she had purchased the drinks had extended an invitation to come to their apartment for a few more drinks, but the invitation was declined by Mr. and Mrs. Strang and Mrs. Vaught. The Verplais Cafe is located across the street from the Torrance Police Station. Mrs. Vaught's coupe had been parked in a nearby parking lot half a block away and while the four members of the party, that is, the appellant, the deceased and the other two women were on their way to the Vaught automobile, the appellant met the two men for whom drinks had been bought and stopped and talked with them. Finally, the deceased retraced his steps and engaged in the conversation which was very brief and the deceased and the appellant then followed Mrs. Strang and Mrs. Vaught, who had proceeded toward the coupe. When Mrs. Strang and Mrs. Vaught were getting into the coupe the appellant and the deceased were standing on the sidewalk about 20 feet away and, according to Mrs. Strang, they were discussing something. While she could not hear what was being said, from the tone of their voices they seemed to be arguing. A moment later the deceased came to the car and fell on the running board. He had been stabbed in the chest and in the back. As he approached the automobile, he said to his former wife, "Honey, she cut me." The appellant immediately followed the deceased to the car and hysterically screamed "I cut him; I cut him," endeavored to lift him off the running board, and asked the other two women to secure aid. The appellant could not remember what happened at the time of the stabbing but she felt something warm and sticky on her hand, looked and observed the knife and the blood and saw that the deceased had a hole cut in his coat on his shoulder and assumed that she had cut him. She testified that the only thing which she remembered which could possibly be classified as an argument was her pleading with him up to the very last moment to be permitted to go home and the deceased insisting that she was not going home but would return to his house with him. After the deceased had slipped on the running board of the car in a dying condition both the appellant and Mrs. Strang ran across the street to the police station.

Officer Hill testified that the appellant arrived first and handed him the knife with which the stabbing was done. The officer stated that when he first saw appellant she was "running across the street directly toward where I was standing watching where she was running for. * * * She came running up and said, 'I cut him, I cut him.' I asked her 'Cut who?' and I couldn't get any sense out of her. All she said was 'I cut him, I cut him'." The officer stated that he then saw the appellant running back across the street and "as I came around the corner she had Kenneth Strang and was lifting him up. I then said 'Leave him alone'. She said, 'Well, I am going to try to get him to a hospital.' I looked up and said 'I don't think he will go with you. He is dead.' "

Immediately thereafter the appellant was interviewed by Captain Ashton of the Torrance Police Department. At the trial he testified at length concerning the interview, stating among other things that "I asked Mrs. Reid why she had cut him and Mrs. Reid stated that her and Mr. Strang had had an agreement among themselves * * * that if Mr. Strang stepped out on Mrs. Reid, Mrs. Reid had the privilege of cutting Mr. Strang, and if Mrs. Reid stepped out on Mr. Strang, he had the privilege of cutting her. * * * She stated that Mr. Strang was a ship's rigger, working the ship yards, and that he had usually always carried a heavy ship rigger's knife with him and that she didn't have any knife and that the knife in question was taken from a shelf on the back entrance of the house, at her house; that it belonged to her husband, which he had

used on a fishing ship when he would go fishing; that she had showed the knife to Mr. Strang. He had seen it on several occasions and that the knife was carried for this purpose and for this agreement that they had made up between themselves." This witness stated that the appellant told him that "during the early part of the evening Mr. Strang asked his ex-wife when she was coming back to live with him, to stay with him, * * *. She stated that during the evening Mr. Strang apparently was trying to get his ex-wife to come back to him and so Mrs. Reid asked Mr. Strang what he meant by doing that, was she just a stooge there; was she there to do all the dirty work and the cooking and him trying to get his ex-wife back. * * * That as the evening wore on, Mrs. Reid became angry at what was going on there * * * and she was mad because of what was going on between her friend and the ex-Mrs. Strang and that she wouldn't set the table. * * * Mrs. Strang told Mr. Strang that she had a date at Verplais Cafe and she had to go down to see if her date had arrived yet. Mrs. Reid said that Kenneth got very excited because of the fact that his ex-wife had this date and he made some remark as to who the date was with. * * * Mrs. Reid said that she told him she was going to leave and she went out on the back porch to the rear of the house, as the ladies went out the front of the house. * * * Mrs. Reid again asked him what the reason was for him trying to get his ex-wife back and he again told her that he had to be good to her. Then Mrs. Vaught and Mrs. Strang did come back to the house. They danced a few times in the house, Mrs. Reid dancing with the elder Mr. Strang, and Kenneth Strang dancing with the ex-Mrs. Strang. Along towards the end of the evening Mr. Strang suggested that they go down to the bar and get a drink. * * * As the drinks were being prepared, Mrs. Strang danced just a few steps with her husband at the bar. * * * But at the closing hour of the bar when they, that was the rest of the party, Mrs. Reid's party, were leaving by the front entrance, Mrs. Reid came out to the entrance to catch up to them and told them that her friends wanted them to go down to his apartment and have some more drinks there. The three of them, Mrs. Vaught and Mrs. Strang and Kenneth Strang, refused. * * * She stated that Mrs. Vaught and Mrs. Strang went on out of the cafe before she did, Kenneth following Mrs. Vaught and Mrs. Strang, she walking in the rear with these two men friends to the entrance. * * * As they got away from this man who had asked them to go to his apartment for a drink, Mrs. Reid told Mr. Strang that she wanted to go home and was going home and Mr. Strang began pulling her up the sidewalk by the arm, telling her to come on up with me and talk to Lola [Mrs. Strang]; said 'You don't want to go home,' and she began insisting that she was going home. Finally, she said 'Are you going home?' to Kenneth. He said 'No, I am not. I am going with Lola.' She started to walk back down the sidewalk and turned and again called to him 'Are you going with me?' He again replied 'No, I am not.' She then stated that she walked up to him on the sidewalk and she said 'I cut him in the back'. * * * She stated that she stabbed him in the back and I asked her how she was so certain of a cut in the back. She said because when he whirled around to walk away from her that it almost pulled the knife out of her hand and that she could see the hole in his jacket, and as he turned away from her, she stated she immediately cut him again in the chest and that he turned from her and walked into the parking lot." This officer was asked, "Had Mrs. Reid been drinking prior to your conversation?," and answered, "* * * She had been drinking. It was noticeable, but she was not drunk. * * * She carried on a very intelligent conversation. * * * Her speech was clear. She would go into details, didn't repeat herself to any great extent at all, and she talked for some two hours there, possibly better."

The Chief of Police of Torrance also testified as to a conversation which he had with Mrs. Reid on the morning following the tragedy, covering many of the points testified to by Captain Ashton. In his testimony he quoted the appellant as saying that she noticed Mrs. Strang and Mrs. Vaught as they drove up to the Strang residence. "She said 'Oh, my God, here she is,' so she said 'I immediately went to the bedroom and closed the door.' She didn't want Mrs Strang to see her there. * * * Kenneth went over and opened the door and Mrs. Strang came in there with her and wanted to know who she was and asked her name, so they talked to her a little bit and she came out in the living room and they had a social time

there, playing the radio and dancing a little, and then Mrs. Lola Strang said she had a date, she had to leave. Kenneth asked her where the date was and she said down to Verplais Cafe. So they insisted that they stay for dinner with them. After a little discussion, she said, begging them to stay, why, they said they would, so she went out in the kitchen and started getting the dinner ready. Kenneth came out into the kitchen and Mrs. Reid said 'Kenneth, I better leave.' Kenneth said 'No, you stay right there.' She said 'Well, I think I am in the way,' so Kenneth said 'No, you are going to stay.' She said about that time Kenneth took his open hand and struck her between the eyes and it hurt her so that she cried, and Kenneth came over and told her that he was sorry and went on again into the other room. They all had dinner. She said she ate very little. She was not hungry. She took Mr. Strang's dinner into the living room and then they decided they would go down to Verplais Cafe. * * * They went down to the parking lot of Van de Kamp's, which is a couple of hundred feet away from Verplais place, went into Verplais and ordered a drink. She didn't believe that she had drank that drink that was ordered. She saw two men at the end of the bar whom she recognized. She went down there to the end of the bar and bought those two men a drink. * * * They had asked her to bring her party and come up to their apartment. She went back up to the front where Kenneth and the other two women were and asked them to go with these two gentlemen up to the apartment and they said 'No, we are going home.' They got up and started walking out and she started walking back towards the back end where the two men were. They opened the door and went out, so she came to the front door and came out the front door. They got on the sidewalk and started up the sidewalk, Mrs. Vaught and Mrs. Strang taking the lead, Kenneth and Mrs. Reid behind them. After getting past the picture show and next to the alley, these two men that had been in the back door were coming up the alley and met them on the sidewalk and they asked them again to go to their apartment and Mrs. Reid wanted to go and Kenneth said 'No, we are going home.' So Kenneth started walking away from her and she talked a few minutes with the two men and then Kenneth turned around and met her and, as he met her, she said 'I told Kenneth I would get even with him'. After that, they passed the water company's office where they had to turn in for the parking lot. From there on, her mind, she says, is blank until she got down to the car. All she could remember at that time is that he whirled and that is all she could remember. * * * I asked her at that time also whether Kenneth had his rigger's knife that had been spoken about in the report. She said she didn't see the rigger's knife. I also asked her about the statement that was made to Officer Ashton about her carrying her knife and him carrying his knife, to be used on each other if they stepped out on each other. She said, 'Well, that was said in a joking way.' I told her I didn't think it was much of a joke to make those remarks. She said 'We just tell it in a joking way' "

Under cross-examination the Chief of Police was asked, "When was it she told you that he shoved her on the shoulder?", and answered, "After they had come out of the cafe and had started up the street there, right shortly after the two men walked away he came back to her and gave her that shove there. That was the second one that evening. The first one was up in the house."

At the trial, Dr. Webb, chief autopsy surgeon of Los Angeles County, testified that the first of the two wounds suffered by the deceased was "on the upper right side of the back at the level of the upper border of the scapula. This wound had a penetration of 1 inch to 1½ inches. The other wound, designated as Wound B, is found on the left side upper front of the chest at a point 2 inches to the right of the front median line and 7 inches below the shoulder level. This wound was three-fourths of an inch in length and had passed into the thorax, between the third and fourth left ribs, penetrating 3 inches to pass through the left side of the heart, which resulted in a profuse internal hemmorhage.

"Q. What did you determine to be the the cause of death, Doctor? A. The immediate cause of death was stab wound of the heart."

At the trial appellant testified that while Mrs. Strang and Mrs. Vaught were gone to the Verplais Cafe, where the former had a date, "I was in the bedroom fixing myself ready to go. I went in the room, starting to get ready, and he said 'Where do you think you are going?' I said 'I am

going home.' He said 'No, you are not,' and that is when he hit me in the face and I started crying and I ran out the back door and they have a kind of a tape that hooks the back screen door and I was trying to get that undone when Ken came out and he said 'If Lola comes back, tell her I will be right back.'

"Q. Did he catch you? A. Yes. He said, 'You are not leaving. Come on back in and have a drink and we will eat and then I will drive you home.'

"Q. And did he drive you home after that? A. No.

"Q. What happened? A. Then they came back and then everything was all ready and we dished it up. I said, 'Ken, I don't want to dish it up." He dished it up. I was sick; I felt too bad."

Appellant further testified that while she was at the rear of the cafe with her two acquaintances and Mrs. Strang, Mrs. Vaught and the deceased were at the other end of the bar, "I looked down and seen that he was busy talking and I thought, 'Well, now is my chance to leave, and he might not see me,' so I got up and walked out and I didn't pay any attention to these fellows at all. I hadn't said anything to them and I guess they thought we were all going to go, so they up and followed me. When they got at the back door they said, 'How about going up there?' And I said, 'Ken said he didn't want to go. You will have to ask him,' and just then Ken came out the back door and grabbed me and said, 'Where are you going?' I said, 'I am going home. You promised to drive me home by 9 o'clock and it is so late now and I am going home,' and he took hold of me and said, 'No baby; no, baby, you are not going home.' He said, 'Lola wants to talk to you.' I said, 'What does she want?' He said, 'Come in and see,' so I walked back in the back door again. * * * the two girls started off and I remember seeing them walk up the street and I told Ken to go with them. * * * Well, I remember walking up the street towards him and I don't know if I called him or what, but he came walking back to me, and I said, 'Well, Ken, I am going to say goodnight to you and I am going home.' He said, 'You are not going home. You are going with me,' and I said, 'I know what is going to happen if I do go back up there and it isn't going to happen again.' He said, 'I promise you it won't' and I said, 'You promised before.' * * * He kept quarreling at me and the next thing I remember was him coming towards me to tell me to cool off and shoved me and I don't remember any more.

"Q. You say he told you to cool off and he shoved you? A. Yes, he said, 'You go on home and cool off,' and he shoved me and I don't remember any more.'"

She testified that the last time she remembered seeing the knife was in the cafe and that it was then in her purse and unopened. The appellant was asked, "Did you tell Officer Ashton that you cut him in the back first because he came very near pulling the knife out of your hand when he turned? A. I don't remember telling him that.

"Q. Do you recall anything like that happening? A. No, I don't remember after he shoved me."

She was questioned and answered as follows: "Now, you heard Officer Ashton's testimony about you saying that you and he had an agreement whereby that if he stepped out on you, you were to cut him with a knife and if you stepped out on him, he was to cut you? A. Yes, sir.

"Q. Did you have any such agreement with him? A. I never had an agreement like that.

"Q. Did you ever have any argument with the deceased about other women or other men? A. Never. When he first started saying what he would do if he caught me out with somebody, I took it more as a joke."

Other items of evidence which were before the trial court we have not deemed it advisable or necessary to quote. They related to a condition which appellant charged to the deceased, but we are satisfied that whatever resentment she held toward him on that account would never, in itself, have caused this tragedy, although it may have contributed somewhat to the wounded feelings and highly emotional state of appellant which, in our opinion, did cause it. As Congreve has said, "Heaven has no rage like love to hatred turned, Nor hell a fury like a woman scorned," and the facts of this case seem to prove it. The picture is succinctly presented in respondent's brief in the following language: "The facts of this case show that the appellant met deceased, fell in love with him, and that they lived with each other much of the time for a period of several months. * * * That they apparently enjoyed

each other's company with the exception of the periods when deceased was drinking. Both drank intoxicating liquors a great deal. Appellant knew deceased was divorced, but had never met his former wife. Deceased knew appellant was married. They agreed during their illicit love affair that should one step out on the other the abused would have the right to cut the other. Deceased carried a rigger's knife and appellant a fish knife. Appellant was so in love with deceased that she not only risked her reputation, but the wrath of her husband and also according to her, her physical health, to be with him. Up until the day of the homicide there had apparently been no cause for her to be jealous, but on that day the divorced wife of deceased entered the picture and deceased made strong efforts to have her come back to him. Appellant became angry and remonstrated with him, but he continued in his efforts. At that time the natural bent of a woman took place and she became jealous. She refused to eat with them; she left them at the bar when they went out for a drink. Then upon the refusal of deceased to go home with her she told him she would get even with him, walked up behind him and stabbed him in the back and then in the chest. The natural, the normal, emotional feelings of a woman who had given her all to a man only to find him attempting to get another woman back to live with him would be anger and jealousy."

[2] The contention of appellant that the evidence would warrant our reducing the offense from second degree murder to manslaughter calls for consideration of the definitions set out in the Penal Code of murder, malice, the degrees of murder and manslaughter (Pen.Code, sections 187, 188, 189 and 192). If malice is shown in the commission of a homicide the offense is murder of either the first or second degree. Section 189 of the Penal Code itemizes the various kinds of murder which are of the first degree and closes with the words "all other kinds of murders are of the second degree." The trial court determined that the killing in this case was not "wilful, deliberate and premeditated" and for that reason decided to characterize the offense as second degree murder. In so doing he necessarily found that malice existed.

[3] We are satisfied that the finding was within the law and as analyzed in People v. Bender, 1945, 27 Cal.2d 164 at page 181, 163 P.2d 8, at page 18, in the following passage: "Murder of the second degree: a willful act characterized by the presence of malice aforethought and, at least ordinarily, by the specific intent to kill, and by the absence of premeditation and deliberation."

The judgment is affirmed.

SHINN and WOOD, JJ., concur.



73 Cal.App.2d 641

MIDDLETON v. CALIFORNIA ST. CABLE RY. CO. et al. (two cases).

Civ. 12977.

District Court of Appeal, First District, Division 1, California.

March 26, 1946.

1. Appeal and error ⇐933(4)

Where order granting motion for new trial did not specify insufficiency of evidence as ground for order, District Court of Appeal conclusively presumed that order was not based on that ground. Code of Civ. Proc. § 657.

2. Carriers ⇐316(1)

Where passenger for hire of common carrier is injured by some movement of carrier, an inference of negligence on part of carrier may be drawn by jury, in absence of showing that movement occurred through no negligence of carrier.

3. Carriers ⇐321(21)

In actions against street railway company and employees for injuries sustained by passengers when they were thrown off or fell from cable car as it went around curve, wherein passengers introduced evidence that car gave a sudden jerk, jury was properly given res ipsa loquitur instruction that negligence of a carrier may be inferred, in absence of showing that carrier's movement, causing injury, occurred through no negligence of the carrier.

4. Carriers ⇐321(11)

Instruction that passenger on streetcar is not entitled to recover damages for fall

from streetcar because of movement by streetcar, unless movement was unusual, unnecessary, and violent, was erroneous because it raised a false legal test as to what passengers were required to prove in order to recover.

5. New trial ⇐159

On motion for new trial, it is trial court's duty to determine whether erroneous instruction was prejudicially erroneous. Const. art. 6, § 4½.

6. New trial ⇐41(3)

Where record in passengers' personal injury actions against street railway company would have warranted a verdict for either passengers or company, trial court did not abuse its discretion in granting a new trial because of the giving of an erroneous instruction that raised a false legal test as to what passengers were required to prove in order to recover. Const. art. 6, § 4½.

7. Carriers ⇐321(23)

In actions against street railway company and employees for injuries sustained by passengers when they were thrown off or fell from cable car as it went around curve, court properly instructed on theory of unavoidable accident, since a certain amount of centrifugal force is bound to be generated when cable cars go around curves.

8. Carriers ⇐348(14)

In actions against street railway company and its employees for injuries sustained by passengers when they were thrown off or fell from cable car as it went around curve, court properly instructed on contributory negligence, where there was evidence that passengers were standing up at time of accident, though seats were available, and that employee shouted usual warning as curve was approached.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Consolidated actions by Jean Middleton and by Edith Middleton against the California Street Cable Railway Company and two of its employees for injuries sustained by the plaintiffs while passengers on the named defendant's street cable railway system. From an order granting a new trial after the jury had rendered a verdict in defendants' favor, defendants appeal.

Order affirmed.

Cooley, Crowley, Gaither & Dana, of San Francisco, for appellants.

Oliver Dibble, Samuel I. Jacobs, and Elmer P. Delany, all of San Francisco, (James A. Himmel, of San Francisco, of counsel), for respondents.

WARD, Justice.

Defendants appeal from an order granting a new trial after a jury had rendered a verdict in their favor in two actions, consolidated for trial and appeal, involving personal injuries to plaintiffs, a mother and daughter, who were injured while they were passengers for hire on defendant California Street Cable Railway Company's system. The other defendants, Hall and Hill, are respectively the gripman or operator of the cable car and the conductor.

The plaintiffs were mother and an adult daughter, who were riding home from church about noon one Sunday. The plaintiffs produced evidence to show that they were standing in the space behind the gripman, the mother on the inside and the daughter on the outside, to the gripman's left; that the speed of the cable car increased as it progressed on Pine Street toward the curve at Hyde Street; that as the car went around the curve the car seemed to jerk their feet from under them and they were thrown off the platform, thereby sustaining severe injuries. The defendants produced evidence to show that there were seats available; that the car proceeded at its usual speed around the curve, 2 to 5 m. p.h., after having come to a full stop when letting go of the cable in order to make the curve; that the gripman shouted his usual warning as he approached the curve; and that the mother was on the outside and the daughter on the inside of the platform; and that there was no unusual movement of the car immediately preceding the accident. The gripman further testified that he saw the two plaintiffs tighten their grips on the hand bar as he shouted the usual warning.

[1] The motion of plaintiffs for a new trial specified all the statutory grounds except misconduct and excessive damages. The order granting the motion for a new trial did not specify insufficiency of the evidence as a ground upon which the order was based; therefore on appeal it must be

conclusively presumed that the order was not based upon that ground. Code Civ. Proc. sec. 657. The failure of the trial court to specify the particular ground or grounds upon which the order was made forces the appellate court by a process of elimination to attempt to determine the error or errors which prompted the trial judge to grant the new trial. Appellants in the opening brief state "The Court ruled that error was committed in the instance of one instruction and granted a new trial on that ground." They thereupon confined their opening argument to the one instruction. Respondents claim that the above statement is untrue and refer to additional instructions as erroneous. No irregularity in the proceedings, such as the improper admission of evidence, the inadequacy of the pleadings, the omission to serve respective parties, abuse of discretion by the trial judge, etc., has been called to the court's attention, and an examination of the record does not reveal any such error which would have justified the granting of the new trial. Consequently the discussion herein will be limited to the points raised by appellants and respondents. Each allegedly erroneous instruction will be considered in order to guide the trial court in the new trial necessitated by the conclusion reached herein.

The first disputed instruction given at the request of defendants reads: "A passenger on a street car is not entitled to recover damages, if any, sustained by a fall from or upon a street car caused by movement of said street car, unless you find that such movement, if any, was unusual, unnecessary, and violent." Throughout the arguments defendants are pleased to refer to the "fall from the street car," whereas plaintiffs seem delighted to use the expression "thrown from the car." The word "thrown" is used in the complaint. One of the plaintiffs testified that the car was traveling at an excessive speed and her feet seemed to jerk from under her. The second plaintiff, on account of a nervous affliction from which she was suffering prior to the accident, did not testify. All other witnesses either refrained from corroborating the plaintiff or in substance testified that there was no unusual movement or speed of the car, or any violence in its operation.

[2-4] Where personal injury is caused to a passenger for hire of a common carrier by some movement of the carrier, an inference of negligence on the part of the carrier may be drawn by the jury in the absence of a showing that the movement occurred through no negligence of the carrier. On the basis of plaintiff's testimony as to causation, the jury was properly instructed on this res ipsa loquitur situation. Waite v. Pacific Gas & Electric Co., 56 Cal. App.2d 191, 132 P.2d 311; Mudrick v. Market Street R. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533. It is contended by defendants that the disputed instruction does not deal with the subject of res ipsa loquitur, but is only a statement of substantive law. Defendants state: "It had nothing to do with that. Obviously, the plaintiffs, as passengers, made out a prima facie case upon their showing that they were injured by a movement of the car while it was being operated by defendants. The sole effect of the inference was to support and corroborate plaintiff Jean Middleton's testimony about an unusual speed and lurch." If the instruction was related to and connected with the instructions on res ipsa loquitur, under the decisions in this state it was erroneous. If it could be disconnected from the res ipsa loquitur instructions it raised a false legal test of what plaintiffs as passengers for hire of a street railway system were required to prove in order to recover. Disregarding, for the moment, res ipsa loquitur in a factual case similar to the present the test of liability is not whether there was an unusual lurch or jerk but rather was the movement causing the injury attributable to the negligence of the defendants. A usual motion may or may not be due to the negligent operation or maintenance of a mechanical instrument. An unusual motion more likely may be the result of faulty maintenance or reprehensible operation. In either case the movement can be caused by negligence, and the carrier is in a better position to explain the cause of the movement than the passenger for hire. In brief, in view of the testimony of one plaintiff an instruction embodying the doctrine of res ipsa loquitur was proper. The quoted instruction was in conflict with the res ipsa loquitur instruction. If defendants had a right to adopt their own theory, the instruction was still erroneous because a usual movement may be a negligent movement depending upon the circumstances surrounding the incident, and, in the absence of an explanation the inference permitted under res ipsa loquitur can support a verdict without proof of unusual movement. In Mudrick v. Market

Street R. Co., supra, three instructions were given relative to res ipsa loquitur without using the word "unusual" in reference to the movement or operation of the street car. The court said, at page 730 of 11 Cal.2d., at page 953 of 81 P.2d, 11 A.L.R. 533: "Defendants contend that these instructions as given incorrectly apply the rule of res ipsa loquitur in this case, and that the word, 'unusual' should have been inserted before the words, 'operation' and 'movement' as indicated by the instructions as set forth above." In the Mudrick case the court referred to Steele v. Pacific Electric R. Co., 168 Cal. 375, 143 P. 718, and stated at page 733 of 11 Cal.2d., at page 955 of 81 P.2d: "Defendants seize upon the word, 'unusual' as used by the court in the above statement, and contend that the court has by its use determined that before the rule of res ipsa loquitur can be applied in a case where a passenger is injured by the movement of a street car, he must show that the movement was an unusual one. Evidently in the language used, the court simply followed the wording of the instruction which contained the word, 'unusual.' We have been cited to no other authority which holds that the movement of a car which inflicts injury upon a passenger must be shown to be an unusual movement before the rule of res ipsa loquitur can be applied. We have already referred to the cases of Wyatt v. Pacific Electric R. Co., supra, [156 Cal. 170, 103 P. 892] and Steele v. Pacific Electric Ry. Co., supra [168 Cal. 375, 143 P. 718], where the rule is announced and where there is no mention or any intimation which supports defendants' contention." In addition, in the Mudrick case the court explains or distinguishes Lynch v. Market Street R. Co., 130 Cal. App. 433, 19 P.2d 1009 and McIntosh v. Los Angeles Ry. Corp., 7 Cal.2d 90, 59 P.2d 959. Appellants stress the decision in Jorgensen v. East Bay Transit Co., 46 Cal.App.2d 189, 115 P.2d 556. This case, decided in 1941, does not note the holding in the Mudrick case, decided in 1938. The instructions offered in the Jorgensen case were subject to the same objections as those in Steele v. Pacific Electric Ry. Co., considered in the Mudrick case. Although the holding in the Mudrick case is a departure from the prevailing view in many other jurisdictions, it is controlling on an intermediate appellate court in California. Hyman v. Market Street R. Co., 41 Cal.App.2d 647, 107 P.2d 485; Waite v. Pacific Gas & Electric Co., supra. In addition, the cases cited by appellants from other jurisdictions apparently did not use the conjunctive form "unusual, unnecessary and violent movement." The conjunctive form of expression puts a greater burden of proof upon the passenger.

[5, 6] For the foregoing reasons the instruction is erroneous. Consequently, on motion for new trial it was the duty of the trial court to determine whether it was prejudicially erroneous. In Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 872, 873, 113 P.2d 244, 247, the court said: "It is well established that, in passing on a motion for a new trial, a trial judge is as firmly bound by this constitutional provision as is an appellate court when the cause is on appeal. It is his duty to sit as a thirteenth juror and weigh the evidence, pass upon its sufficiency and consider the credibility of witnesses. This is true even though he does not specify the insufficiency of the evidence as one of the grounds for granting a new trial because the Constitution contains the direction that he shall not grant a new trial because of errors in ininstructions to the jury until he has reexamined the entire cause and shall have formed the opinion that the errors complained of have resulted in a miscarriage of justice. Sec. 4½, art. VI, Const.; Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774; Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. In considering a similar question in Bieser v. Davies, 119 Cal.App. 659, 7 P.2d 388, 389, this court said: 'On this appeal we think we must indulge in the presumption that the trial court obeyed this mandate of the Constitution and considered the whole record in the case and decided that the giving of the instruction was prejudicial and did result in a miscarriage of justice.'" See, also, Gardner v. Marshall, 56 Cal.App.2d 62, 132 P.2d 833; Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701; Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738. From an examination of the record, though the evidence may have justified the jury's verdict, the jury having seen and heard the witnesses, etc., the record in cold type would have warranted a verdict for either plaintiffs or defendants. Under such circumstances it can not be held that the trial judge abused the discretion which the law imposes upon him. See Bieser v. Davies, 119 Cal.App. 659, 7 P.2d 388.

[7, 8] There is no merit in the plaintiffs' contention that the court should not have instructed on the theory of unavoidable accident. Cable cars running west to operate on tracks running north, must turn corners or curves; a certain amount of centrifugal force is bound to be generated; the jury could have believed that even though both parties exercised their respective duties of care, the accident happened as a result of the ordinary and necessary incidents of cable car operation. Neither is there merit in plaintiffs' claim that the court erred in instructing on contributory negligence in view of all the circumstances of the case. The propriety of an instruction relative to the defendant's not being an insurer is questionable. The use of the word "insurer" is generally inadvisable as it may be misunderstood by the jury. The word "guarantor" seems preferable. If litigants persist in the use of the word "insurer," then the instruction designated 204–D, Palmer's California Jury Instructions, Civil, p. 298, seems to be a safer form to use. No doubt on a re-trial, this instruction will be reframed to indicate to the jury that it was not intended that "insurer" meant anything except to make it clear to layman jurors that the high duty of care imposed on common carriers does not rise to the degree of a guarantee.

The order appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



73 Cal.App.2d 697

Application of CARR.

In re STEVE.

Cr. 1947.

District Court of Appeal, Third District, California.

March 28, 1946.

1. Criminal law ⇐997
Habeas corpus ⇐85(1)

Evidence on petition for writs of error coram nobis, of error coram vobis and of habeas corpus was insufficient to sustain burden of proof upon petitioner imprisoned under a sentence for first degree murder to establish facts which would justify issuance of the writs, and petitioner was properly remanded to custody.

2. Criminal law ⇐997
Habeas corpus ⇐85(1)

Petitioner in proceedings for writs of error coram nobis, of error coram vobis, and of habeas corpus, has burden of proof.

3. Criminal law ⇐322, 997
Evidence ⇐83(1)
Habeas corpus ⇐85(1)

In proceedings on petition for writs of error coram nobis, of error coram vobis and of habeas corpus, the presumption that official duty has been performed and that the records of prior trial are correct and that proceedings were regular are applicable. Code Civ.Proc. §§ 273, 1963, subds. 15, 17.

4. Habeas corpus ⇐25(1)

Advice of counsel to plead guilty to an offense charged does not constitute duress or threat which will authorize subsequent release of defendant on habeas corpus.

5. Habeas corpus ⇐85(1)

On habeas corpus proceeding where there was a conflict between defendant's testimony and the record as to whether accused had personally entered plea of guilty, and a considerable period of time had elapsed, the record was entitled to the greater credence.

6. Habeas corpus ⇐85(1)

Where the only evidence adduced showed defendant's counsel to have been able and competent and record did not disclose anything in his conduct from which either inability or neglect of interests of defendant could fairly be inferred, defendant was not entitled to release on habeas corpus on ground of incompetency of his counsel in advising defendant to enter a plea of guilty.

7. Habeas corpus ⇐25(1)

Where trial judge, who sentenced defendant, an Indian, determined that defendant was able to understand questions and respond in English when he wished to do so, and defendant, on habeas corpus hearing, had no great difficulty in hearing and understanding or in answering preliminary questions and only experienced such difficulty when vital questions touching on offense for which he was imprisoned were asked, defendant was not entitled to relief by habeas corpus for failure of counsel to plead insanity and to insist on an interpreter.

8. Criminal law ⇐642

The appointment of an interpreter is a matter resting in discretion of trial court.

9. Criminal law ⇐642

Court did not abuse its discretion in refusing to appoint an interpreter for defendant, an Indian, when defendant disclosed an ability to understand questions and respond in English when he wished to do so.

10. Witnesses ⇐52(6)

On a hearing for determination of degree of murder and punishment therefor, court did not err in permitting defendant's wife to testify against him, since such a hearing is not a "trial" in the full technical sense and court in considering evidence in aggravation or mitigation of offense may consider many matters not admissible on issue of guilt or innocence.

11. Criminal law ⇐997
Habeas corpus ⇐4

In a proceeding on petition for writs of error coram nobis, of error coram vobis and of habeas corpus, court does not review mere errors properly reviewable on appeal from judgment of conviction.

12. Criminal law ⇐1170½(1)

Where defendant entered plea of guilty to murder, and, on hearing to fix degree, there was evidence in record, without testimony of defendant's wife, sufficient to support trial court's finding of murder in the first degree, defendant suffered no miscarriage of justice by reason of testimony of his wife.

Appeal from Superior Court, Siskiyou County; C. A. Paulsen, Judge.

Proceeding in the matter of the application of Arthur De Beau Carr, on behalf of Gorham Owl Steve, for the writ of error coram nobis, writ of error coram vobis, and writ of habeas corpus, wherein a writ of habeas corpus issued. From an order discharging the writ and remanding prisoner to custody, petitioner appeals.

Affirmed.

Arthur De Beau Carr, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., and Chas. E. Johnson, Dist. Atty., and Mark M. Brawman, Asst. Dist. Atty., both of Yreka, for respondent.

ADAMS, Presiding Justice.

On May 26, 1945, Arthur De Beau Carr, an attorney at law, filed in the Superior Court of Siskiyou County an application on behalf of Gorham Owl Steve "for the Writ of Error Coram Nobis, Writ of Error Coram Vobis and the Writ of Habeas Corpus," alleging therein that said Gorham Owl Steve was imprisoned and restrained of his liberty by the warden of the state prison at Represa. His imprisonment was alleged to be in violation of the Fourteen Amendment of the Constitution of the United States and Section 13 of Article 1 of the Constitution of California, for the alleged reasons that his conviction of murder of the first degree was "had and obtained through duress, fraud and mistake of fact"; that the sheriff had told defendant that he should plead guilty to the charge else he would hang; that defendant's attorney, Mr. Collier, had told defendant that he was charged with manslaughter and upon pleading guilty would be sentenced to prison for five years, and that the district attorney had agreed thereto, and had acted in such manner as to indicate the truth of Mr. Collier's representation; that Mr. Collier had told defendant that he should plead guilty to the crime of manslaughter else he would hang, and that the district attorney had agreed not to demand the death penalty; that the defendant, "not knowing, understanding or realizing the distinction between murder and manslaughter allegedly pleaded guilty to murder when in fact he thought he was pleading guilty to manslaughter"; that defendant, an Indian, could neither read, write, speak nor understand English but was nevertheless denied an interpreter; that the information and amended information were read to defendant but he was not presented with a copy of same nor was it translated to him; that defendant did not plead guilty; that he was not properly defended by counsel; that the trial judge was guilty of an abuse of discretion in that he failed to swear an interpreter for defendant; that defendant was denied a preliminary hearing by his attorney; that defendant is feeble-minded or at least of low mentality, and is deaf and insane; and that defendant was found guilty of first degree murder upon perjured testimony of his wife and brother-in-law; and that no appeal had been taken from the judgment of conviction. The prayer of the petition was that defendant "be restored to his liberty, granted a fair trial up-

on the merits, and/or for any, all and such other relief" as to the court should seem proper in the premises.

A writ of habeas corpus issued and defendant was produced before the court. The district attorney filed a demurrer to the petition, together with an answer denying the allegations thereof, and a hearing was had before the Honorable C. A. Paulsen, who, after hearing testimony adduced by petitioner, filed a written opinion and an order discharging the writ. From said order petitioner has prosecuted his appeal to this court.

It is here contended by appellant that notwithstanding the decision of the superior court upon the evidence adduced before it, this court should on this appeal disregard same, make its own independent determination of the facts upon the evidence before the superior court, and conclude therefrom that the relief demanded in the petition should be granted.

[1] We shall assume for the purposes of this case that an appeal from the decision of the lower court is proper. See People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L.R. 1435; People v. Deutsch, 16 Cal.App. 2d 121, 60 P.2d 155. And though it was held in People v. Deutsch, supra, that an appellate court may not, in such case, weigh the evidence, we have, nevertheless, examined the entire record before us, and have concluded therefrom that the order of the superior court was proper, and that petitioner failed to sustain the burden of proof which was upon him, to establish facts which would justify the issuance of the writs, or any of them, for which the petition prayed.

[2, 3] That the burden of proof was upon petitioner is well established. See People v. Lewis, 64 Cal.App.2d 564, 565, 149 P. 2d 27; People v. Deutsch, supra; State v. Ray, 111 Kan. 350, 207 P. 192, cited in People v. Gilbert, supra, 25 Cal.2d at page 426, 154 P.2d 657; State ex rel. Custinger v. Spencer, 219 Ind. 148, 41 N.E.2d 601, 603. Also the presumptions that official duty has been performed and that the records of the prior trial are correct and the proceedings were regular, are applicable. Code Civ. Proc. sec. 1963(15) (17) and sec. 273.

Petitioner first introduced in evidence the transcript of the proceedings at the time of the conviction of Gorham Owl Steve (hereinafter referred to as Gorham) in November, 1929, which shows that at the time of defendant's arraignment he was asked if he had a lawyer, and replied "yes"; that Mr. Collier appeared for him; that the information was read, and the clerk stated, "I will now hand you a copy of the information"; that when defendant was asked if Gorham Owl Steve was his right name he answered "yes". The matter was then continued four days for plea, at which time, it appearing that the defendant had suffered a prior conviction for burglary, the information was ordered amended to so charge, and the cause was continued until the following day. On arraignment on the amended charge the defendant again admitted his name, and when he was asked by the clerk whether his plea was guilty or not guilty, the following occurred:

"The Clerk: To this information, what is your plea guilty or not guilty?

"The Court: Does he understand, Mr. Collier? Does he understand the language enough?

"Mr. Collier: Well, ask him, does he plead guilty or not guilty.

"The Defendant: Guilty.

"The Court: What is it he pleads, guilty?

"The Clerk: Have you suffered a previous conviction?

"The Defendant: Yes.

"Mr. Johnson: Were you in San Quentin one time for burglary? You were down to state prison at one time?

"The Court: It was Folsom.

"Mr. Johnson: Do you know where Folsom is, by Sacramento? You were down there one time? Judge Lodge sent you down there?

"The Defendant: Yes."

The cause was then continued for two days for the taking of evidence as to the degree of the crime. At the continued hearing Mrs. Gorham Owl Steve was called. She testified, without objection, that she had seen Gorham outside her house about five o'clock the morning of the homicide; that he had a gun with him; that he called "George" two times (George being George McCash) and that her son Harry went and opened the door and "got shot"; that she knew Gorham's voice, and also looked out the window and saw him with the muzzle of the gun pointed toward the door, and heard the shot; that the boy, Harry, started upstairs, but fell and died; that Gorham went away; and that she saw

him again about three o'clock in the afternoon going toward his house in a boat. Mr. Collier asked the witness a few questions on cross-examination, whereupon the court queried her at length, developing the fact that the evening before the homicide George and Harry McCash and her sister Alice had gone to a dance at Orleans and the men had returned shortly before the defendant appeared; that she had two children by Gorham who lived with her, and that defendant sometimes came to see them; that he never had any trouble with Harry, but that George and Gorham did not like each other "because that money," and that George had sometimes not allowed Gorham to come there after she got a divorce; that George McCash was her brother, and the house in which they lived was his.

George McCash was next called and testified to going to the dance, and that they had picked Gorham up on the way, taken him to the dance, and returned him to his house on their return in the morning; that Gorham was not drinking that he knew of; that there was some argument when Gorham got out of the car, but no fight; that he heard the shot that killed Harry and heard Gorham call "Hey! George"; that he knew Gorham's voice; that he had started downstairs but Harry reached the door first; that he did not go out and did not see defendant until about 3:00 p.m., when he saw him go across the river to his place in a boat. The court asked this witness numerous questions and elicited the information that Harry had no gun, that Gorham had previously come "sneaking" around the place with a gun.

Elmer Johnson, next called, testified that he went to the dance with George and Harry McCash the night before the homicide, and that they picked up Gorham on the way and brought him back in the morning, and that he was not intoxicated. This witness was also questioned by the court.

Gorham Humphreys was next called and testified that he went with the sheriff looking for defendant after the shooting; that defendant was not at his home when they first went there but that there was a sign on the door that said something about "on the way to Orleans"; that later they returned to Gorham's house, and found evidence that he had been there since their first visit; that the next day they found defendant asleep in the brush a short distance from his house, and the sheriff then took him into custody; that he (Humphreys) asked defendant some questions and defendant told him he had shot the boy, but had shot him through mistake—that he had shot the wrong man, but did not say whom he wanted to kill; that they found a gun in Gorham's house and that defendant said that was the gun he used to shoot the boy with; that defendant was sober.

Upon this evidence the district attorney urged a judgment of first degree murder, though he did not recommend the death penalty.

Gorham was next sworn and questioned by the court. He answered some questions but when asked how old he was, and when his birthday was, said he did not know. When the court stated that defendant had pleaded guilty to burglary and sentenced to Folsom, and asked defendant if that was the only time he had ever spent in a penitentiary he answered "That is all." He gave his father's name, stated that both his parents were dead, that he had two children, a boy three years old whose name was William, and a girl whose name he did not know; that he had never gone to school. When asked what kind of work he did, he answered, "Any kind of work," but that he did not work very much. He was then questioned by the district attorney:

"Q. Why did you shoot Harry McCash? What made you shoot him? Did you want George McCash; were you going to shoot him? A. Yes.

"Q. And Harry McCash opened the door and you shot? A. Yes, I made mistake.

"Q. You made a mistake. All right. That is all.

"The Court: Q. Why did you want to kill George McCash? A. What?

"Q. Why did you want to kill George McCash? A. Bother all the time.

"Q. Bothered you? A. Yes.

"Q. He never fought you; you never have any fight? A. Yes.

"Q. How many times you fight? A. One time down at Somes Bar.

"Q. One time? A. Yes.

"Q. Did you fight with fist; just fist fight or did you have guns or knives? A. Yes.

"Q. Which? A. Hands.

* * * * *

"Q. Did you have trouble with George McCash coming up from the dance that morning, when you came up from Orleans? Did you have trouble when they let you out there at your home? A. Two weeks before.

"Q. Two weeks before that? A. Yes.

"Q. What did you have trouble about then, did you have a fight? A. He says 'no business to come to his place.'

"Q. You were up there with a rifle? A. I happened to be there.

"Q. You happened to be there? A. Yes.

"Q. And George McCash told you to get away from there with your rifle? A. Yes, sir.

"Q. And what were you doing with your rifle up there? A. Pack in my hand, rifle."

At the conclusion of the hearing the court sentenced defendant to imprisonment for life.

Coming now to the testimony adduced in support of the petition before us, Gorham himself was first sworn, and under questioning by the court stated that he had been in Folsom for the last ten years; that he didn't know why he went there; that his work there was "cleaning up the yard"; that he had been there fifteen years; that he did not like the food; that he had lived on the Klamath river "All my life," and was born there. When first asked if his parents were alive answered "yes" but when asked by the district attorney "Is your father dead or alive," answered "Dead", and said that his mother was dead too. At this point counsel for Gorham suggested that the court talk to Gorham through an interpreter, but the court continued its interrogation:

"Q. Did you know a man by the name of Cash down on the Klamath? A. What? Cash?

"Q. George Cash? A. Yes, I knew him.

"Q. You knew George Cash? A. Yes.

* * * * * *

"Q. You knew nobody by the name of Harrison Cash? A. Yes, I knew him.

"Q. You knew him? A. Yes."

Questioned by his counsel as to whether he had ever had a paper read to him at the time he was "here", answered "no". The same answer was given to the question whether he thought he was charged with murder. He further testified:

"Q. [Mr. Carr] Did Mr. Collier ever tell you to plead guilty? A. Yes.

"Q. Did he say why? A. No, he just—

"Q. (Interrupting) Did Mr. Collier tell you to plead guilty? A. Yes.

"Q. Did he tell you why? A. No, he says you are drunk some place.

"Q. You were drunk and somebody saw you, was that your answer? Was that your answer? Why did Mr. Collier tell you to plead guilty? A. Collier told me to plead guilty.

"Q. Who told you to? A. Collier?

"Q. Collier? A. Yes.

"Q. Owl, did anybody tell you that you would only get 5 years if you pleaded guilty? A. Judge.

"Q. The Judge? A. Yes.

"The Court: What Judge? A. He told me if I would plead guilty he would send me 5 years in prison.

"Q. He told you he would send you five years in prison, that is what you said, was it? A. Yes.

"Q. Now, which judge told you that? What was the name of the judge? A. Judge.

"Q. Was it in this room here? A. Yes.

* * * * * *

"Mr. Carr: Q. Where did the judge see you, Owl, when he talked to you? A. Right here.

"The Court: Q. Right here in this room? A. Yes.

"Q. He said if you plead guilty he will give you five years? A. He told me that if you plead guilty.

"Q. He told you that if you would plead guilty? A. Yes, 'I send you five years in prison.'

"Q. Would you send you 5 years in prison? A. Yes.

"Q. And that happened right here in the court room, did it? A. Yes.

* * * * * *

"Mr. Carr: Q. Now, did Sheriff Calkins tell you to plead guilty. A. He told me—

"Q. The Court: (Interrupting) That is what the sheriff told you. What did the sheriff say to you? A. He told me—

"The Court: (Interrupting) He told you to plead guilty anyway? A. Yes.

"Q. Did he tell you what the judge would give you? A. Five years.

"Q. The sheriff said the judge would give you five years? A. Yes; five years after parole.

"Q. Where did you talk to the sheriff about this? A. What?

"Q. Where did you talk to the sheriff? A. Downstairs.

"Q. Downstairs? A. Yes.

"Q. In the jail? A. Yes.

"Q. Was anybody else there besides you and the sheriff? A. No.

"Q. Just you and the sheriff? A. Yes.

"Q. How many times did he talk to you? How many times did the sheriff talk to you about this? A. Two times, I think.

"Q. Two times? A. Yes.

"Q. Did he tell you that both times? A. Yes.

"Q. He told you, he said 'You plead guilty and the judge will give you 5 years?' A. Yes.

* * * * * *

"Q. [Mr. Carr] Owl, did you kill Harrison McCash? A. I don't know nothing about it.

"Q. 'I don't know nothing about it'? A. No.

"Q. Did you kill him? A. I don't know.

"Q. Did you go over and shoot Harrison McCash? A. I don't know."

He was then questioned about his whereabouts the night before the homicide, and his answers confirmed in substance the testimony of the witnesses at the original hearing except that he stated that he was drinking at Orleans. But he further stated that when he arrived home in the morning he went to sleep and that he did not go to George McCash's house. He admitted that before going to Orleans he had written a sign on his door, which he said was for the purpose of informing his uncle that he had gone to Orleans and would "come back tomorrow"; that he remembered being arrested and that it was on October 1st; that the sheriff asked for his gun and was told where it was; that it was a "30/30" but had no shells in it because "can't get no shot," and "caps worn out." Also:

"Mr. Carr: Q. Did sheriff Calkins say that you used that gun to kill Harrison McCash? A. Yes.

"Q. What did you say to him? A. I said he made a mistake.

"Q. Now, what did you mean by 'made a mistake?' A. I asked him if he made a mistake.

"Q. Mistake about what? A. If I called Harrison McCash.

"Q. Do you mean that you made a mistake or that the sheriff made the mistake? A. I told him that he made a mistake.

"Q. You told him that he made a mistake? A. Yes.

* * * * * *

"Mr. Carr: Q. Did you tell the sheriff that you made a mistake or that he made a mistake? A. I told him mistake.

"Q. That he made the mistake? A. Yes.

* * * * * *

"Q. He made it? A. I say 'I don't know nothing.'

"Q. 'I don't know nothing'? A. Yes.

"Q. And that he made a mistake? A. Yes.

"Q. Did you tell that you—did you tell the sheriff that you shot Harrison McCash, by mistake? A. Yes.

* * * * * *

"The Court: Did the sheriff ask you if you shot McCash? A. Yes.

"Q. And what did you say? A. I says 'Maybe a mistake. I don't know nothing.'"

He also testified that Mr. Collier talked to him:

"Q. [Mr. Carr] And what did he say? A. He asked me—I say 'What trouble.' He asked me if I killed somebody. I says 'I don't know nothing.' He says 'You shot somebody, McCash and that you plead guilty.'

"Q. And that you plead guilty? A. Yes. He says 'You drunk; somebody see you.'

"Q. 'You drunk; somebody see you'? A. Yes.

"Q. So told you to plead guilty? A. Yes.

"Q. All right. Now, did you tell him that you weren't guilty? A. Who?

"Q. Collier? A. He come up. He says 'Plead guilty.'

* * * * * *

"Q. [The Court] * * * What was the first thing he said when he came into the jail; the very first thing he said to you? A. He asked me if I was picking or making trouble.

"Q. And what did you say? A. I said I don't know nothing.

"Q. 'I don't know nothing.' And then what did he say? A. He says 'You shot McCash.'

"Q. He said 'You shot McCash.' A. Yes.

"Q. And then what did you say to that? A. I says 'I don't know nothing about it.'

"Q. 'I don't know nothing about it.' And then what did Collier say? A. He says 'Maybe better you plead guilty; somebody see you drunk.'

"Q. 'Somebody see you drunk.' A. Yes.

"Q. Did he tell you somebody saw you shoot McCash? A. Yes.

"Q. Just what did Collier say to you? Tell me exactly what his words were? A. That is what he said 'Plead guilty.' He come up and plead guilty himself.

"Mr. Carr: Now, did Mr. Johnson ever talk to you? A. No.

* * * * * *

"Q. Now, he didn't tell you to plead guilty, did he? It was Collier, wasn't it? A. Collier, that is right.

"Q. All right. Now, did Collier tell you that you would get light punishment? A. I couldn't understand that. I can't understand.

"Q. You don't understand? A. No.

"Q. Did Collier tell you what sentence you would serve if you pleaded guilty? A. He says 'Maybe a year in prison.'

"Q. 'Maybe a year in prison'? A. Yes.

"Q. That is what Collier said? A. Yes.

"Q. Did he say anything about hanging? A. No.

"Q. Did Collier say anything about hanging; about you hanging? If you pled guilty, you would only get a year? A. Yes.

"Q. Now, did he say what happened if you pled not guilty? A. 'If you lose, you hang' ";

that Collier said he talked to Johnson (the district attorney) but that he did not know what Johnson said; that he did not ask; that he talked to the sheriff, "After, in the court house." His counsel then questioned him as to his appearance before any other judge, apparently in an effort to establish that he had had no preliminary examination, and the witness stated he had appeared before only one judge. He said, under questioning by his counsel, that at the prior hearing he did not know what any of the witnesses said, that he did not himself plead guilty.

"Q. And do you remember whether you pleaded guilty or not guilty or made any kind of a plea at all? A. No.

"Q. Did anybody plead for you? (No answer).

"Q. Did you say 'Guilty.' A. Judge says what you did? You plead guilty? And Collier says, 'Plead guilty.'

"Q. Now, when Collier said 'Plead guilty,' did you plead guilty? A. Collier plead guilty, but I didn't say nothing.

"Q. 'Collier pled guilty, but I didn't say nothing.' Collier, then was the one that said 'guilty'? Is that correct? A. Yes."

But when questioned by the court his answers were not the same.

"The Court: Q. Did you know what Collier said when he pled guilty? You heard him say that, did you? A. Collier said first.

"Q. You heard Collier say 'plead guilty,' did you? A. Yes.

"Q. You knew what was going on? A. I know what he said.

"Q. You knew what he said? A. Yes. Already plead guilty, he said.

"Mr. Carr: At no time did you say that you were guilty? A. At the last; at the last time.

"Q. Let me ask you this: Did you at that trial plead guilty or did Collier plead guilty? A. Collier plead guilty all.

"Q. And you didn't plead guilty at all? A. No.

"Q. All right. You remember the Judge asking Mr. Collier if you understood? A. No.

"Q. Do you remember anything that happened in this trial at all? Did you understand any of the things that went on? A. No."

He stated that he was hard of hearing; that he did not know he was pleading guilty to murder. Under examination by his counsel he again stated that he did not talk to Mr. Johnson nor the latter to him.

In an attempt to explain the defendant's prior testimony regarding his "making a mistake" he was questioned as follows:

"Q. [Mr. Carr] Now, did you realize that at time the record shows you said: 'Yes, I make mistake'? A. No.

"Q. Did you say that at that time, 'I make mistake?' A. Maybe I said it.

"Q. Maybe you said it, but you don't know? A. Yes.

"Q. Well, did you mean by that that you made a mistake in shooting George McCash? A. I don't think so, no.

"Q. You don't think so. Then the Judge, the Court started talking to you, according to this record and asked the question: 'Why did you want to kill George McCash?' Now, did you give any answer to the Judge at that time? A. He asked me something I don't understand.

"Q. You didn't understand. The record shows that you said: 'Bother all the time.' Now, do you remember telling the Judge that you said George McCash bothered you all the time? A. Yes.

"Q. Did George McCash bother you all the time? A. Well, sometimes.

"Q. Sometimes. Did you ever have any fight? A. No, just a hand fight.

"Q. Just a hand fight? How many times? A. One time.

"Q. One time. Where was that? A. At Fort Jones.

"Q. At Fort Jones. Did you ever have any fight at Somes Bar? A. No.

* * * * * *

"Q. All right. When you did fight him, did you fight with fists or did you use guns or knives? A. No.

"Q. How did you fight him? A. By hand.

"Q. Hand. Who got the best of it? Who won? A. Won?

"Q. Yes. Did he lick you or did you lick him? A. Nobody."

When queried as to some of the questions asked him by Judge Luttrell, who presided at the former trial, he remembered some of them, but denied remembering the questions asked of him and his answers regarding the actual shooting. Regarding his conversations with his attorney he said he had tried to tell him that he had gone to "Super's house" (and not to the McCash house) but Mr. Collier said nothing, except that he would be sentenced to "One year in prison," "to plead guilty and one year in prison. He said I go to work again after a year," but that Mr. Collier did not say he had arranged it with the judge or the district attorney, or with anybody. In an apparent effort to clear up what had been said by Gorham regarding a mistake, the following questions were asked:

"The Court: Q. Did you talk to Gorham Humphreys at any time? A. No; outside in the car before arrested?

"Q. Outside in the car before you were arrested? A. Yes.

"Q. And Humphreys talked to you? A. Yes.

"Mr. Carr: Q. All right. Now what did you tell him? A. I told him I make mistake.

"Q. What kind of mistake; a mistake in being arrested? A. Shot by somebody.

* * * * * *

"Mr. Carr: Q. Is that what you said, that you told Gorham Humphreys that the kid was shot by somebody? A. Yes.

"Q. Did he know that the kid had been shot when he talked to you? A. I asked him questions.

"Q. What did you ask Humphreys? A. I asked him a couple of times.

"Q. You asked him a couple of times what? A. I asked him a couple of times—

"The Court: (Interrupting) What did Humphreys say when you were in the car? A. What?

"Q. What did Humphreys say to you? A. He asked me—

"Q. (Interrupting) What did you say? A. I says: 'It is a mistake.'

"Q. 'It is a mistake.' That is all he says.

"Mr. Carr: All right. Was that a mistake in their arresting you? A. No, that shot.

"Q. Well, what was the mistake? (No answer)

"Q. What was the mistake, Owl? A. What you asked me. I told you a couple of times, too.

"Q. Was the mistake in arresting you or that you shot the wrong man by mistake? A. That is where you asked me.

* * * * * *

"The Court: Q. What do you mean by saying that there was a mistake. Go on and explain it to us. Tell us what you mean when you say: 'I think there is a mistake.' What kind of mistake? A. That is what he asked me.

"Q. When you said to the Sheriff and Gorham Humphreys, 'It is a mistake,' what kind of a mistake did you mean? A. He asked me if I shot somebody else.

"Q. Well, what did you mean? What did you mean by saying it was a mistake? (No answer)

* * * * * *

"Q. Gorham, did you ever tell Humphreys that you shot George McCash by mistake? A. No.

"Q. Did you mean that?

* * * * * *

"Q. Did you mean that they were making a mistake arresting you? A. No.

"Q. Well, what was the mistake? A. They asked me if I shot somebody else.

"Mr. Carr: I think he means 'told' instead of 'asked.'

"The Court: I think so, yes.

"Mr. Carr: Q. Do you mean they made a mistake in telling you that you shot somebody? A. Yes."

Regarding his understanding of the proceedings, he testified under questioning by Mr. Carr that he did not understand anything that went on at the trial, though he now knew what was going on; that he did not understand now very much better than before. He gave some testimony regarding the employment of an attorney after going to Folsom, who had told him that he was sentenced for life, but had done nothing for him; also that he had made several applications for parole. Regarding his employment of Mr. Collier he stated that the latter came to see him, that he paid him $57 down and promised to pay him $250; that he paid him $100 after he was in Folsom, that he had a letter in his pocket. But this letter was one from Mr. Collier stating that he had received several letters from Gorham, but that the $100 check had not been sent to him but to Gorham Humphreys.

He also testified on cross-examination that Judge Luttrell had told him he would get parole after five years; that this was after he pleaded guilty.

In support of the petition it was next shown that Gorham had not had a preliminary examination. The Justice of the Peace of the township so testified, and he was also questioned as to the mentality of Gorham, having known him for many years. He stated that Gorham was a "slow sort of fellow," who kept to himself and had little to say to anyone, but that he seemed to understand when witness talked to him. This witness first said that it was his opinion that Gorham was not sane; he changed it on cross-examination, saying he would not say he was insane, but that it was the opinion of some people that he must be crazy because he was off by himself and talked to himself; that if he shot the boy he supposed he would understand the nature and consequences of his act; that he knew what was right and what was wrong—that he knew it was wrong to take a human life.

Louise Hickox testified that she had known Gorham to some extent before he was married, that he was a queer fellow, that he used to be referred to as "Crazy Owl," because he never associated with people, and when spoken to answered in Indian; that he could write though he never went to school.

Former Judge C. J. Luttrell was next called in support of petitioner, but stated he had no independent recollection of the circumstances of Gorham's arraignment, etc.—that the record would have to speak for itself; but that at the time of the proceedings he had absolutely no reason to question the competency of defendant's counsel, Mr. Collier; that the latter was recognized as able counsel and a good lawyer, and was generally so regarded by the bar.

This evidence terminated the proceedings.

[4] From the foregoing we think that it sufficiently appears that petitioner failed to prove the allegations of his petition. The allegations that the sheriff and defendant's attorney told defendant that he should plead guilty or he would hang, that his attorney told him that he was charged with manslaughter and that if he pleaded guilty would be sentenced for five years, and the

allegations that he did not understand English and the nature of the proceedings, have no support in the evidence except the unsatisfactory testimony of defendant himself, and it does not appear that he pleaded guilty in reliance thereon rather than because he had committed the crime charged; and there is no evidence that the district attorney acted in any manner to indicate that he knew or had agreed to the alleged representations of defendant's counsel. It was said in People v. Deutsch, supra, that advice of counsel cannot be said to constitute duress or threats.

[5] The contention that defendant did not himself enter the plea of guilty is not only contrary to the record, but is inconsistent with some of the statements of defendant himself. Petitioner's counsel urges that because the trial court at the time of plea asked "What is it he pleads, guilty?", it must be concluded that defendant did not so plead. However, the court reporter apparently heard the defendant's answer, and if there be doubt the record is, at this late date, entitled to the greater credence. In re Evans, Cal.App., 160 P.2d 551.

[6] As for the competency of defendant's counsel, the only evidence adduced showed him to have been able and competent; and we find nothing in his conduct from which either inability or neglect of the interests of his client can fairly be inferred.

[7] Petitioner's present counsel argues from a statement made by Mr. Collier at the time of the hearing to determine the degree of the crime which was that from the looks of defendant and the talks he had had with him he did not believe that "he could conceive a premeditation that would last long enough to go across the river"—that defendant was "in the same position as an animal," that it must be concluded not only that the defendant was so lacking in understanding as to be insane, but it must also be concluded that Mr. Collier failed in his duty to his client in allowing him to plead guilty, and in not insisting that an interpreter be sworn for him. But we do not believe that either conclusion is justified. The statements of counsel were certainly not evidence, nor can it be said that in the light of subsequent events his conduct of the case was inefficient. The evidence fails to show that defendant was insane; and regarding his competency to speak and understand the English language, the trial judge who saw and heard him, and was therefore better able than we are to judge of his ability to speak, hear, and understand, said in his written opinion that in order to determine these matters he had questioned the witness at length and that he was "satisfied beyond the slightest doubt that petitioner was well able to understand the questions and respond in English when he wished to do so"; that "During his examination in the present hearing, petitioner had no great difficulty in hearing, in understanding, or in answering the many preliminary questions asked; but repeatedly, when vital questions touching upon the shooting of Harry McCash were propounded to him, he was unable to hear, to understand or to express himself"; that "This subterfuge is as old as crime itself and is confined to no single race"; that much was made of petitioner's statement that he "made a mistake," but that everything showed that what he was talking about was not the entry of his plea, but the fact that he had intended to kill George and had killed Harry. His conclusion was that petitioner was neither insane nor lacking in understanding of the English language or the nature of the charge; that he was familiar with court proceedings, having been convicted before. We think that the excerpts from the testimony, which we have set forth at length, sustain this conclusion.

[8, 9] Regarding the contention that the trial court erred in failing to appoint an interpreter, this was matter resting in the discretion of the court, and we find no abuse of discretion. See People v. Young, 108 Cal. 8, 10, 41 P. 281; People v. Morine, 138 Cal. 626, 628, 72 P. 166; People v. Lopez, 21 Cal.App. 188, 190, 131 P. 104.

[10] As for petitioner's contention that it was error to permit defendant's wife to testify against him, the court said in People v. Gilbert, 22 Cal.2d 522, at page 528, 140 P.2d 9, 12: "A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial. As stated in People v. Williams, 14 Cal.2d 532, 536, 95 P.2d 456, 458 (quoting from People v. Popescue, 345 Ill. 142, 153, 158, 177 N.E. 739, 77 A.L.R. 1199), it is 'simply a statutory hearing, by which the court examined witnesses to determine whether any facts existed to aggravate or mitigate the punishment,' and 'in considering evidence in aggravation or mitigation of the offense

the court may consider many matters "not admissible on the issue of guilt or innocence" * * *.'"

[11] It may be added that it is not the province of the court in a proceeding such as this to review mere errors properly reviewable on appeal from the judgment of conviction. People v. Reid, supra; People v. Superior Court, 4 Cal.2d 136, 149, 47 P.2d 724; People v. Gilbert, supra, 25 Cal.2d, at page 444, 154 P.2d 657; People v. Butterfield, 37 Cal.App.2d 140, 142, 99 P.2d 310.

[12] Furthermore, there was evidence in the record, without the testimony of defendant's wife, sufficient to support the trial court's finding that the admitted homicide constituted murder of the first degree; and defendant suffered no miscarriage of justice by reason of the testimony of his wife. See People v. Van Skander, 20 Cal.App.2d 248, 254, 66 P.2d 1228; People v. Bellon, 180 Cal. 706, 707, 182 P. 420.

The order of the trial court discharging the writ and remanding the prisoner is affirmed.

THOMPSON and PEEK, JJ., concur.



73 Cal.App.2d 764

PEOPLE v. D'ELIA.

Cr. 3987.

District Court of Appeal, Second District, Division 2, California.

April 1, 1946.

1. Criminal law ⇐260(1)

Trial court's finding that defendant was guilty as charged was the equivalent of a verdict of a jury, from which an appeal will not lie, and, where no judgment of conviction was entered, an attempted appeal from judgment of conviction was required to be dismissed.

2. Criminal law ⇐1023(12)

An order granting probation is not a judgment and no appeal lies therefrom.

3. Criminal law ⇐737(1), 739(2), 747

Where jury was waived it was the exclusive province of the trial court to determine any conflicts, uncertainties, or inconsistencies in the evidence, the identification of defendant in his relation to the crime charged, and the weight of the evidence relating to defense of alibi.

4. Criminal law ⇐572

Evidence was sufficient to justify conviction of assault by means of force likely to produce great bodily injury, as against defense of alibi.

5. Criminal law ⇐938(1)

Denial of defendant's motion for new trial, on ground of newly discovered evidence that prosecuting witness had registered as having been previously convicted of a felony, was not improper, where such fact, if true, was a matter of record and available to defendant before the trial, and, if proved, would not have affected the result.

6. Criminal law ⇐938(1)

Where the alleged newly discovered evidence in support of defendant's alibi was only cumulative and there was no showing that such evidence could not with reasonable diligence have been produced at the trial, denial of defendant's motion for new trial on ground of newly discovered evidence was not error.

7. Assault and battery ⇐63

The fact that prosecuting witness was a "strikebreaker" was not a defense to the unprovoked and premeditated assault committed upon him by defendant, a union picket.

8. Criminal law ⇐1134(10)

District Court of Appeal was not required to determine validity of one of the conditions of order placing defendant on probation for three years, since an appeal from order of probation is not available.

9. Criminal law ⇐982

In placing defendant on probation, upon conviction of assault by means of force likely to produce great bodily injury, the court could require as one of the conditions of probation that defendant be financially able to pay any judgment rendered against him in a civil action for damages suffered by the victim of the assault.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Antonio D'Elia was convicted of assault by means of force likely to produce great bodily injury, his motion for new trial was overruled, he was placed on probation for three years, and he appeals.

Conviction affirmed and other appeals dismissed.

Pestana & Esterman and Wm. J. Clark, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged with the crime of assault by means of force likely to produce great bodily injury on the person of one Irwin Kurvink. A jury was waived and appellant was tried by the court. He was found guilty as charged, proceedings were suspended, and the court placed him on probation for three years.

[1,2] 1. *The appeals.* As recited in his notice, appellant appeals from (a) the "court's judgment of conviction"; (b) the order denying his motion for a new trial; and (c) "the order of the court sentencing the defendant." The appeals (a) and (c) must be dismissed. There was no judgment of conviction. The court found appellant guilty as charged, which is the equivalent of a verdict of a jury. An appeal from a verdict is unauthorized. People v. Brock, 21 Cal.App.2d 601, 604, 70 P. 2d 210; People v. Bratten, 137 Cal.App. 658, 31 P.2d 210. Appellant was not sentenced and the attempted appeal is from an order that was not made. If it had been made it would not be appealable. People v. Ray, 13 Cal.App.2d 701, 703, 57 P.2d 975; People v. Dunlap, 12 Cal.App. 2d 333, 336, 55 P.2d 522. If by the appeal from the order sentencing him appellant intended to appeal from the order placing him on probation, the appeal is likewise ineffective. An order granting probation is not a judgment (In re Marquez, 3 Cal.2d 625, 627, 45 P.2d 342; People v. Guerrero, 22 Cal.2d 183, 184, 137 P.2d 21; People v. Neel, 133 Cal.App. 332, 24 P.2d 230) and no appeal lies therefrom. People v. Brock, supra.

2. *Sufficiency of the evidence to sustain the conviction.* Kurvink, the victim of the assault, was employed in a motion picture studio where a strike was in progress. He and another employee, Cochran, were taken to Kurvink's home in a studio car. Kurvink, accompanied by his wife and his nephew, started in his car to take Cochran to his home. After driving a short distance they were pursued by a coupe and twice turned into side streets to avoid being forced against the curb. Several cars joined in the pursuit. After Kurvink made his second turn a Packard car, driven by appellant, crowded Kurvink's car to the curb compelling him to stop. Kurvink and appellant alighted from their respective cars and the latter knocked Kurvink down three times, kicked him and struck him on the head with an unidentified instrument. Cochran ran from the scene and he was assaulted by other men.

Kurvink and his wife positively identified appellant as the person who committed the assault, and identified a ring worn by him which scarred Kurvink's face. A resident near the scene of the assault obtained the license number of the car, which was found to be and which appellant admitted was the number of his Packard. After the assault scratches were found on the left front fender on Kurvink's car and corresponding scratches on the right front fender of the Packard.

Appellant denied having taken any part in the assault and attempted to prove an alibi. The time of the attack was fixed at approximately 7:30 o'clock in the evening. Appellant testified that he was in a picket line at a studio from 3:00 o'clock until 8:00 o'clock in the evening, at which time his wife called for him and took him to a bowling alley. She corroborated him in the latter statement. Another witness, testifying on behalf of appellant, placed the latter at a captains' meeting at 7:30 o'clock, but appellant denied that he attended the meeting. There were other contradictions and discrepancies in the evidence of both appellant and Kurvink.

[3,4] It was the exclusive province of the court, a jury having been waived, to judge the facts and to determine all of the points discussed by appellant: (1) Any conflicts, uncertainties, or inconsistencies, real or apparent, in the evidence (People v. Spencer, 58 Cal.App. 197, 224, 208 P. 380; People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814); (2) the identification of appellant in his relation to the crime charged against him (People v. Connelly,

195 Cal. 584, 593, 234 P. 374; People v. Hightower, 40 Cal.App. 2d 102, 106; People v. Madsen, 93 Cal.App. 711, 714, 270 P. 237; People v. Farrington, supra); (3) the weight of the evidence relating to the alibi. People v. Freer, 104 Cal.App. 39, 44, 285 P. 386; People v. Madsen, supra. There is ample evidence to sustain the conviction and the court's finding will not be disturbed.

[5] 3. *The motion for a new trial.* We have already disposed of appellant's claim that the evidence is insufficient to sustain the conviction. An additional ground of his motion for a new trial was that new evidence material to his defense had been discovered after the trial which he could not with reasonable diligence have discovered and produced at the trial. In one of the affidavits it is asserted that Kurvink, the prosecuting witness, had registered with the Sheriff of Los Angeles County as having been previously convicted of a felony elsewhere than in California. Such registration, if it existed, was a matter of record and was available to appellant and his counsel before the trial and no reason or excuse is offered for their failure to produce the evidence at the trial. The mere fact that they did not have actual knowledge of a matter that was of public record is not a valid excuse. The registration, if offered, would have tended to impeach Kurvink's testimony, but inasmuch as appellant was positively identified by Mrs. Kurvink as the assailant and the Packard car which crowded Kurvink to the curb admittedly belonged to appellant and was identified by the license number obtained by another witness, the impeachment of Kurvink would not necessarily have changed the opinion of the court as to appellant's guilt. The judge's remarks on this subject in denying the motion for a new trial indicated that the conviction, if it had been proved, would not have affected the result of the trial.

[6] Affidavits of two persons stating facts in support of appellant's alibi were only cumulative and there is no showing that the evidence of the witnesses could not, with reasonable diligence, have been produced at the trial.

[7] The fact that Kurvink was a "strikebreaker," as stated in one of the affidavits, was not a defense to the unprovoked and premeditated assault. It was his undoubted right and privilege to work wherever he could obtain employment in order to provide a livelihood for himself and his family, without being subjected to violence on the part of appellant who apparently wished to deny that right by the use of force. Kurvink's employment in the studio could have been considered as and no doubt was the reason for the attack upon him by appellant, who was a union picket. The trial judge commented that the element of Kurvink's being a strikebreaker would have added strength to the prosecution's case.

[8, 9] 4. *The order placing appellant on probation.* Appellant complains that one of the conditions of his probation, to wit, that he should have financial ability to pay any judgment rendered against him in a civil action for damages, was void. The question is disposed of by the fact that an appeal from an order of probation is not available. Furthermore, we see no reason why a defendant should not be required, as a condition of probation, to answer financially for damages suffered by the victim of his assault.

The purported appeals from a nonexistent judgment of conviction and from an alleged order sentencing appellant, which was never made, are dismissed. The order denying appellant's motion for a new trial is affirmed.

MOORE, P. J., and McCOMB, J., concur.

73 Cal.App.2d 653

BOWKER v. BAKER et al.

Civ. 3156.

District Court of Appeal, Fourth District, California.

March 26, 1946.

1. Appeal and error ⇐113(1)

An order denying motion to vacate judgment is not appealable. Code Civ. Proc. § 963.

2. Constitutional law ⇐48

In considering the constitutionality of a statute, question presented is not whether it is possible to condemn it, but whether it is possible to uphold it, and the statute is not to be declared invalid because incidental to the main purpose there results an advantage to individuals.

3. Constitutional law ⇐70(1)
States ⇐114

The Legislature is vested with a large discretion in determining what is for the public good and what are public purposes for which public moneys can be rightfully expended, and such discretion cannot be controlled by the courts except when it is clearly evasive.

4. Evidence ⇐20(1)

That there are numerous denominational schools, colleges, and universities in the state may be judicially noticed.

5. Schools and school districts ⇐3

The section of the education code permitting school districts to transport pupils of private schools at public expense does not infringe constitutional prohibitions against appropriation of public funds in aid of religious sects or in support of any denominational schools. Education Code, § 16257; Const. art. 4, § 30; art. 9, § 8.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Victor V. Bowker against G. M. Baker, Boyd B. Kreider, and Emmett R. Berry to restrain defendants from permitting pupils attending a parochial school to ride in buses owned and operated by the Porterville School District. From a judgment for defendants and from order denying a motion to vacate the judgment, the plaintiff appeals.

Judgment affirmed and appeal from order denying motion to vacate dismissed.

Alan H. Critcher, of San Francisco, for appellant.

Walter C. Haight, Dist. Atty., Leroy McCormick, Asst. Dist. Atty., and McFadzean & Crowe, all of Visalia, for respondents.

MARKS, Justice.

[1] This is an appeal from a judgment which denied plaintiff an injunction by which he sought to restrain defendants from permitting pupils attending a parochial school from riding in buses owned and operated by the Porterville School District, and from an order made after judgment denying a motion to vacate the judgment denying a motion to vacate the judgment and enter another judgment. Plaintiff also attempted to appeal from the order denying his motion for new trial which is not appealable. Sec. 963, Code Civ.Proc.

Plaintiff, with C. M. Baker and Boyd B. Kreider composed the board of trustees of the Porterville School District. Emmett R. Berry was its superintendent of schools.

At a meeting of the trustees of the district held on September 21, 1943, by a vote of the two "Yes" and one "No," plaintiff voting in the negative, the following resolution was passed:

"That transportation be allowed private and parochial school students in the District's public school buses on the basis of the following provisions:

"1. That there shall be no increase in the number of students eligible to ride in the District's buses above the number eligible for riding that were enrolled in the private and parochial schools on Tuesday, September 21, 1943. This to be the maximum number to be given transportation for the Year 1943 to 1944.

"2. That this permission be allowed only in accordance with the District's transportation rules and regulations governing the transportation of public school children.

"3. That the parochial and private schools be notified that the permission for the Year 1943 to 1944 is granted only as a measure to relieve the present war emergency situation and the home defense program."

On January 10, 1944, plaintiff filed this action. He alleged that pursuant to the resolution, pupils of a parochial school operated by the Roman Catholic Church were

riding on public school buses, and sought to enjoin this practice.

The foregoing resolution was passed under the authority granted by section 16257 of the Education Code which provides as follows:

"The governing board of any school district may allow pupils entitled to attend the school of the district, but in attendance at a school other than a public school, under the provisions of section 16624, transportation upon the same terms and in the same manner and over the same routes of travel as is permitted pupils attending the district school."

"The allowance of this section shall be restricted to actual transportation when furnished by the district to children attending the district school, and nothing in this section shall be construed to authorize or permit in lieu of transportation payments of money to parents or guardians of children attending private schools."

In the trial court counsel agreed that the sole issue to be presented and decided was the constitutionality of section 16257 of the Education Code and that they hoped no other question would be considered, argued or decided. No other question is presented here and we will confine ourselves to this one unless it becomes necessary to consider the bearing on the case of the fact that the resolution was a temporary measure intended to relieve the shortage of transportation during the war emergency. Many acts that could not be countenanced in periods of peace and tranquility become legal and are permitted during emergencies as aiding the war effort and the defense of the nation.

The facts of this case are simple and are not in dispute. The Porterville School District is a school district of the County of Tulare organized under the laws of the State. It owns and operates school buses to transport pupils to and from its schools over regularly established routes.

St. Anne's Parochial School is a private school operated by the Roman Catholic Church. Its school was located about one block from the district school that served as the inner terminus of the school bus routes. St. Anne's Parochial School maintained educational standards equal to those of the public school and met the requirements of section 16624 of the Education Code. In addition to the subjects usually taught in public schools it instructed in the religious beliefs of the church. Pupils were not compelled to take this instruction and about forty per cent of them did not receive it.

The school buses on two routes did not have sufficient public school passengers to fill the seats. Under authority of the Education Code and the resolution of the board of trustees of the school district, pupils of the Catholic School were permitted to fill these vacant seats and ride with the public school students. The routes of the buses were neither changed nor extended to accommodate the private school pupils and no additional stops were made for them. A maximum of seventeen private school pupils were transported on the two buses. Their ages ranged from five to twelve years, both inclusive, and the distances from their homes to the public school ranged from two to eight miles, both inclusive. When the seats in the buses were filled no other private school pupils were permitted to ride. The evidence discloses that seven parochial school pupils applied for transportation which was refused because the seats on the buses were filled. The principal of St. Anne's school testified he had endeavored to purchase buses for the school but was unable to do so because of war shortages.

The evidence further discloses that in the school year 1942-1943 the average transportation cost per mile was 2.9 cents for each pupil; that during the month of January, 1944, there were twelve private school pupils transported a total distance of 58 miles per day at an average cost of $1.68 per day. This average cost per day is based on the total cost of operation of the buses, including depreciation and the total number of passengers carried. Of course there would have been the same depreciation, the same wages of the operators, and the same distances traveled had there been no private school passengers. The only actual cost to the district of transportation was the small additional cost caused by the added weight in the buses. It is obvious that this could amount to only a very small fractional part of the $1.68 per day which was figured as the average daily cost of transporting the twelve private school pupils with the public school pupils in January, 1944. This actual added cost to the school district was not computed and probably could not have been computed from

the available records, but that there must have been some slight added cost is obvious. This case seems to be one where a principle is involved rather than the small amount expended by the district, so we will consider the principle, admitting that the transportation of the private school pupils cost the district something.

Before proceeding to a consideration of the question of law involved, we should observe that it is the act of the legislature that is under attack here; that this act permitted the public transportation of pupils attending Catholic schools as well as pupils attending any private school who could qualify under its terms. Thus the fact that transportation was furnished only to pupils attending a Roman Catholic School is an unimportant incident of this case and can have no bearing on its decision which would have to be the same if the school were operated by one of the Protestant denominations. Our reference to St. Anne's Parochial School as a Roman Catholic School is required because of the necessity for exactness in description under the evidence before us and should not arouse any historical or ancient prejudice in favor of or against the legislative enactment.

[2, 3] Plaintiff maintains that section 16257 of the Education Code is violative of several sections of the State Constitution and therefore an unconstitutional enactment. Our duty in determining the constitutionality of a legislative enactment is clearly set forth in People v. Standard Accident Ins. Co., 42 Cal.App.2d 409, 108 P.2d 923, 926, as follows:

"And in considering the constitutionality of the statute the question presented is not whether it is possible to condemn it, but whether it is possible to uphold it. It is not to be declared invalid, because incidental to the main purpose, there results an advantage to individuals. Patrick v. Riley, 209 Cal. 350, 287 P. 455. The legislature is vested with a large discretion in determining what is for the public good and what are public purposes for which public moneys can be rightfully expended and that discretion cannot be controlled by the courts except when its action is clearly evasive. Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L.R.A. 474, 27 Am.St.Rep. 95."

Plaintiff maintains that the section violates section 30 of Article IV and sections 8 and 4 of Article IX of the State Constitution. The question is of first impression in California on the precise facts before us. There are numerous decisions on similar questions from other states and it is interesting to note that there are strong dissenting opinions in the majority of them indicating, generally speaking, that the question is a close one upon which reasonable and able minds have disagreed.

Article IV of the Constitution deals with the Legislative Department of the State. Section 30 of that Article provides in part as follows:

"Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; * * *."

Article IX of the Constitution deals with Education. Section 8 of that Article provides in part as follows:

"No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; * * *."

It is unnecessary to quote section 4 of Article IX because it deals with funds derived from special sources which are declared to constitute and must "remain a perpetual fund" which "shall be inviolably appropriated to the support of common schools throughout the State." There is no indication in the record that any of the funds used by the Porterville School District to pay for operation of its buses came from this "perpetual fund" so the provisions of that section are not applicable here.

Defendants call attention to section 1 of Article IX of the Constitution which provides as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."

Plaintiff cites and relies upon the cases of State v. Milquet, 180 Wis. 109, 192 N.W. 392, 393; State v. Brown, 36 Del. 181, 172 A. 835; Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 118 A.L.R. 789;

Gurney v. Ferguson, 190 Okl. 254, 122 P.2d 1002; Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W.2d 963; Mitchell v. Consolidated School District, 17 Wash.2d 61, 135 P.2d 79, 146 A.L.R. 612; Everson v. Board of Education, 132 N.J.L. 98, 39 A.2d 75; State ex rel. Nevada v. Hallock, 16 Nev. 373; Jenkins v. Inhabitants of Andover, 103 Mass. 94, and Synod of Dakota v. State of South Dakota, 2 S.D. 366, 50 N.W. 632, 14 L.R.A. 418.

The foregoing cases announce what we may term the strict rule in the United States. However, New Jersey in the case of Everson v. Board of Education, 133 N. J.L. 350, 44 A.2d 353, and Kentucky in Nichols v. Henry, 191 S.W.2d 930, reversed their former positions taken in Everson v. Board of Education, 132 N.J.L. 98, 39 A.2d 75, and Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W.2d 963. The facts in some of the other cases cited are so different from those in the instant case that they furnish no direct authority here. State ex rel. Nevada v. Hallock, supra, involved a direct appropriation of money which the legislature attempted to make to a Catholic orphanage. Jenkins v. Inhabitants of Andover, supra, involved a gift of public money to rebuild a private school that had been destroyed by fire. Synod of Dakota v. State of South Dakota, supra, involved an attempt by the State to pay the tuition of students in a private Presbyterian University.

In Mitchell v. Consolidated School District, supra, the Supreme Court of Washington remarked that carrying out the mandate of the legislature to furnish transportation to pupils attending private schools would require the direct expenditure of considerable amounts of money to purchase additional buses. The Judd case involved the direct expenditure of school funds and the Constitution of New York prohibited direct and indirect aid to denominational schools, which prohibition does not appear in the California Constitution.

Counsel for defendants attempt to distinguish the cases from sister states relied upon by plaintiff, on the grounds of the different provisions of their Constitutions and statutes from those of California. While some differences exist, for the purpose of this opinion, we prefer to regard some of those cases as supporting the arguments of plaintiff.

Generally, the reasoning running through those cases in point is similar and is stated by the Court of Appeals of New York in Judd v. Board of Education, supra [278 N.Y. 200, 15 N.E.2d 582], as follows:

"The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. It not only ignores the spirit, purpose and intent of the constitutional provisions but, as well, their exact wording. The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it, and this intent is to be found in the instrument itself unless the words or expressions are ambiguous (Cooley's Constitutional Limitations, 8th Ed., pp. 124–126). There is nothing ambiguous here. The wording of the mandate is broad. Aid or support to the school 'directly or indirectly' is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language? Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' State ex rel. Traub v. Brown, 6 W. W. Harr. [181], 36 Del. 181, 172 A. 835, 837, writ of error dismissed Feb. 15, 1938, Del.Sup., 197 A. 478. Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books accommodations and other facilities are such an aid. In the instant case, $3,350 was appropriated out of public moneys solely for the transportation of the relatively few pupils at-

tending the specific school in question. If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, in view of interpretation in analogous cases it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school."

Defendants cite numerous cases from other jurisdictions. Some of them are directly in point, others are closely analogous while others seem rather unimportant. Because we believe the issues before us are settled by California cases, we will cite those other cases relied upon, with only brief comment. Board of Education v. Wheat, 174 Md. 314, 199 A. 628; Adams v. County Commissioners, 180 Md. 550, 26 A.2d 377; Everson v. Board of Education, 133 N.J.L. 350, 44 A.2d 333; Nichols v. Henry, Ky., 191 S.W.2d 930; Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655; Cochran v. Louisiana State Board of Education, 168 La. 1030, 123 So. 664; Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913; Chance v. Mississippi etc. Board, 190 Miss. 453, 200 So. 706; Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127; State ex rel. Atwood v. Johnson, 170 Wis. 251, 176 N.W. 224; Nichols v. School Directors, 93 Ill. 61, 34 Am.Rep. 160, and Cost v. Shinault, 113 Ark. 19, 166 S.W. 740, Ann.Cas.1916C, 483.

The general line of reasoning running through those cases which uphold the right of the school district to provide free transportation for school children finds its starting point in the undoubted police power of the State to promote the public welfare by aiding in practical ways the education of the young. It is generally held that the direct benefit conferred is to the children with only an incidental and immaterial benefit to the private schools; that this indirect benefit is not an appropriation of public moneys for private purposes and does not violate any constitutional provisions against giving State aid to denominational schools.

We find this comment in 51 Harvard Law Review at page 935:

"This strict rule reflects the court's insistence that the states maintain nonsectarian schools rather than delegate their educational responsibilities to subsidized private and parochial schools. Despite these arguments the fact that the highways are extremely dangerous, especially to children, should be sufficient to induce a court to hold that an effort by the state to protect all children is a valid exercise of police power. If this is the purpose of the statute providing free transportation, the children may well be considered its true beneficiaries, and any advantage received by the private and parochial schools incidental and immaterial."

In Cochran v. Louisiana State Board of Education, supra [281 U.S. 370, 50 S.Ct. 336], the Supreme Court of the United States said:

"Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

It has been the practice in many primary and secondary school districts in California to furnish free transportation at public expense to pupils attending public schools. This is expressly authorized by statute. Sec. 16251 et seq., Education Code. It has been held that this does not amount to a gift of public funds but serves a public purpose. Pasadena City H. S. Dist. v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408. It has also been held that an appropriation for a public purpose is not a gift of public funds. San Diego v. Hammond, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155.

In 1917 the legislature amended section 1613 of the Political Code and provided that school houses might be used by the public as civic centers in which community meetings could be held. Stats. 1917, p. 741. This enactment has now been amplified and further codified into Division 9, Chapter 9 of the Education Code. This use of school houses and grounds is given free (Sec. 19437, Education Code) except under certain circumstances, and the cost of lighting, heating, janitor service and other necessary expenses of such use is paid out of the school funds. Sec. 19439, Education Code. Of course this use of the school house as a civic center by the public entails the expenditure of school funds for purposes other than those directly connected with the education of children and diverts

public money raised for the support of the schools to other uses. Nevertheless the school house civic center law has been upheld. Ellis v. Board of Education, Cal., 164 P.2d 1; Goodman v. Board of Education, 48 Cal.App.2d 731, 120 P.2d 665, 669. In the Goodman case it was said:

"The objection with relation to the diversion of funds is answered by the following: 'Except in a few of the so-called extreme cases which deny the power to permit other uses of school property, the second objection (as to the diversion of moneys raised by taxation for a specified purpose, and that such moneys may not be used for private purposes) is given little consideration as being conclusive of the illegality of the use, on the theory that, where the primary purpose to be subserved is legitimate, the expenditure of moneys secured through taxation is legal notwithstanding incidental uses are made thereof for otherwise authorized purposes. Consequently the wording and import of the statutes prescribing the powers and duties of those charged with the care of school property is to a large extent determinative of whether the particular use in question will be allowed.' 86 A.L.R., p. 1195."

While these cases do not directly touch on the main question before us they do support the theory that where the main purpose of an enactment is lawful, and an incidental or immaterial benefit results to some person or organization, which benefit is not directly permitted by law, this incidental benefit alone will not defeat the legislation, its main purpose being lawful.

Raising the standard of intelligence of youth and providing for the safety of children are legitimate objects of government and are authorized under the police powers. It is also true that the transportation of pupils to and from public schools is one of the legitimate methods adopted to help promote education and safeguard children. If the transportation of pupils to and from public schools is authorized, as it certainly is, and if the benefit from that transportation is to the pupils, than an incidental benefit flowing to a denominational school from free transportation of its pupils should not be sufficient to deprive the legislature of the power to authorize a school district to transport such pupils.

In 1921 the legislature passed the Veterans' Educational Act. Stats. 1921, p. 967. This act provided, among other things, for the organization of the California Veterans Educational Institute to supervise and continue the education of those qualified veterans of World War I who might place themselves under its jurisdiction. The veteran might choose any educational institution in the State in which to enroll, subject to the provision "that private tuition schools shall be chosen only when suitable opportunity is not available in public or semipublic institutions." Among the benefits the veterans would receive from the State was "payment of transportation charges once each year from the home of the student to and from the institution of learning."

The constitutionality of this act was upheld in the case of Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531. See also, University of Southern California v. Robbins, 1 Cal.App. 2d 523, 37 P.2d 163; Robbins v. University of Southern California, 295 U.S. 738, 55 S.Ct. 650, 79 L.Ed. 1685; Allied Architects' Ass'n v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; City and County of San Francisco v. Collins, 216 Cal. 167, 13 P.2d 912.

In University of Southern California v. Robbins, supra [1 Cal.App.2d 523, 37 P.2d 164], it was said:

" 'If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court.' In re Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 274, 675, 14 L.R.A. 755, 27 Am.St.Rep. 106, Walker v. Shasta Power Co., 9 Cir., 160 F. 856, 67 C.C.A. 660, 19 L.R.A.,N.S., 725. * * *.

"The framers of our State Constitution gave recognition to the high importance of education for a self-governing people and solemnly enjoined our lawmakers in the following language: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.' Article 9, § 1. The Legislature, mindful of this duty, has enacted from time to time laws appropriately designed to make effectual this ideal, including the code section under which this action is brought. In doing so it has properly assumed the power vested in it as a body composed of duly elected representa-

tives of the citizens of this state, and has exercised a discretion which is a reasonable concomitant to the responsibility imposed upon it by the Constitution. The legal philosophy of our state with reference to education is discussed in Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678, 682, 22 A.L.R. 1531. In that case the validity of an act which provided educational aid to veterans was upheld, and the Legislature's right to devote taxpayers' money to this useful purpose was confirmed. The law had been assailed on the theory that such aid amounted to a gift of public funds and was therefore unconstitutional. The court said: 'Bearing in mind that the burden is primarily upon the state Legislature to determine whether or not the purpose served is a public purpose, and whether or not the development of the state requires the extension of education facilities and the giving of additional opportunities to different types of students, it may safely be said that the question is one for the Legislature, and that the broad general restrictions upon the state Legislature prohibiting gifts should not be held to prevent reasonable allowances made to enable students to secure the advantages of educational institutions."

[4] We may take judicial notice that there are numerous denominational schools, colleges and universities in this State. If the direct payment by the State of the transportation costs of the veteran between his home and such an institution of learning, as well as to publicly maintained schools and colleges, is not a violation of the constitutional provisions, then certainly permitting a little child to occupy a vacant seat in a school bus in order that he might attend a denominational school cannot be held to be such a violation.

It is true that the sections of the Constitution we are concerned with here were not cited in Veterans' Welfare Board v. Riley, supra, in either the main or dissenting opinions. Eminent counsel represented the parties in that case, and those counsel as well as the learned members of the Supreme Court must have been familiar with the entire Constitution. The fact that the sections here involved were not considered, especially by the dissenter, would indicate that they were considered no bar to the Veterans' Educational Act, rather than that they were overlooked in a case of such importance.

The evidence in this case shows that the parochial school children had to cross railroad tracks and travel on busy highways in going to and returning from school. The promotion of the safety of the children of the State is an important function of government, just as much so as their education. It is a well recognized function under the police powers. This is one of the reasons why the system of transportation of children to and from public schools was authorized and has been regarded lawful.

The resolution of the board of trustees of the district pertains to transportation of pupils during the school year of 1943-1944 and recites that it was passed as a war emergency measure. We are not informed whether the transportation of the pupils was continued after the year specified but assume that it was. The principal of the parochial school testified that he had attempted to buy buses for the use of the school but was unable to do so. All of this would indicate that the use of the vacant seats on the school buses by the parochial school pupils may be of short duration. Also other acts of the legislature have authorized the use of the school buses in other than strictly school functions. We have found no case in which these laws have been challenged.

When we consider the complexities of our modern life we realize that many expenditures of public money give indirect and incidental benefit to denominational schools and institutions of higher learning. Sidewalks, streets, roads, highways, sewers are furnished for the use of all citizens regardless of religious belief. No one has yet challenged the right of any law abiding citizen to travel to a school over a highway built with public funds because of his religious beliefs or because he is attending a denominational institution, yet to paraphrase the expression used in Judd v. Board of Education, supra, without roads over which pupils could reach the school there would be no school. Police and fire departments give the same protection to denominational institutions that they give to privately owned property and their expenses are paid from public funds. If St. Anne's Parochial School caught fire would the plaintiff argue that the Porterville fire department responding to the call should stand by idle until the flames spread to privately owned buildings before attempting to extinguish the conflagration because the

cost of the fire-fighting equipment and the salaries of the firemen are paid by funds raised by general taxation?

[5] In view of the broad police powers of the State to promote the educational welfare and safety of its citizens, including little children, of the broad mandate to the legislature found in section 1, Article IX of the Constitution, of the fact that the direct benefit of the legislation authorizing the transportation of pupils attending private schools flows to the children in providing for their safety and promoting their education, with only an indirect benefit to the private parochial school, and in view of the rule that requires us to resolve any doubt in favor of the constitutionality of a challenged act of the legislature, we conclude that the legislation is constitutional and is not subject to the attack made here.

The attempted appeal from the order denying the motion for new trial is dismissed. The judgment and order appealed from are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



73 Cal.App.2d 739

HAGGE v. DREW.

Civ. 15118.

District Court of Appeal, Second District, Division 3, California.

March 29, 1946.
Rehearing Denied April 26, 1946.
Hearing Denied May 27, 1946.

1. Account stated ⇐19(3)

In action on account stated, statement of account which showed money advanced by plaintiff's assignor to defendant in the total amount for which suit was brought and which was subscribed by the defendant, and testimony of assignor that nothing had been paid on the account, and failure of defendant to offer evidence to prove that the sum was not owing, warranted judgment for the plaintiff.

2. Trial ⇐397(1)

In action on note executed by tenant in favor of real estate broker negotiating lease, evidence whether broker received commission from landlord for negotiating the lease and represented to tenant when lease was made that broker was not receiving commission from landlord, required a finding by the trial court, since such evidence, if true, constituted a good defense.

3. Brokers ⇐67(2)

A real estate broker cannot lawfully collect a commission from both parties to the transaction without disclosing dual nature of his representation and obtaining consent of each principal to the payment of a commission by the other.

4. Bills and notes ⇐452(4)

A tenant sued on note executed in favor of real estate broker negotiating lease could raise defense that broker had collected commission from landlord without making any disclosure thereof to tenant, notwithstanding that broker had assigned note to plaintiff and that note was negotiable in form, in absence of showing that plaintiff was a holder in due course.

5. Bills and notes ⇐519

Evidence that $16,875 note representing profits to be derived from real estate transaction was payable only in accordance with terms of agreement which provided that the profits were to be paid as they accumulated, and that note and agreement constituted a single contract, and that only $4,300 of profits had become due and payable, was insufficient to sustain judgment for the full amount of $16,875.

6. Money received ⇐18(3)

In action to recover sum of money allegedly advanced and paid out for use and benefit of defendant at defendant's special instance and request, evidence that plaintiff's assignor had advanced such sum to defendant at defendant's request and that no part thereof had been repaid, warranted judgment in favor of plaintiff.

7. Assignments ⇐137
Bills and notes ⇐523

Evidence was sufficient to show that notes and accounts sued on had been assigned to plaintiff prior to commencement of action.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by H. H. Hagge against John Drew on an account stated, on promissory notes and to recover money allegedly ad-

vanced and paid out for the use and benefit of defendant at defendant's special instance and request. From the judgment and from an order denying a new trial, the defendant appeals.

Partly affirmed, partly reversed and remanded, and attempted appeal from order denying new trial dismissed.

Samuel De Groot and Aaron Sapiro, both of Los Angeles, for appellant.

Buel R. Wood, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff, as assignee of J. A. Charlesworth, recovered judgment against defendant John Drew, as follows: $3,000 upon an account stated; $4,300 upon a promissory note, together with $498.08 as attorney's fees; also $16,875 on a promissory note, together with $1,897.61 attorney's fees; also $1,347 on account of moneys advanced and paid out for the use and benefit of defendant, at his special instance and request. Interest also was awarded on the various sums, and the judgment was for $30,699.62. Defendant appeals.

J. A. Charlesworth was a real estate broker. His services were engaged by defendant in connection with two of defendant's enterprises. One of these was the sale of acreage in the San Fernando Valley in Los Angeles County to H. H. Hagge, plaintiff herein. Plaintiff, however, in the present action is interested, so far as shown, only as the holder of the obligations for collection. The second transaction was one in which defendant leased from the Lankershim Estate some beach frontage on the Roosevelt Highway, where he operated what is known as the Variety Beach Club.

[1] The indebtedness evidenced by the account sued on in the first cause of action arose out of advances made by Charlesworth in connection with the beach club venture, and consisted of sums advanced for defendant's liquor license, payment of rent and other bills. Plaintiff introduced in evidence a statement of account showing moneys advanced by Charlesworth in the total amount of $3,000 for which suit was brought. This statement was subscribed by the defendant under the name of J. Drew. Charlesworth testified that nothing had been paid on the account, and defendant offered no evidence to prove that the sum was not owing, with interest.

[2-4] The promissory note for $5,000 which was the subject of the second cause of action was executed by defendant in consideration of the services of Charlesworth in negotiating a lease of the beach club property from the Lankershim Estate. It was dated January 23, 1942, was payable at the rate of $100 per month, commencing May 1, 1942, and bore five percent interest. It provided that the unpaid principal and interest should become immediately due and payable, at the option of the holder of the note, in case of default in the payment of any installment when due, and it also provided for attorney's fees in case of suit. $700 was paid on account of this note and the testimony of Charlesworth was that no further sum had been paid. No evidence was offered by the defendant except as to this second cause of action. The answer pleaded, and the proof established, that Charlesworth received a commission from the Lankershim Estate Company for negotiating the lease with defendant. The answer further alleged that Charlesworth represented to defendant at the time the lease was made that he was not receiving a commission from Lankershim Estate Company. Defendant testified that Charlesworth had made that representation, that he believed and relied upon it, and otherwise would not have paid a commission to Charlesworth, and he testified further that he did not learn that the Lankershim Estate had paid Charlesworth a commission until December, 1943, at which time he refused to make any further payments on the note. Charlesworth testified that he told defendant he was receiving a commission from the Lankershim Company but he did not testify, and there was no evidence, as to when he imparted that information, or that it was prior to, or at the time of, the execution of the note. The court made no finding upon this defense. The absence of a finding is fatal to the judgment for plaintiff on the second cause of action. In view of the evidence, a finding upon this issue would not necessarily have been made in favor of plaintiff. Charlesworth could not lawfully collect a commission from both parties to the lease transaction without disclosing the dual nature of his representation and obtaining the consent of each principal to the payment of a commission by the other. Glenn v. Rice, 174 Cal. 269, 162 P. 1020;

1 Cal.Jur. p. 810, sec. 95. The note was negotiable in form, but plaintiff was not shown to be a holder in due course.

The $16,875 note was given by Drew in connection with a real estate transaction in which he and Charlesworth were interested together. A consideration of the relations of the parties in that transaction is of assistance in determining the question of liability under the note. The references to this real estate venture found in the briefs and in the transcript in the present case shed little, if any, light upon the background of the note transaction. We have looked to the opinion on the former appeal, Hagge v. Drew, Cal., 165 P.2d 461, which states the pertinent facts as to the association of Charlesworth and Drew in that transaction. Drew purchased a tract of land from the estate in bankruptcy of F. W. Newport Company for $87,135, and he enlisted the services of Charlesworth to assist him in finding a purchaser for the land, in order that the same might be subdivided and sold for residential purposes. Charlesworth contacted H. H. Hagge, plaintiff herein, and Hagge entered into an agreement with defendant to purchase the land for $174,270 under a plan of subdivision. The evidence in the present case as to the transaction between Drew and Charlesworth is introduced by the production of an agreement between the two, dated March 4, 1942, which was a few days before the deed of the trustee in bankruptcy to Drew, and a trust deed which Drew executed in connection with the purchase, were recorded. The agreement recites that Drew (the party of the first part) is acquiring 140 acres of land in North Hollywood, at a price of $625 per acre, and has contracted to sell the same to Hagge; that there was established by the Hagge agreement an apparent gross profit of $87,135, which would be derived at the rate of $125 for each lot released and transferred under the Hagge contract; that Charlesworth (the party of the second part) had rendered services and would render further services and had also rendered financial assistance to Drew, and it recited, "Whereas, it is the desire of the first party, in the event that the aforementioned sale to H. H. Hagge is consummated, to pay to the second party, a sum equal to Twenty-five per cent (25%) of the aforementioned, anticipated profits after certain enumerated deductions have been taken." It further read: "It is therefore mutually covenanted and agreed by and between the parties hereto as follows: In consideration of the sum of Ten Dollars ($10.00) by the second party paid to the first party, receipt of which is hereby acknowledged, and other good and valuable consideration, the first party agrees to pay to the second party a sum of money equal to Twenty-five per cent (25%) of the profits, said profits to be computed upon the actual residential lots released to the said H. H. Hagge after the following deductions, expenditures and expenses have been deducted from the established or apparent gross profit of Eighty-seven Thousand One Hundred and Thirty-five ($87,135.00) Dollars." The agreement then provided for the payment of sums amounting to $19,635, some of which was to go to Charlesworth, some to Drew, and the remainder for other purposes, and it provided:

"(c) It is further agreed by and between the parties hereto that upon completion of the entire transaction and release of all of the said residential lots to the said H. H. Hagge and after deduction of the aforementioned deductions, listed hereinabove, there will remain an undivided profit in the amount of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars.

"(d) It is further agreed by and between the parties hereto that the second party herein shall receive Twenty-five per cent (25%) of the aforementioned sum hereinabove.

"2. The first party hereby agrees and by these presents does agree to execute in favor of the second party, one (1) promissory note, in the sum of Sixteen Thousand Eight Hundred and Seventy-five Dollars ($16,875.00).

"The parties hereto further agree that the said promissory note shall be earmarked as part of this agreement." The payments above noted, which would reduce the gross profits to $67,500, were to be made from sums received from Hagge, and in addition thereto $150 was to be paid to the Security-First National Bank for the release of each lot from the lien of a trust deed. There was a provision for the application of a percentage of the receipts to the payment of certain sums which Charlesworth and Drew were to receive from the gross profits before the $67,500 was divided, but this provision is not ma-

terial here. It has no connection with the $16,875 note. Following this provision, the agreement provided:

"4. It is further agreed by and between the parties hereto that when the said Security First National Bank shall have been paid in full for all of the aforementioned lots, that the percentages hereinabove stated, shall be increased in the following manner, to-wit:

"Twenty-five per cent (25%) to the second party and Twenty-five per cent (25%) to the first party.

"5. It is further agreed by and between the parties hereto that any funds remaining in the Bank of America after all expenses have been paid, with reference to the Seven Thousand One Hundred and Thirty-five ($7,135.00) Dollars, shall be equally distributed by and between the parties hereto, Twenty-five per cent (25%) to the first party, and Twenty-five per cent to the second party.

"6. It is further agreed by and between the parties hereto that any and all funds remaining after the aforementioned promissory note is paid and the other aforementioned sums are paid, Twenty-five per cent (25%) of such funds shall be paid to the second party herein."

On the date of the agreement, defendant and Florence Drew executed to Charlesworth their promissory note, by which they agreed to pay six months after date $16,875 "as per agreement of even date." There is not the slightest doubt that this note is the one referred to in the agreement and that the agreement which we have been discussing is the one referred to in the note. In addition to the instruments, there was other evidence to this effect. There was no evidence of any other transaction between the parties involving any such note.

[5] The answer alleged that the note was payable only in accordance with the contract, that the sum of approximately $4,300, and no more, had become due and payable under the note, and that that sum had been paid to the payee, Charlesworth, during the month of August, 1942. The finding as to this defense was as follows: "That it is not true that the said promissory note was subject to a contract. That it is not true that only the sum of $4300 has become due and payable thereunder," etc. This finding has no support in the evidence. It is clear that the agreement and the note constituted a single contract and that the note was payable only in accordance with the terms of the agreement. Plaintiff's rights were limited by the contract and he had no right to recover thereunder more than his percentage of profits as they accumulated. Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65; Stern v. Franks, 35 Cal.App.2d 676, 96 P.2d 802; Martin v. Martin, 5 Cal.App.2d 591, 43 P.2d 314; Miles v. McFarlane, 104 Cal.App. 513, 286 P. 507; Clarey v. Security Portland C. Co. Inc., 99 Cal.App. 783, 279 P. 483; Congdon v. Chapman, 63 Cal. 357; Warman Steel Casting Co. v. Redondo Beach C. of C., 34 Cal.App. 37, 166 P. 856; 17 C.J.S., Contracts, § 456, p. 939. So far as shown by the record, no profits were realized in excess of those which were divided in accordance with the agreement. There was no evidence that any more than the sum of $4,300 had become due and payable on the note, according to the terms of the agreement. There was no finding to the effect that any sum had fallen due according to the terms of the agreement in excess of $4,300. Manifestly, the judgment on the third cause of action for $16,875, attorney's fees and interest is based upon a material finding which is contrary to all of the evidence on the subject. As to that cause of action the judgment must be reversed.

[6] On the fourth cause of action, the finding was that Charlesworth had advanced to defendant the sum of $1,346, at defendant's special instance and request, and that no part of the same had been repaid. The judgment on that count was for $1,347. There was ample evidence to support the finding.

[7] It is contended with reference to all of the causes of action that there was no evidence that the notes and accounts had been assigned to plaintiff prior to the institution of the action. There was no evidence of a written assignment and there was but a minimum of evidence as to an oral assignment. Charlesworth was asked the question: "Prior to the commencement of this action, what did you do, if anything, with the account? A. I assigned this account to Mr. H. H. Hagge." This had reference to the account stated of $3,000. Cross-examination developed that the witness was unable to state when the assignment was made, but he did say that it was some time in the beginning of 1944. He

was also asked the question on cross-examination: "Everything was assigned at one time? A. I think so. Q. Without any documents in writing at all? A. That's right." We are of the opinion that this testimony of the assignor was sufficient to support the finding which the court made that the notes and accounts were assigned to plaintiff prior to the commencement of the action.

The judgment is affirmed as to the first and fourth causes of action, and is reversed and remanded for a new trial as to the second and third causes of action. The attempted appeal from the order denying a new trial is dismissed. Appellant will recover costs.

DESMOND, P. J., and WOOD, J., concur.



73 Cal.App.2d 681

PEOPLE v. SALO.

Cr. 3940

District Court of Appeal, Second District, Division 3, California.

March 27, 1946.

1. Receiving stolen goods ⇐8(3)

Evidence warranted conviction of defendant for receiving stolen property consisting of tires which police found in storeroom of liquor store which belonged to defendant's sister and in which defendant worked.

2. Criminal law ⇐742(1)

In a trial without a jury, credibility of witnesses was for determination of trial judge.

3. Criminal law ⇐1171(1)

In prosecution for receiving stolen tires, the asking of question by district attorney and the trial judge's direction that defendant answer the question as to where defendant's brother-in-law lived was not prejudicial misconduct under circumstances, notwithstanding that answer revealed that brother-in-law was in penitentiary.

4. Criminal law ⇐254

In a trial without a jury, trial judge's statement, made after submission of case to trial judge for decision, that accused and his witnesses could not have helped the court any better if they had prefaced each one of their answers with the comment "I am lying" was not an improper expression of opinion as to credibility of the witnesses.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Thomas Richard Salo was convicted for receiving stolen property, and he appeals.

Affirmed.

Paul Angelillo, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was accused of the crimes of burglary and receiving stolen property. In a trial without a jury, he was acquitted of the charge of burglary and convicted of receiving stolen property. He appeals from the judgment of conviction and the order denying his motion for a new trial, and asserts that the evidence was insufficient and that there was misconduct on the part of the district attorney and the court.

On January 27, 1944, eleven new automobile tires were stolen from a gasoline service station in Los Angeles. On February 3, 1945, three police officers and three officers of the State narcotic bureau, in the presence of defendant, searched a liquor store at 861 East Jefferson Boulevard, Los Angeles, which was owned by defendant's sister, and operated by her with the assistance of defendant. The salesroom of the store was at the front of the building. Adjoining the back of that room was a storeroom, and back of the storeroom a bedroom. After they had searched the bedroom where there was "a lot of new merchandise," new clothes and bed linen, and while they were talking to defendant about that merchandise and were searching the storeroom, one of the officers, who was on top of a stack of beer cases, said there were tires back of the beer cases. Thereupon the defendant said, according

to the testimony of one of the officers, "'Those tires are hot; that is the only thing that is hot here; the rest of that stuff my sister bought and paid for.'" The beer cases were stacked about nine feet high and so arranged that, in order to get the tires, it was necessary to climb over the stack of beer cases. One of the officers did so and found six automobile tires, four of which were new tires that had been stolen from the service station.

An officer testified that he asked defendant where he got the tires, and defendant said he got them "'from a fellow named George, a colored boy,'" who came along driving a Firestone truck, and who asked defendant if he could use some tires. The officer testified further that defendant said that he paid $10 or $12 apiece for the tires; that he had had them about a year; that he knew they were hot, and that was the reason he hid them back of the beer cases; and that he ran the store for his sister most of the time. The officers of the narcotic bureau arrested defendant on February 3rd, and when all had left the store defendant locked it with his keys. He was arrested by the police officers on the charge herein on February 5th.

Another police officer testified that on February 5th defendant said he bought the tires as "recaps" about two months previously, and that he did not know the difference between new tires and recaps. He testified further that after the officers had taken defendant to his father's house where defendant lived, had made a search there, and had left, they asked defendant about the burglary, and defendant said, "'There wasn't no burglary, I did not go in the station,—after all, you got the man you want why bother my family, they know nothing about this.'"

Defendant testified that in December, 1944, he was standing in front of a pool hall talking to a fellow about tires, and a colored fellow by the name of George, whom he had never seen before, came up and told defendant that he could get tires for him, that he worked for the Firestone Company, that the tires were recapped and it was not necessary to have a priority; that he told the fellow he would like to have some recapped tires; that defendant did not know the size of the tires used on his automobile, but the fellow looked at his automobile, said he would bring the tires that afternoon, and that the price would not be more than $10 each; that defendant told the fellow his name, where he worked, and that he would meet him at the pool hall when he returned with the tires; that the fellow then drove away in a Firestone truck, returned later, and said it would be "a couple of days" before he could get the tires; that "a couple of days" later, accompanied by another man, he came to the liquor store in a Firestone truck, rolled six tires into the storeroom and placed them against the wall; that defendant paid him $60 cash for the tires, but did not get a bill of sale, nor the fellow's surname, nor the license number of his truck; that defendant had no automobile, but the automobile for which he bought the tires was a 1940 model belonging to his brother-in-law who had been in the penitentiary since 1939; that his brother-in-law bought the automobile after he was in the penitentiary; that the tires on the automobile were not in "too good a condition"; that the reason he did not put the tires on the automobile was that he did not have time to do it; that he did not know whether the tires would fit the automobile; that the reason the tires could not be seen was that the store gets "an awful lot" of beer, and as it came in he "would just stack it up there" in front of the tires which were against the wall; that he did not say that the tires were "hot."

Two witnesses called on behalf of defendant testified that they were present when the tires were delivered, and they heard the fellow who delivered them say that the price was $60.

[1, 2] The evidence was sufficient to support the judgment. The credibility of the witnesses was for the determination of the trial judge. He stated at the close of the trial that he did not believe the testimony of the defendant and his witnesses.

[3, 4] Appellant asserts that the district attorney was guilty of prejudicial misconduct because he asked defendant where his brother-in-law, the owner of the automobile for which defendant said he bought the tires, lived. His argument is that the question was designed to bring out that appellant was related to a bad person, the brother-in-law being in the penitentiary. On several occasions in his testimony, the defendant had referred to the automobile, for which he said he bought the tires, as "my" automobile. It having appeared later in his testimony that he did not own an automobile, it was the privilege

of the district attorney, as a test of the veracity of the defendant, to inquire concerning the name and whereabouts of the owner of the automobile and his availability as a witness. Although the answer to such inquiry revealed that the owner, the defendant's brother-in-law, was in the penitentiary, it was not misconduct to make the inquiry. The trial was without a jury, and there is no foundation for asserting in effect that the trial judge was influenced improperly by such testimony. The assertion that there was misconduct on the part of the trial judge because he directed the defendant to answer such inquiry is also without merit. Appellant refers to a certain comment by the trial judge as constituting an attack on the credibility of the witnesses for the defense. The comment was in part that, "The witnesses [referring to defendant and his witnesses] could not have helped the Court any better if they had prefaced each one of their answers with the comment 'I am lying' * * *." That statement was made after the case was submitted to the trial judge for decision, and it was not improper for him to express his opinion as to the credibility of the witnesses.

The judgment and the order denying the motion for a new trial are affirmed.

DESMOND, P. J., and SHINN, J., concur.



73 Cal.App.2d 685

PEOPLE v. SALO.

Cr. 3941.

District Court of Appeal, Second District, Division 3, California.

March 27, 1946.

1. Poisons ⇐9

Evidence that defendant rented liquor store premises for his sister, that he frequently stayed at store all night, and that on many occasions he was in sole charge of store, warranted conviction of defendant for unlawful possession of marihuana which was found in liquor store when defendant was in sole charge thereof. Health and Safety Code, § 11160.

2. Criminal law ⇐706

In prosecution for unlawful possession of marihuana, the district attorney's cross-examination of defendant's sister, in whose liquor store the marihuana was found, as to whether sister knew that officers found four new automobile tires in store, was not misconduct in view of sister's testimony that customers left things in store. Health and Safety Code, § 11160.

3. Criminal law ⇐706

In prosecution for unlawful possession of marihuana found in liquor store at a time when defendant was in sole charge thereof, district attorney's question whether officer was referring to a certain exhibit for identification when officer said the bag was found on negro in parked automobile, and officer's affirmative answer and further statement that defendant was told that some of the 39 bags containing marihuana found in store had the same number as that appearing on bag containing marihuana found in possession of negro, was not misconduct. Health and Safety Code, § 11160.

4. Criminal law ⇐713

In prosecution for unlawful possession of marihuana, wherein defendant's counsel read from transcript of preliminary examination while cross-examining a witness and deputy district attorney on redirect examination asked witness to read earlier portion of the transcript, deputy district attorney's statement in response to counsel's question whether deputy district attorney was going to impeach his own witness, that "I am going to impeach your integrity in trying to mislead the jury", was not misconduct. Health and Safety Code, § 11160.

5. Criminal law ⇐706

In prosecution for unlawful possession of marihuana, district attorney's questions whether witness knew market value of marihuana and how many marihuana cigarettes could be made from one or one and one-half ounces of marihuana, and deputy district attorney's statement, when trial court sustained objections to questions, that the purpose of questions was to show the improbability of anyone leaving a package of that value in the store in which defendant worked and in which the mari-

huana was found, was not misconduct. Health and Safety Code, § 11160.

6. Criminal law ⇐655(1)

Statements made by trial judge to defendant's counsel did not indicate a failure to protect defendant's rights where such statements were made by the trial judge in directing an orderly course of the trial.

7. Criminal law ⇐404(4)
Poisons ⇐9

In prosecution for unlawful possession of marihuana found in liquor store at a time when defendant was in sole charge thereof, bag of marihuana which had been in automobile of person who had just come from store, and which had the same six-digit number that appeared on some of the bags of marihuana found in the store, was admissible in evidence, and the weight to be given to bag as evidence was for jury. Health and Safety Code, § 11160.

8. Criminal law ⇐404(4)

In prosecution for unlawful possession of marihuana, debris taken from pocket of defendant's jacket and subjected to chemical analysis and found to contain a trace of marihuana was admissible. Health and Safety Code, § 11160.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Thomas Richard Salo was convicted for unlawful possession of flowering tops and leaves of Indian Hemp or marihuana, and he appeals.

Affirmed.

Paul Angelillo, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was convicted, in a jury trial, of the crime of violation of Section 11160 of the Health and Safety Code, a felony, in that on February 3, 1945, he unlawfully had in his possession flowering tops and leaves of Indian Hemp (cannabis sativa). He appeals from the judgment and the order denying his motion for a new trial. He contends that the evidence was insufficient, that there was misconduct by the district attorney, that the court did not protect his rights, and that certain evidence was received erroneously.

On February 3, 1945, about 12:30 p. m., two officers from the State narcotic bureau, who were in a parked automobile across the street from a liquor store at 861 East Jefferson Boulevard, observed the defendant, on several occasions while they were there, step out of the store, look around and step back into the store. The officers returned about 2:30 p.m., accompanied by three other officers, and parked their automobile about a block from the store and remained therein. Soon thereafter an automobile, in which there were two negro men, was parked in front of the officers' automobile about 100 feet from the store. When one of those men went into the store, officer Beckner also entered and saw defendant back of the counter, near the cash register, talking to the man. After being in the store about two minutes, the officer returned to his automobile. When the man, who had gone into the store, returned to his automobile and was about to drive away, officer Beckner drove his automobile alongside the other automobile and stopped. Then officers Rappattoni and Duede went to the other automobile, and when officer Duede opened the right front door thereof, a paper bag containing an ounce or an ounce and a half of marihuana fell upon the running board. The five officers then took the two men into the store, and conducted a search of the premises in the presence of defendant, the only other person in the store. The salesroom of the store was at the front of the building. Adjoining that room and back of it there was a storeroom. A bedroom and kitchen adjoined the rear of the storeroom. In the storeroom, on top of a stack of beer cases, extending about to the ceiling, officer Beckner found a Blue Ribbon beer carton in which there was a large paper bag containing 39 small paper bags in each of which there was an ounce or an ounce and a half of marihuana. On the bottoms of many of the 39 bags there was a stamped number, "021155," which same number was also on the bottom of the bag of marihuana which fell upon the running board of the automobile when the right front door was opened.

Officer Beckner testified that when he told defendant they were going to search for marihuana defendant said that none was there; that after it was found the officer said to him, "Isn't this marihuana?"

and he said "Yes"—that a negro man had come in Wednesday and asked him to keep it until he returned; that later defendant said that a negro man and a Mexican boy brought it in, that he did not know their names, but he knew who they were. He also testified that defendant said that he knew it was marihuana and that is why he hid it; that his sister owned the store; that he rented the place for her; and that he frequently stayed there all night.

Officer Rappattoni testified that, at the police station in the presence of defendant and others, he turned the pockets of defendant's leather jacket inside out, gathered the debris from them on a piece of paper, placed the paper and its contents in a sealed envelope, marked the envelope "Debris from Salo," and delivered it to the property clerk of the police department.

It was stipulated that a police officer, assigned to the investigation bureau as a chemist, whose duties included the analysis of samples to determine whether they contained marihuana, was qualified to testify as a chemist. He testified that the material in the 39 bags was Indian hemp or cannabis sativa, commonly known as marihuana; that the material in the envelope, marked "Debris from Salo," consisted of a trace of marihuana and a combination of lint and material that is commonly found in a pocket; and that the material in the bag, which fell on the running board when officer Duede opened the automobile door, was cannabis sativa.

Defendant testified that he helped occasionally in the liquor store, but he had no management or control therein; that on Wednesday, preceding the Saturday when he was arrested, he was in the store while his sister, the owner of the store, was away, and at that time a Mexican and a colored boy came in, made a purchase, and the Mexican asked him if he would do him a favor by keeping a box of laundry, which he had under his arm, until Saturday, because they were going to Central Avenue; that he replied that he would do so with the understanding that they would return for it; that they left the box, which was a Blue Ribbon beer carton, and defendant put it on top of the beer cases in the storeroom; that those persons had been in the store on different occasions, but he did not know their names, other than knowing the Mexican by the name of Chuck; that he had not seen them since that day; that on February 3rd (Saturday) a colored boy by the name Bradley (the driver of the automobile that was parked in front of the officers' automobile) came in the store to buy beer, but did not get any; that while he was there a person (officer Rappattoni) came in and asked for cigarettes, but did not get any; that when officer Beckner came in later and asked him about marihuana, defendant said he did not know anything about it; that the officers searched the store, found the box which had been left there, and officer Beckner put it on the floor and said, "that is good old marihuana"; that defendant said, "I don't know anything about it"; that he did not say that he knew it was marihuana; that the officers took him to the police station and searched the pockets of his jacket; that he never used marihuana and never had any in his pocket; that he told officers Duede and Rappattoni that the persons who left the box with him told him it was laundry, and he thought all the time that laundry was in that box; that he had kept packages on many occasions to accommodate customers of the store and customers of a clothes cleaning shop which was next door; and that there were many cartons of Blue Ribbon beer in the store.

Two witnesses, called on behalf of defendant, testified that they were in the liquor store on Wednesday when a colored boy and a Mexican man, carrying a Blue Ribbon beer box under his arm, came into the store; that the Mexican asked defendant if he would keep the box containing his laundry until Saturday, when he would return and pick it up; that defendant said he would keep it, and he took the box and put it in the storeroom.

Defendant's sister testified that she was the owner and manager of the liquor store, and had been such about eight years; that she did not employ or pay defendant, but he stayed there at times when she was away temporarily from the store; that she was away from the store during the afternoon of February 3rd, and defendant was taking care of the store at that time; that it was a custom of the store to keep packages for its customers and for the cleaning shop next door; that she had never seen the box in which the marihuana was found; that, as far as she knew, no one in the store had had any marihuana; that her store sold Blue Ribbon beer, and it was delivered to the store in boxes of the same kind as that in which the marihuana was found; and that defendant did not live at the store,

but lived at their father's house on Hoover Avenue.

Officers Beckner and Rappattoni testified, in rebuttal, that defendant had never said to either of them or in their presence that he was under the impression that the box which was left by the Mexican was a box of laundry; and that the first time they had heard about the laundry was when the defendant testified at the trial.

[1] Appellant's argument, in support of his contention that the evidence was insufficient to sustain the conviction, is in part that the evidence did not show he was the owner, lessee, or tenant of the premises, or that he used it or considered it his home. There was evidence that he rented the place for his sister, that he frequently stayed there all night, and that on many occasions he was in sole charge of the store. Even though he may not have occupied the premises in any of the capacities referred to by appellant, the circumstances as to his occupancy thereof and all the other circumstances, as shown by the evidence, were sufficient to support the judgment.

[2] Appellant asserts misconduct on the part of the district attorney in that during his cross-examination of defendant's sister he asked her if she knew that the officers found four new automobile tires in her store. The trial judge overruled defendant's objection to the question, stating that the question was proper in view of her testimony that customers left things there. The charge of misconduct is not sustained.

[3] It is asserted further that there was misconduct by the district attorney by reason of the fact he asked an officer, who was testifying, if he was referring to a certain exhibit for identification when he said the bag was found on the negro who was in the parked automobile. The officer answered in the affirmative, and said further that it was pointed out to defendant that some of the 39 bags found in the store had the same number on them that appeared on the bag found in the possession of that man. His argument is that the question and answer injected extraneous matter into the proceeding. The charge of misconduct is not sustained.

[4] He also contends that the district attorney was guilty of further misconduct. While counsel for defendant was cross-examining a witness, she read from a transcript of the preliminary examination. The deputy district attorney, upon redirect examination, asked the witness to read a few questions in advance of the part read by counsel for defendant. Thereupon counsel for defendant asked him if he was going to impeach his own witness, and he replied: "I am going to impeach your integrity in trying to mislead the jury." A recital of the questions and answers read by each counsel, relative to the point then under consideration, would unnecessarily extend this opinion. Under the circumstances here, it appears that the statement did not constitute misconduct.

[5] He asserts further misconduct in that the district attorney asked a witness if he knew the market value of marihuana, and if he knew how many marihuana cigarettes could be made from an ounce or an ounce and a half of marihuana. The court sustained objections to those questions. The deputy district attorney stated that the purpose of the questions was to show the improbability of anyone leaving a package of that value there. The charge of misconduct is not sustained.

Furthermore, with respect to the above contentions as to misconduct, counsel for defendant did not assign the statements as misconduct or ask the court to instruct the jury to disregard them.

[6] Appellant asserts that the court did not protect his rights in four instances, as follows: (1) When the court stated to his counsel that she should not have taken defendant's jacket, an exhibit in the case, out of the courtroom during the noon recess. (2) When the court stated to his counsel that she should proceed in the regular manner to prove what a witness said at the preliminary examination, the deputy district attorney having refused to stipulate that a certain part of the transcript was correct. (3) When the court told his counsel to direct her question to the witness and "never mind addressing the jury." (4) When the court said that a certain question asked by counsel for defendant was not proper cross-examination. It appears that such statements were made by the trial judge in directing an orderly course of the trial, and they do not indicate a failure to protect defendant's rights.

[7] He also contends that it was error to receive in evidence the bag of marihuana which fell on the running board of the automobile, as above stated. That bag, which had been in the automobile of the person who had just come from the store,

had the same six-digits number on it that appeared on some of the 39 bags found in the store. The bag was admissible, and the weight to be given it as evidence was for the jury to determine.

[8] The further contention of appellant that the debris taken from defendant's jacket should not have been received in evidence is not sustained.

The judgment and order denying the motion for a new trial are affirmed.

DESMOND, P. J., and SHINN, J., concur.



73 Cal.App.2d Supp. 979

ERTMAN v. BLUMENTHAL et al.

Civ. 1724.

Appellate Department, Superior Court, San Francisco, California.

Dec. 20, 1945

1. Courts ⇐190

Before effective date of new Rules on Appeal from Municipal Courts, defendants, granted new trial by such court after judgment for plaintiff, were bound to move in trial court for termination of proceedings and to show that they served on plaintiff or filed notice of order granting new trial, as required by statute, and that plaintiff, appealing from order, did not file and serve on defendants his proposed bill of exceptions within statutory time, in order to prevail on their motion to dismiss appeal. Code Civ. Proc. § 953d; Rules on Appeal from Municipal Courts in Civil Cases.

2. Courts ⇐190(4)

Defendants, granted new trial by municipal court order after judgment for plaintiff, were required by statute, before effective date of new Rules on Appeal from Municipal Courts, to give plaintiff notice of such order before time for preparation and filing of plaintiff's proposed bill of exceptions on appeal therefrom began to run, though plaintiff had actual notice of order. Code Civ.Proc. § 953d; Rules on Appeal from Municipal Courts in Civil Cases.

3. Courts ⇐190(4)

Defendants' failure to serve on plaintiff or file notice of municipal court order granting defendants a new trial after judgment for plaintiff and to move for termination of proceedings in such court, before effective date of new Rules on Appeal from Municipal Courts, excused plaintiff from laches in prosecuting appeal from such order. Code Civ.Proc. § 953d; Rules on Appeal from Municipal Courts in Civil Cases.

4. Courts ⇐190(4)

Defendants, granted new trial by municipal court order after judgment for plaintiff prior to effective date of new Rules on Appeal from Municipal Courts, owed duty to terminate proceedings therein in order to start running of time for plaintiff to prepare and file his proposed bill of exceptions on appeal from such order. Rules on Appeal from Municipal Courts in Civil Cases.

5. Courts ⇐190(4)

Plaintiff's appeal from municipal court order granting defendants new trial after judgment for plaintiff was not barred by laches, in absence of showing that municipal court clerk ever notified plaintiff of filing of such order, regardless of whether new Rules on Appeal from Municipal Courts required service of notice of order by defendants on plaintiff to start running of time for preparation and filing of plaintiff's bill of exceptions. Code Civ.Proc. § 953d; Rules on Appeal from Municipal Courts in Civil Cases, rule 3a.

6. Courts ⇐190

A motion by defendants to terminate proceedings in municipal court was necessary before dismissal of plaintiff's appeal from such court's order granting defendants a new trial after judgment for plaintiff as against contention that no proceedings for a record were pending, where record showed that plaintiff procured court order extending time to file bill of exceptions and did not show that time was not extended by stipulation or court order before effective date of new Rules on Appeal from municipal courts. Rules on Appeal from Municipal Courts in Civil Cases.

Appeal from Municipal Court of City and County of San Francisco.

Action for damages by Fred H. Ertman against Harry Blumenthal and others. From an order granting defendants a new trial after a judgment for plaintiff, plaintiff appeals. On defendants' motion to dismiss the appeal.

Motion denied.

Abraham Setzer, of San Francisco, for appellant.

Morris Oppenheim and Henry Robinson, both of San Francisco, for respondents.

CONLAN, Judge pro tem.

This matter is a motion to dismiss the appeal of the plaintiff from an order of the municipal court granting a new trial.

It was noticed for hearing before this appellate department of the superior court on August 17th, 1945, and is made upon two grounds, viz.:

1. That appellant has been guilty of gross laches in the prosecution of the appeal; and

2. That appellant by his laches and conduct has abandoned the appeal.

The record shows that the judgment was entered in favor of the plaintiff on August 19th, 1943, for $1,500 damages and $176.45 costs and that on August 26th, 1943, defendants filed notice of intention to move for a new trial. Thereafter and on the 14th day of October, 1943, Judge Kaufman made an order granting the motion of defendants for a new trial upon the insufficiency of the evidence unless, within ten days from October 14th, 1943, plaintiff should file a written consent to a reduction of the verdict and judgment to $750. Plaintiff never filed any consent to said reduction. On November 13th, 1943, the plaintiff filed a notice of appeal from the order granting a new trial.

It appears from the record in the municipal court that plaintiff on December 3d, 1943, had his time to file his proposed bill of exceptions extended by order of the trial court to January 2d, 1944.

It does not appear from the record that defendants ever served on the plaintiff or filed a notice of the granting of the motion for a new trial (which is the order herein appealed from) as provided for in section 953d of the Code of Civil Procedure.

It does not appear from the record that the defendants at any time ever took any steps in the trial court to terminate proceedings before or after making this motion to dismiss the appeal

[1] We are of the opinion that prior to September 15th, 1945, it was the duty of the defendants and respondents to make a motion in the trial court to terminate proceedings and show in the trial court that the defendants had complied with the provisions of section 953d of the Code of Civil Procedure, and, that the plaintiff had not within the time provided by law filed and served upon the defendants and respondents his proposed bill of exceptions.

In this regard we refer to the case of Corporation of America v. Abrams, 168 P. 2d 74 (opinions by Dooling, pro tem, judge, filed January 4, 1939), numbers 1260 and 1261 of the Appellate Department of the Superior Court in and for the City and County of San Francisco. Judge Dooling, in his opinions, discusses many cases on this point and particularly the case of Curtin v. Ingle, 155 Cal. 53, 99 P. 480.

[2] With reference to the point discussed on argument of the instant appeal, i. e.: did the appellant have sufficient legal notice that a judgment has been rendered against him when he appealed from the same, we are of the opinion that, while it cannot be argued that he did not have actual notice that a judgment has been rendered against him, the law then required that notice be given him as provided in the Code of Civil Procedure (sec. 953d) before the time began to run against him to prepare and file his proposed bill of exceptions.

Section 953d of the Code of Civil Procedure reads as follows:

"953d. (Notice of entry of judgment or order.) Any notice of entry of judgment, or of order granting or denying a motion for a new trial, required by the provisions of section 650, section 659 or section 953a of this code must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes."

In this regard defendants and respondents urge the point that plaintiff and appellant had actual notice of the order granting the new trial and that such notice appears in the proceedings for an alterna-

tive writ of mandate which is stated in the opinion in the case of Ertman v. Municipal Court, 68 Cal.App.2d 143, 155 P.2d 908, 156 P.2d 940.

There can be no question but that plaintiff and appellant herein had actual notice of the order granting the new trial, and, it so appears in the proceedings in Ertman v. Municipal Court, supra, as well as by the fact that he (plaintiff and appellant herein) filed a notice of appeal therefrom.

The authorities, however, rule otherwise and cite with approval the case of Attkisson v. Reynolds, infra, which states the reasons therefor.

The record shows that on December 3, 1942, the plaintiff and appellant filed an order extending his time to file proposed bill of exceptions to January 2, 1944.

Thereafter plaintiff and appellant commenced the proceedings in Ertman v. Municipal Court, 68 Cal.App.2d 143, 155 P.2d 908, 909, 156 P.2d 940.

The record in the Ertman v. Municipal Court case shows the meandering course of the plaintiff and appellant only to be cast back to the starting place. We quote from the opinion as follows:

"Nourse, Presiding Justice. The petitioner sought a writ of mandate to compel the respondent to issue a writ of execution upon a judgment which was set aside by an order granting a new trial. The petition attacked the validity of the order granting a new trial. The respondent defended the order and raised the separate defense that petitioner had an adequate remedy by appeal. A minute order denying the petition was entered and from this order the petitioner has appealed.

"Petitioner as plaintiff had a verdict upon a trial to a jury in the municipal court. The defendants' motion for a new trial was granted on the ground of insufficiency of the evidence by an order signed by Judge Kaufman on October 6, 1943, with directions to his clerk to file it on October 14, unless the judge directed him otherwise. Judge Kaufman then left the state of California and was in Mexico on the day of October 14. The order was filed on that day. It was a conditional order granting the motion for a new trial unless the plaintiff within ten days thereafter consented to a reduction of the verdict. The sixtieth day, or the last day upon which the motion for a new trial could have been granted under section 660 of the Code of Civil Procedure, was October 19th. Hence the effect of the conditional order was to attempt to give the plaintiff five additional days within which to consent to a reduction of the verdict. The petitioner took an appeal to the superior court from the order granting a new trial and moved to vacate it in the municipal court upon grounds which were thereafter pleaded in his petition for a writ of mandate. The motion was denied and the record is silent as to further proceedings on the motion and on the appeal from the order granting a new trial."

We quote from the syllabus in the Ertman v. Municipal Court case, as follows:

"(1) Judges—Where Powers May Be Exercised.—While a judge cannot grant a motion for new trial during the time that he is outside the territorial limits of the state, it seems that such an order is valid if it is signed and delivered to the clerk while the judge is within the state, although it may not be filed until after he has left the state.

"(2) New Trial—Conditional Orders—Validity.—An order granting a defendant a new trial unless plaintiff consented to a reduction of the verdict, although invalid insofar as it gave plaintiff time to make the election on a day subsequent to the 60-day period prescribed by Code Civ. Proc., § 660, was without prejudice to plaintiff where he did not make an election to remit at any time.

"(3a–3c) Mandamus—Appeal—Presumptions.—When the court to which a petition for writ of mandate is addressed in the first instance determines that petitioner has another adequate remedy, its decision that the writ should not issue is, like any other judgment, subject to appeal to a reviewing court, but, like other judgments, it carries the presumption of regularity, though open to attack for error. In the absence of a contrary showing, it will be presumed that the trial court denied the writ because it found that petitioner had an adequate remedy by appeal.

"(4a, 4b) Id.—Discretion.—Mandamus is not a writ of right, but one of discretion.

"(5) Id.—Existence of Other Remedy.—The fact that a legal remedy has been lost either by neglect or delay does not

require the granting of a writ of mandate."

[3] We are of the opinion that appellant is excused from laches for the reason that the defendant never did comply with the provisions of section 953d of the Code of Civil Procedure, and, that prior to September 15th, 1945, never did make a motion to terminate proceedings.

In Peebler v. Olds, 26 Cal.2d 656, paragraph 2, starting on page 659, 160 P.2d 545, it was held that the law in force prior to September 15th, 1945, governs in appeals taken before the time the new Rules for Appeals from the Municipal Court took effect, i. e.: September 15th, 1945.

As it will be hereinafter discussed it will be noted that the clerk of the municipal court, either before or after September 15th, 1945, never gave any notice to these contending parties that there was an entry of an order of the trial court's granting a new trial upon the conditions hereinabove referred to.

[4] It was the duty of defendant and respondent prior to September 15th, 1945, to terminate proceedings in the trial court in order to start the time of plaintiff and appellant to run for the preparation and filing of his proposed bill of exceptions.

Plaintiff and appellant cites the case of Neusted v. Skernswell, 1942, 52 Cal.App.2d 366, 126 P.2d 371, 372.

In the Neusted case the defendant made a motion for a new trial. The motion was denied on July 10th, 1941. The plaintiff filed a notice of appeal from the judgment on July 18th, 1941. The plaintiff never, in compliance with section 953d of the Code of Civil Procedure, served a notice in writing notifying the defendant that an order denying a new trial had been made, nor did the defendant, in writing or by oral stipulation, waive said notice. The plaintiff on September 3d, 1941, served and filed a notice to terminate proceedings. On September 12th, 1941, the trial court granted the motion terminating proceedings. The District Court of Appeal held that the defendant could not be deprived of the ten days' notice to which he was entitled and reversed the order appealed from (which was the order terminating proceedings). It is stated in the opinion that plaintiff relied upon the fact that in the affidavit of Joseph A. Brown, Esq., his attorney, which was filed in support of his motion to terminate proceedings, the affidavit stated (in part) as follows:

"* * * And that defendants made a motion for a new trial, which was denied and * * *."

The opinion further states:

"He contends that said recital was notice in writing in compliance with the statute as early as September 3, 1941, but the order appealed from was dated September 12, 1941. * * * If the plaintiff would rely on the recital contained in said affidavit it is manifest that he should have renewed his motion."

We have had the record of the trial court in the Neusted case examined (case number 294014 in the Superior Court in and for the City and County of San Francisco) and this record shows that on June 6, 1944:

"Notice of Intention, Motion for a new trial" was filed and that on July 10th, 1944, "Motion for New Trial denied."

The Neusted opinion does not hold, as plaintiff and appellant contends, that regardless of the fact that the losing party appeals from such an order made by the trial court that the prevailing party nevertheless must comply with the provisions of section 953d of the Code of Civil Procedure. The opinion seems to indicate that if the respondent (Neusted) were to renew the motion to terminate upon proper notice that the above mentioned quotation from the Brown affidavit might be sufficient notice to the defendant and respondent Neusted to comply with the provisions of said sections 953d and 650 of the Code of Civil Procedure.

The Neusted case merely holds that the defendant was entitled to ten days' notice, which he did not get, and, that if the plaintiff desired to rely upon the recital in the Brown affidavit as being sufficient to meet the legal requirements of section 953d of the Code of Civil Procedure he was privileged to renew the motion to terminate proceedings by giving defendant the required ten days' notice.

The Neusted case does not hold that, if proper notice were given, that the District Court of Appeal would hold that the recital in the Brown affidavit was sufficient to meet the legal requirements of section 953d of the Code of Civil Procedure.

In the case of Attkisson v. Reynolds, 1928, 94 Cal.App. 185, 270 P. 686, there was a motion made by plaintiff and respondent to dismiss the defendant's appeal.

(In this regard it will be noted that the defendant filed a notice of appeal in the Attkisson case, and, in the instant case, the plaintiff filed a notice of appeal from the order granting a new trial. In both these cases the prevailing and satisfied parties did not comply with the provisions of section 953d of the Code of Civil Procedure and made the respective motions, i.e.: a motion to terminate proceedings in the Neusted case and a motion to dismiss in the Attkisson case).

The opinion in the Attkisson case states in part [94 Cal.App. 185, 270 P. 687]:

"In order to fix the time within which the notice to prepare the transcript [should be given], as provided in section 953a of the Code of Civil Procedure, the successful party in the trial court must comply with section 953d of the same Code and see to it that all uncertainty in this particular has been removed. The last sentence of rule 6 governing this court to which attention has been called requires that the moving party shall present to us proof that the time to give notice to prepare a transcript on appeal has expired."

Also see Kling v. Kimball Pump Co., 115 Cal.App. 517, 1 P.2d 998.

[5] As will hereinafter appear we are of the opinion that whether or not the new Rules on Appeal from the Municipal Court, effective September 15th, 1945, require a notice of the entry of an order granting a new trial to be served by the satisfied party (as provided in section 953d of the Code of Civil Procedure) upon the dissatisfied party in order to start the time running to prepare and file a bill of exceptions as to such ruling the record in the instant case now on appeal does not show that the clerk of the municipal court at any time or at all ever notified the plaintiff and appellant herein of the filing of the order granting the new trial.

Defendant and respondent also contends that the Rules on Appeal from Municipal Court in Civil Cases, effective September 15th, 1945, relieves the prevailing party from serving notice as provided in section 953d of the Code of Civil Procedure.

We find nothing in these rules which in any way are in conflict with section 953d of the Code of Civil Procedure except perhaps, that in rule 3(a) it is provided that if an appeal is taken from an order granting a new trial the respondent may appeal from the judgment within ten days after the mailing of the notification by the clerk.

It will be noted that in these Rules on Appeals from the Municipal Court in civil appeals the parties other than the appellant shall be notified by the clerk of the court of the decision of the court when a new trial is granted.

The notice of the clerk of the trial court merely puts the parties other than the appellant on notice that the notice of appeal has been filed to an order granting a new trial.

In this regard there is not anything in the record which shows compliance by the clerk of the municipal court of the new rule; i. e.: that he notified either of the parties of the conditional order of the new trial being granted.

Defendant and respondent contends that the rule contended for by appellant which was in effect prior to September 15th, 1945, is not only unjust and absurd, but has been specifically abrogated by statute.

The Supreme Court and the District Courts of Appeal have, no doubt, considered the unjustness and absurdity of this question in the cases herein referred to and have adopted the conclusions reached in the Attkisson v. Reynolds case, infra, which state the law in effect prior to September 15th, 1945.

[6] Defendant and respondent further contends that no motion to terminate proceedings was necessary because (1) "there are no proceedings for a record pending" etc., and (2) "that the Code section relative to the dismissal of appeals requires no such procedure as a condition precedent to the dismissal of an appeal."

Answering the second point firstly the cases cited herein conclusively show that the motion to terminate proceedings in the lower court was the proper and accepted practice prior to September 15th, 1945. Answering the first point secondly it is sufficient to say that the record shows that plaintiff and appellant procured a court order extending the time to January 2d, 1944, and, the record does not show, by a termination of proceedings, or that the plaintiff and appellant did not have his time extended by stipulation prior to

September 15th, 1945, by stipulation or order of court.

The case of Benson v. Gardner, 1939, 14 Cal.2d 526, 95 P.2d 136, states, in part, as follows:

"In other words, section 953a provides that the notice requesting the preparation of the transcript must be filed '* * * within ten (10) days after notice of entry of the judgment * * *', and it is well settled that the period of time thereby fixed does not begin to run until written notice of the entry of judgment is given or waived in the manner specified by section 953d of the same code, and that the filing of notice of appeal does not constitute a waiver of such notice. Griffin v. Kent, 206 Cal. 263, 274 P. 56; Attkisson v. Reynolds, 94 Cal.App. 185, 270 P. 686; Smith v. Wall, 97 Cal.App. 674, 275 P. 983; Best v. Smith, 22 Cal.App.2d 363, 71 P.2d 78; Sterling Corporation v. Superior Court, 207 Cal. 370, 278 P. 859. * * * Therefore, since the provisions of section 953a are available in taking an appeal of this kind, it cannot be held that the appellant herein is in default, because, under the authorities hereinabove cited, the period of time fixed by said section within which he may initiate proceedings to procure a transcript does not begin to run until respondents serve their notice of entry of the judgment, or such notice is waived in the manner provided by section 953d. Accordingly the motion to dismiss should be denied, and it is so ordered."

In Averill v. Lincoln, 1944, 24 Cal.2d 761, 151 P.2d 119, 120, it is stated:

"Gibson, Chief Justice. This is an application by appellants, under rule 53(b) of the Rules on Appeal, for relief from default occasioned by their failure to comply with that provision of rule 7(b) which requires service, as well as filing, of a notice of election to proceed on a settled statement on appeal. * * *

"The new rules constitute a fundamental departure from the old procedure in the following respects: (1) Fixed periods are specified for the performance of the various steps in preparing the record, and when the allotted time has elapsed the appellant is in default. Rules 4–7. (2) The trial court has authority to extend time for limited periods, and has no power to extend if the time has already expired. Rule 45(b). (3) The appellate court alone has power to grant additional extensions of time and to relieve from default. Rules 45(c) and 53(b).

"As a result of these changes, the motion to terminate proceedings for a record has disappeared from our procedure. If the specified time and allowable extensions have elapsed, the appeal will be dismissed under rule 10(a) unless the appellate court grants relief. As stated above, respondents moved to strike the proposed statement because of appellants' failure to comply with the provision of rule 7(b) requiring service of a preliminary notice of election to proceed by way of settled statement."

This case holds that "the motion to terminate proceedings for a record has disappeared from our procedure."

To epitomize our conclusions we believe the defendant and respondent was duty bound, prior to September 15th, 1945, to terminate proceedings in the trial court before he was entitled to prevail in this motion to dismiss the appeal; and, that since September 15th, 1945, no laches can be attributed to the plaintiff and appellant sufficient to show that the appeal should be dismissed.

This motion to dismiss the appeal is denied.

FRANKLIN A. GRIFFIN, P. J., concurred.

27 Cal.2d 760

KALUZOK et al. v. BRISSON et al.
L. A. 19419.

Supreme Court of California, in Bank.
March 22, 1946.

1. Venue ⇐4

In determining whether an action is local or transitory within meaning of venue statutes, it is necessary to determine the nature of the action as disclosed by the complaint and the scope of the judgment which might be entered on default. Code Civ. Proc. §§ 392(1), 395(1).

2. Fraud ⇐31

A purchaser who has been induced to enter into a contract for purchase of realty by fraudulent representations of vendor may elect to affirm the contract, retain realty, and sue vendor for damages in an action for deceit, or he may elect to rescind contract for fraud, restore possession to vendor, and recover purchase money paid less fair value of use of realty during occupancy.

3. Vendor and purchaser ⇐299(1), 305

Where a vendor brings an action against purchaser for balance due under contract for sale of realty, or an action in ejectment, a defrauded purchaser by way of defensive relief may elect to sue for damages or to rescind and recover purchase money paid.

4. Fraud ⇐31

Where purchasers of realty sought to recover damages for alleged fraudulent representations in connection with the purchase of the realty, they sought an affirmance of the transaction and restitution to extent of damages suffered on account of alleged fraud.

5. Venue ⇐21

The right of a defendant to have an action against him tried in the county of his residence is an ancient and valuable right, safeguarded by statute and supported by many decisions. Code Civ.Proc. § 395(1).

6. Venue ⇐21

The right of a plaintiff to have an action tried in a county other than that of defendant's residence is exceptional, and if the plaintiff claims such right, he must bring himself within the exception. Code Civ.Proc. §§ 392(1), 395(1).

7. Venue ⇐5(3)

Action by purchasers to recover damages from vendors because of alleged fraudulent representations in connection with sale, was a transitory action rather than a local action and should have been brought in county of vendors' residence rather than in county where realty was located, notwithstanding purchasers' prayer that any damage allowed should be applied on unpaid balance of note given for purchase price and secured by trust deed on realty. Code Civ.Proc. §§ 392(1), 395(1).

8. Venue ⇐72

Questions as to the legal sufficiency of a complaint do not arise on motion for change of place of trial.

9. Appeal and error ⇐863

Questions as to legal sufficiency of complaint do not properly arise on an appeal from an order denying a motion for a change of place of trial.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Frank Kaluzok, and others, against Joseph G. Brisson and others to recover damages for alleged fraudulent representations in connection with purchase of realty. From an order of the Superior Court, denying defendants' motion to transfer the action to Los Angeles County, defendants appeal.

Order reversed.

Prior opinion, 161 P.2d 64.

Walker & Horn, of Long Beach, for appellants.

Sarau, Thompson & Colgate, of Riverside, for respondents.

SHENK, Justice.

This is an appeal from an order denying a motion for a change of place of trial.

The action was commenced in Riverside County. The motion was for a change of venue to Los Angeles County on the ground that the defendants were residents of that county. On the hearing of the motion it was conceded that the individual defendants are residents of Los Angeles County and that the corporate defendant has its principal place of business in that county. However, the real property described in the complaint is situated in Riverside County. The question is whether the action is local,

Code Civ.Proc. § 392, subd. 1, or transitory. Code Civ.Proc. § 395, subd. 1. If it is local the motion was properly denied. If it is transitory the defendants are entitled to have it tried in Los Angeles County.

[1] To decide the question it is necessary to determine the nature of the action as disclosed by the complaint, and the scope of the judgment which might be entered on default. Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557; Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931; Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 P. 120; McFarland v. Martin, 144 Cal. 771, 78 P. 239.

It appears from the complaint that the defendants were the owners of certain described real property in Riverside County; that with intent to deceive and defraud plaintiffs and to induce them to purchase the property, the defendants knowingly made certain representations concerning the property which were relied on by the plaintiffs; that defendants knew that plaintiffs relied on the representations; that the representations were false and untrue in the particulars set forth; that at the time the representations were made, and at the time of the purchase, plaintiffs did not know of the falsity of the representations; that in reliance on those representations, plaintiffs were induced to purchase the real property, together with certain tools and equipment, for the sum of $55,000 for the realty and $1,000 for the personalty, and that plaintiffs would not have purchased except for the representations made; that on the purchase price $17,500 was paid in cash, and the balance was represented by a promissory note in the amount of $38,500 secured by a deed of trust wherein defendants Brisson were the beneficiaries and defendant trust company was trustee, and by a chattel mortgage as additional security wherein defendants Brisson were the mortgagees; that plaintiffs received a deed to the real property and a bill of sale to the personal property; that plaintiffs have performed the terms and conditions of the promissory note, and are ready, willing and financially able to meet all obligations on their part to be performed; that the market value of the property at the time of the representations and of the sale was $35,000 and no more; and that by reason of the false and fraudulent representations plaintiffs have been damaged in the sum of $20,000. Plaintiffs prayed for judgment in the amount of $20,000, together with interest at five per cent from September 7, 1943, the date of the purchase and sale, and that all sums recovered by plaintiffs be ordered applied by the defendants upon the unpaid balance of the promissory note.

[2, 3] Two remedies are available to a vendee who has been induced to enter into a contract of purchase by the fraudulent representations of his vendor. First, the defrauded vendee may elect to affirm the contract, retain the property received under it, and sue the vendor for damages in an action for deceit. Secondly, the defrauded vendee may elect to rescind the contract for fraud, restore possession to the vendor, and recover the purchase money paid less the fair value of the use of the property during his occupancy. In addition, the defrauded vendee may set up either remedy by way of defensive relief where the vendor brings an action for the balance due or an action in ejectment. Kent v. Clark, 20 Cal.2d 779, 128 P.2d 868, 142 A.L.R. 576; Nevada Land & Investment Corp. v. Sistrunk, 220 Cal. 174, 30 P.2d 389.

[4] The gravamen of the present action is damages for deceit. By the action the plaintiffs did not elect to rescind the contract and restore the property to the defendants, thus effecting a reconveyance. Its purpose was not the cancellation of the deed or of the deed of trust. In electing the first remedy the plaintiffs seek an affirmance of the transaction and restitution to the extent of the damages suffered on account of the defendants' alleged fraud.

[5, 6] The right of a defendant to have an action brought against him tried in the county of his residence is an ancient and valuable right, safeguarded by statute and supported by a long line of decisions. The right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional. If the plaintiff would claim such right he must bring himself within the exception. Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 521, 522, 274 P. 977; Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209.

[7-9] The venue of the action is determined by subdivision 1, section 395 of the Code of Civil Procedure which provides for the trial of the action in the county of the defendants' residence upon their demand. This is true unless the action falls within some exception to that general rule. The plaintiffs seek to bring themselves within the exception provided by subdivision 1,

section 392 of the Code of Civil Procedure, reading in part as follows: "Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

"(a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property; * * *." If this action falls within the foregoing exception to the general rule, it is local and the position of the plaintiffs must be sustained. But it seems clear that it does not come within the exception and that the general rule should be applied. If the cause should proceed as upon the default of the defendants, the sole power of the court would be to find on competent evidence the extent to which the plaintiffs have been damaged and enter a money judgment against the defendants in that amount. The title to the real property would not be affected. That title remains in the plaintiffs as before, encumbered by the same deed of trust given to secure whatever sum the plaintiffs are in law obligated to pay the defendants. No interest in the real property is determined or affected. The prayer of the complaint that the amount of damages awarded be ordered applied on the promissory note could not in any substantial sense result in a "determination in any form" of an interest in real property. It results merely in a reduction of the obligation represented by the promissory note. Such application of damages awarded is in harmony with cases involving executory contracts where the award was deducted from the unpaid part of the purchase price, or the unpaid part of the purchase price was deducted from the award, regardless of whether there was a prayer to that end. Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380; Hines v. Brode, 168 Cal. 507, 143 P. 729; Palladine v. Imperial Valley F. & L. Ass'n, 65 Cal.App. 727, 225 P. 291; Pembrook v. Houston, 41 Cal.App. 54, 181 P. 828. In the case at bar the application would relate to the form of the recovery and be merely incidental to the main purpose of the action which is to recover a personal judgment for damages for fraud. Questions as to the legal sufficiency of the complaint do not properly arise on the motion or on this appeal. Eckstrand v. Wilshusen, supra, 217 Cal. 380, 18 P.2d 931.

Cases where it has been held that the action was local are cited by plaintiffs and claimed to be analogous. They involve such matters as cancellation of a deed (Eckstrand v. Wilshusen, supra, 217 Cal. 380, 18 P.2d 931; Stanley v. Barney, 123 Cal.App. 139, 10 P.2d 1022), declaration of a trust in real property (Donohoe v. Rogers, 168 Cal. 700, 144 P. 958; Booker v. Aitken, 140 Cal. 471, 74 P. 11; Hannah v. Canty, 1 Cal.App. 225, 81 P. 1035), an action to set aside an alleged fraudulent sale of real property (Sloss v. De Toro, 77 Cal. 129, 19 P. 233), and reformation of a contract of sale of real property. Franklin v. Dutton, 79 Cal. 605, 21 P. 964. These and like cases are not controlling.

We conclude that the pending action is transitory, and the order is therefore reversed.

GIBSON, C. J., EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 794

O'MORROW v. BORAD et al.

L. A. 19228.

Supreme Court of California, in Bank.

March 28, 1946.

1. Action ⇐8

In litigation involving private parties and rights, payment of all counsel fees by one party to the litigation may give that party such control over both the preparation and argument of the cause as to make the suit collusive.

2. Action ⇐15

One may not be both the plaintiff and the defendant in an action.

3. Insurance ⇐514½

Where plaintiff and defendant in automobile collision case were each insured by same insurer and each had affirmative claim against the other, insurer could not control defenses of the insureds against their respective claims as provided in policy, since to permit it to do so would be to permit it to control both sides of the litigation contrary to public policy.

4. Insurance ⇐514½, 640(2)

A co-operation clause in an automobile liability policy is not a condition precedent to validity and enforcement of the policy, but is a condition subsequent to be pleaded by insurer in defense of liability.

5. Insurance ⇐514½

Under co-operation clause in automobile liability policy, insurer is ordinarily released from its contract by the total and unjustifiable refusal of co-operation by insured including unjustifiable refusal of insured to permit insurer to make any defense.

6. Contracts ⇐318

Forfeitures are not favored.

7. Insurance ⇐146(3)

An insurance contract and conditions therein will if possible be construed to avoid a forfeiture.

8. Insurance ⇐514½

Where condition of co-operation in insurance policy is express and cannot be avoided by construction, the court may in a proper case excuse compliance with it or give equitable relief against its enforcement. Civ.Code, §§ 3275, 3369.

9. Insurance ⇐514½

Where plaintiff and defendant in automobile collision were each insured by same insurer and each had an affirmative claim against other, with result that interest of insurer and its attorneys was in conflict with interest of each insured, compliance by insureds with co-operation clauses in policies was excused, and insurer would be held liable for any judgment costs of suit, and reasonable attorneys' fees which either of insureds incurred in defending himself against claims of the other. Civ.Code, §§ 3275, 3369.

10. Insurance ⇐514½

Where plaintiff and defendant in automobile collision were each insured by same insurer and each had an affirmative claim against other with result that interests of insurer and its attorneys were in conflict with interest of each insured, reasonable attorneys' fees incurred by insureds in defending against claims of the other were recoverable from insurer in lieu of the defense required by the insurance contract. Civ.Code, §§ 3275, 3369.

11. Insurance ⇐514½

Insured who brought action for declaratory relief to determine his right to use his own attorney to defend against and to prosecute cross-complaint in an automobile negligence action without loss of protection under his automobile liability policy for non-compliance with co-operation clause was not entitled to recover from insurer the reasonable expense of counsel in the declaratory relief action, though successful therein.

12. Attorney and client ⇐133

Generally, in absence of contract or statutory provision the services of an attorney must be paid for by client who employs him.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by W. D. O'Morrow against Jack Borad and others for declaratory relief with respect to right of parties under provisions of insurance contract relating to defense of claims. From an adverse judgment, the plaintiff appeals.

Judgment reversed with directions.

For prior opinion, see 161 P.2d 28.

Musick, Burrell & Pinney, Anson B. Jackson, Jr., and Eugene M. Elson, all of Los Angeles, for appellant.

Hunter & Liljestrom, Benjamin J. Goodman, and Laurence Berger, all of Los Angeles, for respondents.

EDMONDS, Justice.

Following a collision between two automobiles, Jack Borad, who was driving one of the cars at the time of the accident, sued W. D. O'Morrow, the operator of the other vehicle. Under complementary policies, each of these persons was insured by Firemen's Insurance Company and The Metropolitan Casualty Insurance Company against liability for damages resulting from such accident. Through counsel selected by him, O'Morrow filed a cross-complaint in which he claimed damages against Borad. O'Morrow then notified the insurers that these attorneys would also present his defense to Borad's cause of action. In the present suit for declaratory relief, which was brought against Borad and the insurers to obtain a determination as to the rights of the respective parties under the insurance contracts insofar as the provisions relating to the defense of claims are concerned, the trial court decided in favor of the insurers.

According to the terms of each of the policies, the insurer agreed "to pay on be-

half of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages" sustained under specified circumstances. A further provision is that the insurer shall "defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company." The requirement laid upon the insured in connection with the obligation to defend is that he "shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of the accident."

Each driver claims that he is entitled to damages because of injury to his person and to his property resulting from the collision. Timely notice was given to the insurers by both of them. After Borad filed his complaint, counsel for O'Morrow conferred with the attorneys for the insurers in regard to the unusual situation of the companies. On the following day the insurers were notified that, because they were bound to both litigants under the same form of contract, there was a conflict of interest which precluded representation of O'Morrow by the attorneys for the companies. This position was taken upon the ground that it would be to the insurers' interest to defeat both Borad's cause of action and O'Morrow's affirmative claim for damages. Any recovery by either policyholder within the limits of the contracts, said O'Morrow's counsel, would have to be paid by the insurers, and for that reason the insurers should have no connection with the litigation but act only as stakeholders until the litigation was concluded. The reply of the insurers was that the action of O'Morrow in undertaking to defend the action was a violation of the terms of the policies and, in consequence, they would not pay the amount of any judgment which Borad might recover nor the costs or attorneys' fees incurred in connection with the defense.

O'Morrow then filed the present suit for the purpose of obtaining a determination as to whether he has the right, notwithstanding the provisions of the policies, to defend against the Borad complaint through attorneys of his own choice. Although O'Morrow is demanding a judgment declaring that the insurers are chargeable with the expenses of the litigation, he limits the extent of their liability to a reasonable sum, not exceeding the amount ordinarily paid by the insurers to their attorneys.

The judgment appealed from declares that "O'Morrow has violated the conditions of said policy of insurance issued to him, in that he has refused to permit the * * * [insurers] * * * to defend in his name and on his behalf * * * and has failed to cooperate with the * * * [insurers] * * * in the defense of said action." The court also concluded that the insurers have the right of complete control over the defenses of both Borad and O'Morrow and that neither may recover any costs or attorneys' fees incurred in this suit or the action brought by Borad against O'Morrow.

O'Morrow challenges these determinations principally upon grounds of public policy. The defense of Borad's claims, he insists, is inextricably interwoven with the cause of action of his cross-complaint, and since the insurers are clearly disqualified to represent him in the prosecution of his affirmative demands, they are likewise precluded from defending him against Borad's charges. The argument is that when one places either the defense or the prosecution of his legal rights in the hands of another, a relationship of trust is created which requires the exercise of the utmost good faith. In this connection, O'Morrow calls to his aid section 2230 of the Civil Code relating to transactions in which the interest of a trustee is adverse to that of the beneficiary, and section 2778 of the Civil Code which states the rule to be applied in interpreting agreements of indemnity. The conflict of interest between O'Morrow and the insurers, it is said, has arisen as the result of their method of doing business with a large number of persons in the same community and, under such circumstances, the companies are estopped from taking advantage of the cooperation and right to defend provisions of the policies. Furthermore, there has been

no violation of the cooperation clauses, and it is elementary in the law of insurance that conduct by an assured, even though in violation of the terms of an insurance policy, which results in no prejudice to the rights of the insurer is immaterial. In conclusion, the appellant urges that the insurers are liable for attorneys' fees and all other expenses in connection with defending litigation arising out of matters covered by the policy including the expenses of the present litigation. Respondent Borad agrees with the position taken by the appellant and points to section 6068 of the Business and Professions Code and Pennix v. Winton, 61 Cal.App.2d 761, 143 P.2d 940, 145 P.2d 561, which, he declares, state the rule that counsel cannot serve two masters.

The insurers stand squarely upon the cooperation clauses of the policies and the requirement that it shall defend. They assert that O'Morrow has violated those provisions by filing an answer to Borad's complaint after notification that the defense is to be conducted without any participation by the insurers. No right to control the prosecution of O'Morrow's cause of action upon the cross-complaint is claimed, but they contend that there is no liability under the policies if the policyholder takes over the defense of a suit. There is no fiduciary relationship between an insurer and the insured, the insurance companies say, and none of the elements necessary to create a trust is shown in the present case. Finally, the argument concludes, there is not necessarily a conflict of interest if an insurer defends two policyholders.

[1, 2] It is contrary to public policy for a person to control both sides of litigation. True, the insurers seek only to direct the respective defenses of the parties, but the issues of negligence and contributory negligence cannot be separated. These issues require the presentation of evidence by means of the same witnesses, and although the insurers propose to retain different counsel for each policyholder, through their respective attorneys the companies would have access to all information in regard to the entire case. Under the terms of the policy contracts, the insurers have undertaken to pay any judgment rendered in favor of either the plaintiff or the cross-complaint; they, therefore, have a pecuniary interest in effecting a balance between the litigants and so conducting the litigation that neither party recovers against the other. This court has recognized the rule "that in litigation involving only private parties and rights, payment of all counsel fees by one party to the litigation may give that party 'such control over both the preparation and argument of the cause as to make the suit * * * collusive * * *.' Gardner v. Goodyear, etc., Co., 131 U.S.Append. ciii, 21 L.Ed 141." City and County of San Francisco v. Boyd, 22 Cal.2d 685, 694, 140 P.2d 666, 667. And the United States Supreme Court vacated the judgment in an action where one of the parties dominated the conduct of the suit by payment of the fees of counsel for both of the parties. United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L. Ed. 1413. These decisions are in accordance with the fundamental principle that one may not be both the plaintiff and the defendant in an action (Stevens v. Superior Court, 155 Cal. 148, 150, 99 P. 512; Byrne v. Byrne, 94 Cal. 576, 579, 29 P. 1115, 30 P. 196; see: 11B Cal.Jur. 322; 20 Cal.Jur. 485), and it is difficult to see why, in the litigation between Borad and O'Morrow, the insurance companies would not come within that prohibition if they were allowed to defend each of their insureds against the claim of the other. Certainly a full and fair judicial examination of the merits of a case cannot be had when one person controls counsel for both sides.

[3] The companies argue that a conflict of interest between an insurer and the insured will not prevent the insurer from requiring strict performance of the contract. A typical example of conflict of interest, the insurers say, is the situation where there is a probability that any judgment rendered may exceed the amount of policy coverage. But in such a case the interest of the insurer makes certain that a complete and vigorous defense will be interposed in accordance with the requirements of the policy, a situation far different from that shown by the present record. Here the same insurers represent two persons, each of whom is claiming damages from the other, and proof that both of the parties were guilty of negligence proximately causing injury would be to the financial advantage of the companies. Under these circumstances, the insurers may not control the defenses of the two policyholders against their respective claims.

[4, 5] However, the further question for decision is whether the insurers, though not permitted to defend as required by their contracts, are nevertheless bound to pay any judgment, within the limits of his

policies, that might be rendered against O'Morrow and to reimburse him for his costs of suit and attorneys' fees. In Woodman v. Pacific Indemnity Co., 33 Cal.App.2d 321, 330, 91 P.2d 898, it was said that while the breach of cooperation clauses of an insurance policy may, under some circumstances, relieve the insurer from liability, such requirements are not conditions precedent to the validity and enforcement of an insurance policy but are conditions subsequent to be pleaded by the insurer in defense of liability. See Glens Falls Indemnity Co. v. Keliher, 88 N.H. 253, 187 A. 473. Other courts have held such clauses to be conditions precedent to liability. Conold v. Stern, 138 Ohio St. 352, 35 N.E.2d 133, 137 A.L.R. 1003; Kindervater v. Motorists Cas. Ins. Co., 120 N.J.L. 373, 199 A. 606. But regardless of the name given to provisions of this kind, the insurer is ordinarily released from its contract by the total and unjustifiable refusal of cooperation by the insured including unjustifiable refusal of the insured to permit the insurer to make any defense. See Valladao v. Fireman's Fund Indemnity Co., 13 Cal.2d 322, 89 P.2d 643; Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13; Wright v. Farmers Auto. Inter-Ins. Exch., 39 Cal.App.2d 70, 102 P.2d 352; Margellini v. Pacific Auto Ins. Co., 33 Cal.App.2d 93, 91 P.2d 136; State Farm Mut. Auto. Ins. Co. v. Bonacci, 8 Cir., 111 F.2d 412; Curran v. Connecticut Indemnity Co., 127 Conn. 692, 20 A.2d 87; Conold v. Stern, supra; Cameron v. Berger, 336 Pa. 229, 7 A.2d 293; Hilliard v. United P. Cas. Ins. Co., 195 Wash. 478, 81 P.2d 513; Kindervater v. Motorists Cas. Ins. Co., supra; Witt v. Universal Auto. Ins. Co., 1938, Tex.Civ.App., 116 S.W.2d 1095; 29 Am.Jur. 600; 139 A.L.R. 771; Ocean Accident & G. Corporation v. Lucas, 6 Cir., 74 F.2d 115, 98 A.L.R. 1465; Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1446.

[6, 7] Forfeitures, however, are not favored; hence a contract, and conditions in a contract, will if possible be construed to avoid forfeiture. Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 771, 128 P.2d 665; Ballard v. MacCallum, 15 Cal.2d 439, 444, 101 P.2d 692; Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 374, 108 P.2d 960. This is particularly true of insurance contracts. Bittinger v. New York Life Ins. Co., 17 Cal.2d 834, 841, 112 P.2d 621.

[8] And where, as in the insurance policies held by O'Morrow, the condition is express and cannot be avoided by construction, the court may, in a proper case, excuse compliance with it or give equitable relief against its enforcement. See Civ. Code, §§ 3275, 3369; Ballard v. MacCallum, supra, 15 Cal.2d page 444, 101 P.2d page 692; Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 143, 69 P.2d 849; Hopkins v. Woodward, 216 Cal. 619, 622, 15 P.2d 499; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 499, 2 P.2d 776; Farmers' & Merchants' Mutual Life Ass'n v. Mason, 65 Ind.App. 66, 116 N.E. 852; Rest., Contracts, § 307; 21 Cal.L.Rev. 516; 18 Cal. L.Rev. 681; 52 Harv.L.Rev. 129.

[9-12] To relieve the insurers in the present suit from liability under their contracts because of the bar of public policy would be most inequitable, for the situation of O'Morrow and Borad results entirely from the extensive operations of the two companies in the insurance field. Under these circumstances, compliance with the cooperation clauses is excused and the insurers are liable for any judgment, costs of suit, and reasonable attorneys' fees which O'Morrow may incur in defending himself against the claims of Borad. See Greer-Robbins Co. v. Pacific Surety Co., 37 Cal.App. 540, 174 P. 110; Kelly v. Kass, 1944, 154 Pa.Super. 267, 35 A.2d 531; Conroy v. Commercial Cas. Ins. Co., 292 Pa. 219, 140 A. 905; 8 Appleman's Insurance Law & Practice, § 4691. Such fees are recoverable in lieu of the defense required by the insurance contracts (see Munro v. Maryland Cas. Co., 48 Misc. 183, 96 N.Y.S. 705, 707; Sanders v. Frankfort, M., A. & P. Glass Ins. Co., 72 N.H. 485, 57 A. 655, 658, 101 Am.St.Rep. 688), but there is no basis for allowing O'Morrow the reasonable expense of counsel in the present suit for declaratory relief. He has not brought himself within any of the few exceptions to the general rule that, in the absence of contract or statutory provision, the services of an attorney must be paid for by the client who employs him. In re Estate of Marrés, 18 Cal.2d 191, 192, 114 P.2d 591.

The judgment is reversed with directions to the trial court to enter a declaratory judgment in accordance with these conlusions.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

73 Cal.App.2d 852

PEOPLE v. WILLIAMS et al.

Cr. 1912.

District Court of Appeal, Third District, California.

April 6, 1946.

Stipulations ⇐14(12)

Where a stipulation was filed in the District Court of Appeal signed by attorneys for both accused and the people, consenting and requesting that the Court of Appeal modify judgments by reducing them from judgments of first-degree murder to judgments of second-degree murder, and as so modified that judgments be affirmed, and ground for reversal that jury was erroneously instructed relative to the distinction between first and second degree murder was well-founded, motion would be granted.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Oscar Williams and Frank Williams were convicted of murder of the first degree. Motion to reduce the degree of the crime from murder in the first degree to murder in the second degree was denied, and defendants appeal.

Causes remanded with directions.

John L. Brannely and Robert A. Zarick, both of Sacramento, and Wm. A. White, of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In this case defendants Oscar Williams and Frank Williams were found guilty of murder of the first degree, the punishment being fixed at imprisonment for life. Motion to reduce the degree of the crimes from murder in the first degree to murder in the second degree was denied, and an appeal was taken to this court. One of the grounds for reversal urged herein is that the jury was erroneously instructed relative to the distinction between first and second degree murder. Recent decisions of our Supreme Court in which the same or similar instructions were held erroneous to an extent justifying reversal of the judgments of conviction indicate that this contention is well founded. This conclusion has been concurred in by respondent, and a stipulation has been filed in this court signed by attorneys for both appellants and respondent, consenting and requesting that this court modify the judgments by reducing them from judgments of first degree murder to judgments of second degree murder, and as so modified that said judgments be affirmed. On the filing of said stipulation the submission of the cause was set aside and said cause put upon the calendar for further proceedings. At the time set for hearing, counsel for both parties appeared, and, upon motion of counsel for respondent, concurred in by counsel for appellants, that the judgments be modified and affirmed as aforesaid, it is ordered that the judgments of the trial court be, and they are hereby, modified by reducing them to murder of the second degree, and, as so modified, said judgments are affirmed. Said causes are remanded to the trial court with directions to pronounce judgments upon said defendants sentencing them and each of them for the term prescribed by law for murder of the second degree.

PEEK and THOMPSON, JJ., concur.



73 Cal.App.2d 866

BUTLER v. ALLEN.

Civ. 15177.

District Court of Appeal, Second District, Division 2, California.

April 8, 1946.

Rehearing Denied April 26, 1946.

Hearing Denied June 6, 1946.

1. Landlord and tenant ⇐180(3)

Where apartment owner refused to accept tenant's rent tendered on 2d of month in accordance with custom of long standing to pay between 2d anl 8th, and, notwithstanding that tenant on 7th mailed a money order to manager in payment of rent, tenant was locked out of her apartment, her personal effects either lost, destroyed, or damaged, some of which effects were irreplaceable, evidence authorized judgment for tenants against owner for wrongful eviction.

2. Landlord and tenant ⇐180(4)

$2,000 actual damages and $2,000 exemplary damages were not excessive for the wrongful eviction of tenant from her apartment and for the destruction of or damage to her personal effects, loss of salary, and other expenses.

3. Landlord and tenant ⇐180(6)
New trial ⇐74

In action by tenant against apartment house owner for wrongful eviction and loss of, destruction of, or damage to tenant's personal effects, both compensatory and punitive damages are left first to sound discretion of jury and next to like discretion of trial judge on motion for a new trial.

4. Evidence ⇐18

Court takes judicial notice that purchasing power of the dollar is 60¢ or less compared with 10 years ago, salaries and wages are higher, and cost of living is greater.

5. Damages ⇐127

The value of the sum awarded is to be measured, not by number of dollars named in verdict, but by their comparative ability to furnish the necessaries of life.

6. Landlord and tenant ⇐180(6)

Where defendant in wrongful ejectment action did not claim to be operating a hotel, but testified that he was owner of five apartment houses, including that in which plaintiff had been residing, use in an instruction of the words "rent money", "tenancy", "rents", and "eviction" was not error, since recovery was not affected by fact that plaintiff was either a tenant in an apartment house or resided in a hotel. Civ. Code, §§ 1861, 1861a.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Louise F. Butler against George S. Allen for wrongful eviction from an apartment. Judgment for plaintiff, and defendant appeals.

Affirmed.

Paul Taylor and Joseph D. Taylor, both of Los Angeles, for appellant.

Frank C. Weller and Thomas S. Tobin, both of Los Angeles, for respondent.

WILSON, Justice.

Appellant is the owner of five apartment houses in the city of Los Angeles, in one of which respondent, a cultured, elderly lady professionally trained as a business librarian, had been a tenant for five years. During that time she had usually paid her rent on or before the 3d of the month. On several occasions she paid as late as the 5th or 8th. Appellant had always accepted the rent whenever tendered without objection as to time of payment until the occurrence which gave rise to this action. On March 2, 1944, respondent went to the desk where she had been accustomed to paying her rent and an employee of defendant in charge of the desk refused to accept payment, stating that appellant wished to see her. She immediately repaired to appellant's apartment and he said that he did not have time to talk to her. On March 3d she again offered to pay another of appellant's employees then at the desk, who stated that she had been instructed by appellant not to accept the rent. On the evening of March 4th, at respondent's request, the night clerk called appellant on the telephone and asked him to come to the office so that she might pay him, but appellant refused to do so. On March 7th respondent procured a post office money order for the amount of the rent and had a letter written and an envelope addressed to appellant by a stenographer who resided in the same apartment house, enclosed the letter with the money order in the envelope and placed it in a nearby mail box. She heard nothing more from appellant until she returned to her apartment on the evening of March 14th and found that her key would not open her door. Upon inquiry as to the reason for having locked her out of her apartment appellant replied that he had done so because she had not paid her rent. She informed him that she had sent him a money order through the mail on March 7th, but he denied having received it. She stated that she had no place in which to sleep and appellant directed one of his employees to provide a place for that night. She was taken to an apartment which had accommodations for eleven people. The room was unclean, empty beer bottles were scattered about and it was otherwise uninviting. She asked for a key so that she could lock the room and was told that there was none. Respondent, not desiring to sleep in such surroundings, stayed two nights with a lady who occupied another apartment in the building and then found a small room in another location where she remained for a

few days until she found a permanent place of abode. Meanwhile respondent had been unable to get any of her personal belongings. She was without clothing except that which she wore at the time she was locked out, and was unable to obtain even a nightgown. Appellant compelled her to pay a half month's rent before he would allow her to take any of her property. Upon being permitted to enter the apartment which she had occupied she found a roughly constructed double bed which had been placed there in her absence. Some of her belongings had been swept into the closet appurtenant to her room, others had been scattered over the house. Some were found in the basement, some in a janitor's dirty service closet in grocery cartons; keys to her trunks had been lost; blankets and a chair which she personally owned had not been recovered at the time of the trial.

In an endeavor to make it appear that the post office money order had not been mailed on March 7th as testified by respondent, appellant produced an envelope postmarked on March 24, and claimed that the money order had been received therein. The evidence showed that the envelope had been addressed upon a different typewriter from that used by the stenographer who wrote respondent's letter and addressed the accompanying envelope.

Among respondent's personal effects were articles of cultural and sentimental value, books containing 500 illustrations of works of art which respondent had procured in Europe. The latter were rare and out of publication and because of conditions in Europe could not be replaced. There were many other items such as family records of respondent's ancestry, a letter written by her mother which was over 100 years old, and papers regarding family property, none of which she had been able to recover after her eviction.

Respondent paid out $50 storage charges, expenses of moving, and lost one month's salary of $125 while she was searching for new living quarters.

The jury returned a verdict for $2,000 actual damages and $2,000 exemplary damages. From the judgment defendant appeals.

[1, 2] We find nothing in the record to support appellant's claim that the judgment is not sustained by the evidence or that it is so excessive as to indicate that the verdict was given under the influence of passion and prejudice. Appellant offered no justification for his unwarranted and malevolent procedure except his claim that the rent was not paid. Respondent's receipts which are in evidence show that her rent had never been paid before the 2d of the month and that appellant accepted it on various dates between the 2d and the 8th without objection. Appellant made a maladroit attempt to fabricate evidence and to build up a defense in advance by opening an envelope containing respondent's money order of March 7 and displaying it in the presence of several employees, althought it was not his custom to open his mail and exhibit its contents to them. This fruitless endeavor to vindicate his unlawful eviction of respondent from her apartment failed with the demonstration that the envelope produced by him was not the one sent by her. His acts in scattering her personal effects over the apartment house and placing them in unclean places show a base disregard of the feelings and sensibilities of a refined, elderly lady. The fact that a crudely constructed double bed was placed in respondent's apartment where there had been only a wall bed previously is evidence that the eviction resulted not by reason of her failure to pay her rent on the first day of the month but from appellant's desire to obtain more revenue than respondent had been paying for the apartment by placing additional tenants therein.

[3] Both compensatory and punitive damages in such a case as this are left first to the sound discretion of the jury and next to like discretion of the trial judge on motion for a new trial, when such motion is made. We find no abuse of discretion here.

[4, 5] The facts warranted a verdict in a substantial amount and we cannot say that it would have been excessive in normal times. Considering the economic conditions of the period through which we are now passing, the jury cannot be criticized as having been too liberal in either element of damages. The courts will take judicial notice that the purchasing power of the dollar is sixty cents or less compared with ten years ago. Salaries and wages are higher and the cost of living is greater. The value of the sum awarded is to be measured not by the number of dollars named in the verdict but in their comparative ability to furnish the necessaries of life. O'Meara v. Haiden, 204 Cal.

354, 367, 268 P. 334, 60 A.L.R. 1381, and cases cited.

[6] There was no error in the instructions to the jury. Appellant's objections to the use of the words "rent money," "tenancy," "rent," and "eviction" are without merit. He did not claim to be operating a hotel but testified that he was the owner of five apartment houses, including that in which respondent had been residing for five years. Whether respondent was a tenant in an apartment house or residing in a hotel would not have affected the right or the amount of the recovery. Appellant would have had a lien on respondent's baggage and other personal property in the event of her nonpayment of rent, whether in a hotel or an apartment house, Civil Code, §§ 1861, 1861a, and that fact was not an issue in the case since she offered to pay her rent in the same manner as she had paid it during the five year period of her occupancy. The jury was correctly instructed upon the question of malice.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



WEST v. EVANS.

Civ. 13014.

District Court of Appeal, First District, Division 2, California.

April 4, 1946.

Hearing Granted May 29, 1946.

1. Tenancy in common ⇐13

Possession of one cotenant is in law the possession of all.

2. Tenancy in common ⇐15(7)

Where plaintiff recorded deed to himself from adopted mother of entire fee in realty, and mother had only an undivided three-fourths' interest in realty, and son resided on the property from date he recorded the deed in 1931 until 1937 and paid all taxes, plaintiff gained title by adverse possession as against other cotenants.

3. Tenancy in common ⇐15(7)

Registration of a deed, being constructive notice of existence and contents and of all other material facts which an inquiry thereby reasonably suggested would have disclosed, is constructive notice to cotenant out of possession of the adverse claim of a stranger where the deed from the cotenant in possession purports to convey to him the entire estate, and he makes entry and retains possession thereunder.

4. Tenancy in common ⇐14, 15(2)

A conveyance to a stranger to the title, by one cotenant, by instrument purporting to pass the entire title in severalty, and not merely such cotenant's individual interest, followed by an entry into actual, open and exclusive possession by such stranger under claim of ownership in severalty, amounts to a disseisin of the other cotenants, which, if continued with the necessary requisites for the statutory period, will ripen into good title by adverse possession.

5. Tenancy in common ⇐15(7)

Where plaintiff recorded deed approximately four years after delivery of deed to him, the delay in recording the deed did not prevent acquisition of adverse possession by the plaintiff after five years' actual occupancy of the realty as against other cotenants.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by George Randall West against Meta J. Evans, as administratrix of the estate of James West, also known as James C. West, deceased, to quiet title against defendant as administratrix of the Estate of James West, deceased. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

James P. Montgomery, of Oakland, for appellant.

Eugene T. Nebiolo, of Oakland, for respondent.

DOOLING, Justice.

James and Melinda West were husband and wife. In 1917 Melinda West secured an interlocutory decree of divorce from James West and said decree awarded Melinda West an undivided three-quarter interest and James West an undivided one-

quarter interest in certain real property, the subject of this action. This decree was never made final. James West died in 1919. The plaintiff as a child was taken into the family by James and Melinda West. After the interlocutory decree of divorce was entered plaintiff and Melinda West lived on the property in suit. In 1927 Melinda West legally adopted plaintiff and in the same year executed and delivered to plaintiff a deed purporting to convey the entire fee in the property to him. In 1931 plaintiff recorded this deed. After the delivery of the deed he paid all taxes on the property and he lived on the property with Melinda West continuously from the time of the entry of the interlocutory decree until 1937, when he was married and moved to another home. James and Melinda West had four children the issue of their marriage none of whom lived on the property at any time after the deed to plaintiff was executed in 1927. After Melinda's death the plaintiff sued to quiet title to the property against the appellant, as administratrix of the estate of James West deceased. From a judgment for plaintiff, defendant appeals.

[1, 2] Appellant, relying on the rule that the possession of one cotenant is in law the possession of all, argues that respondent's possession was at no time adverse to the heirs of James West as to the one-quarter interest owned by them. Respondent recorded the deed from his adopted mother in 1931. He resided on the property from that time continuously until 1937, paying all taxes. He took under a deed purporting to convey the entire fee. The finding of the trial court that he thereby gained title by adverse possession finds support in Satariano v. Galletto, 66 Cal.App.2d 813, 153 P.2d 201; Pease v. Gibson, 37 Cal.App.2d 353, 99 P.2d 353; and Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404.

[3] Appellant attempts to distinguish the latter two cases on the ground that in those cases the adverse claimant was not aware of the outstanding cotenancy interest. Satariano v. Galletto, supra, cannot be so distinguished, for there a widow who was administratrix of her husband's estate was held to have acquired a title against the estate by adverse possession under color of a probate order of assumed invalidity. The case before us is much stronger since plaintiff was a stranger to the title. "Registration of a deed, being constructive notice of its existence and contents and of all other material facts which an inquiry thereby reasonably suggested would have disclosed, is held to be constructive notice to cotenants out of possession of the adverse claim of a stranger where the deed from the cotenant in possession purports to convey to him the entire estate and he makes entry and retains possession thereunder." 62 C.J. 438, 439.

[4] "A conveyance to a stranger to the title, by one cotenant, by an instrument purporting to pass the entire title in severalty, and not merely such cotenant's individual interest, followed by an entry into actual, open, and exclusive possession by such stranger under claim of ownership in severalty, amounts to a disseisin of the other cotenants, which, if continued with the necessary requisites for the statutory period, will ripen into good title by adverse possession." 1 Am.Jur. 828, 829.

[5] The delay in recording the deed presents no difficulty, since over five years of actual occupancy by respondent after the recordation was proved.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



73 Cal.App.2d 667

HELVEY v. CASTLES et al. (three cases). SAME v. MILLER et al.

SAME v. MILLER (two cases).

Civ. 15044, 15085, 15116.

District Court of Appeal, Second District, Division 3, California.

March 27, 1946.

1. Appeal and error ⇐935(3)

Where order did not specify any grounds for denial of motion for issuance of execution, it was to be presumed that court considered all grounds that could have been urged for issuance of execution and against its issuance and decided them in favor of defendant.

2. Execution ⇐75

The question whether creditor has acted with due diligence is necessarily involved in proceeding for issuance of execution on judgment, where question is not waived.

3. Execution ⇐74

Where, in proceeding on prior motion for issuance of execution on judgment, question of creditor's due diligence was raised and court denied motion on merits, the order constituted a final adjudication and plea of res judicata was properly sustained in subsequent proceeding for issuance of execution against same judgment debtor.

4. Judgment ⇐563(2)

A decision on ground of want of jurisdiction over a party to a proceeding is not a decision on merits and does not bar a determination on merits by a court which has jurisdiction.

5. Execution ⇐74

Where a judgment debtor was not served with notice of prior motion for issuance of execution on judgment, and she made no voluntary appearance, presumption existed that motion was denied as to such judgment debtor for want of jurisdiction and the denial did not bar a subsequent proceeding for issuance of execution. Code Civ.Proc. § 685.

6. Execution ⇐75

The mere examination of public records in hope that a judgment debtor will acquire property in his name constitutes a minimum of effort to locate property subject to execution, but it does not follow as matter of law that more must be done by judgment creditor under all circumstances to avoid a charge of negligence which would preclude issuance of execution. Code Civ.Proc. § 685.

7. Appeal and error ⇐983(3)
Execution ⇐77

Whether motion for issuance of execution failed to show that judgment creditor used due diligence for collection of judgment must be determined on facts of each case and discretion in matter is with trial court, not reviewing court. Code Civ.Proc. § 685.

8. Execution ⇐75

Where motion for issuance of execution was not filed until approximately 14 years after rendition of judgment, and motion stated that public records had been searched in effort to find property subject to execution, directing issuance of execution over objection that motion failed to show that judgment creditor had used due diligence for collection of judgment was not an abuse of discretion. Code Civ.Proc. § 685.

9. Appeal and error ⇐485(2)

Where appeal had been taken by defendant from order directing the issuance of execution, the effect of appeal was to stay all proceedings in trial court, clerk had no authority to issue writ of execution, issuance of writ was a void act, and trial court properly quashed writ without notice to plaintiff and without hearing. Code Civ.Proc. § 949.

Appeals from Superior Court, Los Angeles County; Alfred E. Paonessa and Ruben S. Schmidt, Judges.

Action by Katherine F. Helvey against Alfred C. Castles, Paul H. Bruns, B. A. Miller, and Herman Miller, wherein A. C. Helvey, plaintiff's assignee, filed a motion for execution against defendants Miller and obtained a restraining order against the transfer of property pending the hearing of the motion. The defendants Miller moved to dissolve the restraining order and for an injunction against further proceeding for the collection of the judgment. From various portions of the order which denied the assignee's motion as to Herman Miller but granted execution as against B. A. Miller, and denied the motions of the defendants, B. A. Miller and Herman Miller appeal, and A. C. Helvey appeals from the adverse portions of the order and from an order quashing writ issued against B. A. Miller and releasing the property under the levy.

Affirmed.

William M. Taylor, of Beverly Hills, for appellant and respondent A. C. Helvey.

Roth, Brannen & Schwab, of Los Angeles, for appellants and respondents B. A. Miller and Herman Miller.

SHINN, Justice.

We have several appeals from an order made in a proceeding for the issuance of execution upon an old judgment. A. C. Helvey, referred to herein as plaintiff, as

assignee of his wife, Katherine, who obtained a judgment against Herman Miller, Blanche A. Miller and others in 1931, made a motion in March, 1945, for execution against defendants Miller, and had a restraining order issued against the transfer of property pending the hearing of the motion. The Millers moved to dissolve the restraining order and for an injunction against further proceedings for collection of the judgment. The several motions were heard together and were disposed of by a single order. The motion of plaintiff was denied as to Herman Miller but execution was ordered to issue against Blanche A. Miller, and the motions of the defendants were denied. Thereafter the Millers appealed from several provisions of the order, including the one for the issuance of execution against Blanche A. Miller. Notwithstanding the appeal the clerk issued execution against Mrs. Miller, but upon the following day certified to the court the fact that execution had been issued erroneously and inadvertently, and the court, upon the certificate of the clerk, ordered the writ quashed and property which had been levied upon released. In No. 15116 plaintiff appeals from the order insofar as it denied his application for a writ against Herman Miller; in No. 15085 he appeals from the order quashing the writ and releasing the property under levy, and in No. 15044 the Millers appeal from the order insofar as it directed execution to issue against Blanche A. Miller and denied their application for an injunction.

The motion of defendants for an injunction, and their opposition to the motion for issuance of execution, were based upon the record, which shows that a former holder of the judgment, one Potter, applied for a writ of execution against both Mr. and Mrs. Miller in 1943 and that an order was made denying the motion. It is contended that the former order operates as a bar to the later application. The plea of res judicata was sustained as to Herman Miller and overruled as to Blanche A. Miller. This application of the doctrine of res judicata, if correct, is decisive of plaintiff's appeal from the order denying execution as against Herman Miller and of Blanche A. Miller's appeal from the order denying her an injunction.

[1-3] We shall discuss first the effect of the order made in the 1943 proceeding. In that proceeding the motion was based upon affidavits of A. C. Helvey and one Weiss, attorney for M. Potter, who at that time was the holder of the judgment. An order to show cause was issued and was served upon Herman Miller but not upon Blanche A. Miller. Herman filed an affidavit in reply to those of plaintiff, but Blanche A. Miller did not file an answering affidavit or otherwise appear in the proceeding. The matter came on for hearing, Mr. Weiss appeared on behalf of Mr. Potter, and there was no appearance by or on behalf of either defendant. The motion for issuance of the execution was presented, was taken under advisement and upon the following day was denied. The order did not specify any ground for the denial. Plaintiff makes the statement that the motion was abandoned because it was shown by the affidavit of Miller that defendants had no interest in the property which plaintiff was attempting to reach, but this statement finds no support in the record. It is to be presumed that the court considered all grounds that could have been urged for the issuance of the execution, and against its issuance, and decided them in favor of the defendants. 2 Cal.Jur. 860, A sufficient ground for denial of the motion as to Herman would have been that plaintiff had not proceeded with due diligence in the 12 years that had elapsed after the judgment was rendered. The question whether the creditor has acted with due diligence is necessarily involved in such a proceeding, where it is not waived, and it was specifically raised by the affidavit of Miller. This 12-year period is a closed book. Whether the 1943 order was correct or incorrect, there can be no reexamination of the question of the use of diligence prior to 1943, either upon the evidence that was then before the court or upon additional evidence, so far as affects Herman Miller. There is no suggestion that the court was prevented from making a complete factual investigation at that time by reason of any extrinsic fraud. It is unnecessary to decide whether a reexamination would be allowable upon a showing that the creditor had been prevented from presenting the facts upon the first application by reason of fraudulent representations or concealment on the part of the debtor. No such showing was attempted by plaintiff. A decision as to whether diligence had been used by plaintiff which would excuse the delay in applying for execution could not have been made except on a motion for execution,

and the hearing on the motion was a trial of that issue. The order that was made was upon the merits, it constituted a final adjudication upon a mixed question of law and fact, and it had all the force of a judgment. The same question was before the court in Wheeler v. Eldred, 1902, 137 Cal. 37, 69 P. 619, where it was held that the defense of res judicata will prevail against a second motion for execution after denial, upon the merits, of a prior motion. The court said (137 Cal. at page 39, 69 P. at page 620), with reference to the claim that there had not been a full presentation of the facts upon the first application: "The contention of appellant is no stronger than would be the contention of a party that he ought to be allowed to maintain a second suit, after judgment had been rendered against him in a former suit on the same cause of action, because on the trial of the first action he had not properly argued his case." In ruling upon the same point, the court said in Creditors' Adjustment Co. v. Newman, 1921, 185 Cal. 509, 513, 197 P. 334, 338: "The order of the court granting this motion was a judgment on the merits as to plaintiff's right to enforce its judgment under the provisions of section 685, as to all grounds presented, or defense thereto open to the plaintiff on such hearing. The question of plaintiff's right to an execution was clearly before the court on its merits, and, conceding that the court may have committed error in the admission of certain evidence and in considering certain grounds of objection to the original order, which would have called for reversal on appeal, it had jurisdiction to act in the premises, and, the judgment having become final, without appeal or other direct attack, it is conclusive, whether the matter was rightly or wrongly decided, as to all matters presented or which should have been presented on the hearing. [Citing cases.]"

The trial court properly sustained the plea of res judicata as to Mr. Miller. It would have been improper to retry the issues that had been decided upon the first motion. It was unnecessary to order that no further proceedings should be had for execution against Mr. Miller.

[4, 5] Blanche A. Miller was not served with notice of the 1943 motion and she made no voluntary appearance. The court would have been without jurisdiction to order issuance of execution against her. Code of Civ.Proc. § 685. It must be presumed that the motion made by Potter in 1943 was denied as to her upon that ground, since it would have been improper to make any other disposition of the motion as to Mrs. Miller when she had not been served with notice. A decision upon the ground of want of jurisdiction over a party to a proceeding is not a decision upon the merits and does not bar a determination upon the merits by a court which has jurisdiction. Hogeberg v. Industrial Acc. Comm., 1927, 201 Cal. 169, 256 P. 413; 15 Cal.Jur. p. 124.

Blanche A. Miller seeks a reversal upon the further ground that the court was guilty of abuse of discretion in ordering execution against her, for the reason that the affidavits filed in the instant proceeding in support of the motion failed to show that the judgment creditor had used due diligence for the collection of the judgment. In Butcher v. Brouwer, 1942, 21 Cal.2d 354, 132 P.2d 205, 207, it was said that the present provisions of section 685 of the Code of Civil Procedure should be construed as authorizing the court to order executions "only if, during the five years following entry of judgment, he [the judgment creditor] exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time."

The affidavit of Mr. Helvey in the present proceeding, which set forth the efforts that had been made to discover property of the Millers, was loosely worded and contained an abundance of irrelevant matter. We shall mention only the statements which were relevant to the inquiry in the trial court. It was stated that he is a professional searcher of records, that he has made a practice ever since the judgment was rendered of searching the records of the offices of the Recorder and Assessor of Los Angeles and other counties and records of the Motor Vehicle Department and has been unable by such means to locate property of the defendants upon which to levy execution. It was stated that between 1931 and 1941 there was no property standing of record in the name of either defendant in Los Angeles or some 20 other named counties, and that during the past 10 years there had been no motor vehicle registered in the name of

either defendant as registered and legal owner; that he had tried many times to locate bank accounts in the names of defendants and had been unsuccessful; that on May 1, 1936, suit was filed for renewal of the judgment; that he then learned that Herman Miller was in some prison but that he was unable to learn which prison, and that the defendants could not be located for the service of summons. It was stated that both Mr. and Mrs. Miller went through bankruptcy in 1937 but that the judgment he holds against them was based upon findings of fraud and that they were not discharged from liability under it. It appeared from other affidavits that Herman Miller was sentenced in 1933 to pay a fine of $3,000 and to serve two years in prison for conspiracy to violate the Volstead Act, consisting of the unlawful manufacture of intoxicating liquor and possession of a still and apparatus. The offenses were committed in Merced County in 1932 and the defendant spent two years in prison in the State of Washington, being released in April, 1935. It further appeared that the original amount of the judgment was $14,933.32, but that $3210.75 had been collected in 1931 and $3240 in 1932 upon execution issued against judgment debtors other than the Millers. It was stated in the affidavit of Herman Miller that he and his wife did not profit in the transaction which was the basis of the cause of action for which the judgment was given. It was stated, "That this defendant and the defendant B. A. Miller have had property, both real and personal in their names and several different times, and the records of such ownership by this defendant and the defendant B. A. Miller have been on file in the office of the County Recorder of Los Angeles County, California, and in the Department of Motor Vehicles of the State of California," but no reference was made to years prior to 1940, except with relation to automobiles standing in Mrs. Miller's name as registered owner. It was stated that Mrs. Miller had owned automobiles at different times but there was no statement as to their value nor as to the encumbrances against them. She was not shown to have been the legal owner of any of them. There was no evidence before the court as to the occupation or business activities of the defendants Miller prior to 1940, except such as was furnished by the judgment of the United States District Court in the criminal case.

We think the trial court would have been justified in holding that it would have been useless for plaintiff to have had execution issued against the Millers at any time during the ten years subsequent to the rendition of the judgment. There was no evidence that anything could have been realized from a levy upon any of the automobiles which Mrs. Miller owned from time to time. It was admitted in the affidavit of Herman Miller that he had used a third person to take title to property in which he had an interest in 1940, and there was no evidence that other property had been owned by the Millers prior to that time.

[6, 7] It must be conceded that the mere examination of public records in the hope that a judgment debtor will acquire property in his own name constitutes a minimum of effort to locate property subject to execution, but it does not follow as a matter of law that more must be done under all circumstances to avoid a charge of negligence. There are situations in which there is little else that can be done. Apparently plaintiff lost track of the Millers as early as 1932 and did not know of Herman's venture in Merced County, the same being of a nature not commonly publicized. In May, 1936, Mr. Helvey believed Herman to be still in prison, although he had been released a year earlier. There was in reality nothing which plaintiff could do but wait for the Millers to accumulate something. The law does not require idle acts and the statute under consideration should not be given a construction which would penalize a creditor for inactivity when he in good faith explores the available sources of information. There is no rule of law which requires a creditor to continue a vigorous search for something he believes does not exist and which does not in fact exist. Each case must be judged upon its own facts; the discretion in such matters is with the trial court, not the reviewing court. We are not saying that the court could not properly have denied the application as to Mrs. Miller, but an order directing the issuance of execution may not be reversed merely for the reason that the court with equal propriety could have declined to make the order.

[8] There was no abuse of discretion in directing the issuance of execution against Blanche A. Miller, nor in denying defendants the injunction they sought.

[9] We find no merit in plaintiff's appeal from the order quashing the execution. An appeal had been taken by defendants and the effect of it was to stay all proceedings in the trial court upon the order appealed from. Code of Civ.Proc. § 949. The clerk had no authority to issue the writ and the issuance of it was a void act. Peterson v. Lampton, 1941, 46 Cal. App.2d 751, 116 P.2d 952. It was the duty of the court to quash the writ. No notice to plaintiff and no hearing were necessary.

The order is affirmed as to all of its provisions from which the several appeals were taken.

DESMOND, P. J., and WOOD, J., concur.



73 Cal.App.2d 881

DILL et al. v. HAMILTON.

Civ. 12978.

District Court of Appeal, First District, Division 2, California.

April 10, 1946.

1. Bankruptcy ⇐425

The designation of city of residence of a creditor in scheduling of creditors, without the street and number of his residence, is sufficient to meet terms of Bankruptcy Act. Bankr.Act §§ 7, 17, 11 U.S.C.A. §§ 25, 35.

2. Bankruptcy ⇐425

Where bankrupt listed residences of creditors as "San Francisco" without giving street and number of their residences, in preparing schedule of creditors pursuant to rule announced in United States Supreme Court decision, bankrupt could not be charged with fraud in preparation of his schedule on ground that he did not use due diligence to ascertain the "street and number" of residences of creditors. Bankr.Act §§ 7, 17, 11 U.S.C.A. §§ 25, 35.

3. Bankruptcy ⇐425

If debt is duly scheduled by bankrupt, creditor is charged with constructive notice of the bankruptcy proceedings, though he may have failed to have received the written notice mailed to him. Bankr.Act §§ 7, 17, 11 U.S.C.A. §§ 25, 35.

4. Bankruptcy ⇐425

Where real and only party having any interest in judgment had been properly scheduled by bankrupt under rule announced in United States Supreme Court decision, such party would be presumed to have had constructive notice of bankruptcy proceeding and was foreclosed from asserting that debt of the judgment was not discharged. Bankr.Act §§ 7, 17, 11 U.S.C.A. §§ 25, 35; Code Civ.Proc. § 1963, subd. 24.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Marian S. Dill, formerly Marian S. Schmidt, and Carl Bender, as executors of the last will and testament of Herbert A. Schmidt, deceased, and Marian S. Dill, formerly Marian S. Schmidt, individually, against Fletcher Hamilton, to enforce a judgment for money. From a judgment for plaintiffs, the defendant appeals.

Reversed with directions.

A. Brooks Berlin and Ralph W. Scott, both of San Francisco, for appellant.

Hugo D. Newhouse, Russell P. Tyler, and Herbert Pothier, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued to enforce a judgment for money. The defendant pleaded a discharge in bankruptcy. The trial was had upon a written stipulation of facts and resulted in a judgment for plaintiffs.

The issue raised on the appeal is whether the debt "was duly scheduled" within section 17 of the Bankruptcy Act, 11 U.S.C.A. § 35, and, if not, whether respondents "had notice or actual knowledge" of the bankruptcy proceedings. On April 2, 1936, a judgment was rendered in the superior court in an action entitled "Marian S. Schmidt and Carl Bender, as executors of the last will and testament of Herbert A. Schmidt, deceased, and Marian S. Schmidt, individually, plaintiffs, vs. Fletcher Hamilton, defendant" in the sum of $4019.45. Marian S. Schmidt thereafter became Marian S. Dill, though the date of her

remarriage is not disclosed. On June 21, 1937, Hamilton filed a petition in bankruptcy in the San Francisco office of the United States District Court in which there was entered in the schedule of debts the following: "Marian Schmidt and Carl Bender, San Francisco, Calif. Judgment Superior Court, S.F. 262397—$4019.45 Judgment Municipal Court S.F. 12564—1300.00 Judgment Municipal Court S.F. 2083—1999.99." (The present action is one to enforce judgment No. 262397.) The schedule did not specify the "street and number of the residence" of the creditors and these were unknown to the bankrupt, but the schedule did not recite that they were unknown to him. It was agreed that both plaintiffs would testify that they had no "actual knowledge" of the filing of the bankruptcy proceedings; that they acquired knowledge of the proceedings on March 6, 1942, when Hamilton filed his answer in this action setting up the pleading of a discharge of the debt through the decree in bankruptcy.

The notice of the first meeting of creditors was duly mailed to all the creditors, including Marian S. Schmidt and Carl Bender, by depositing copies thereof in the U. S. postoffice at San Francisco enclosed in envelopes franked by notice of official business and addressed to the place of residence appearing in the schedule. The notices were mailed first class and the envelopes contained the return address of the sender—the referee in bankruptcy. The file in the bankruptcy proceeding does not disclose any returned notices addressed to these plaintiffs, but does contain a returned envelope and notice which had been mailed to another creditor at an address in Porterville, California.

It was stipulated that neither Marian S. Schmidt nor Carl Bender were listed in the telephone directory of San Francisco at the time when the schedule was filed; that a "Mrs. Herbert A. Schmidt" was listed, and that a "Carl Bender" was listed in a supplement to the San Francisco directory under "Other Cities and Towns." No stipulation was made, and no proof was offered that these were the same parties as those noted in the schedule. The petitioner was away from San Francisco at the time he prepared the schedule and did not have access to a city directory; he did not know either Carl Bender or Marian S. Schmidt personally, and did not recall the names or the addresses of their attorneys who appeared in the proceedings wherein the judgments were entered. On July 3, 1938, notices of hearing of the petition for discharge of the bankrupt were duly mailed in the same manner as the first notices were mailed, but none of the notices mailed to these creditors was returned to the referee, though the official return address was stamped on the envelopes.

On this stipulation of facts the trial court found that the schedule in the bankruptcy proceeding did not include the "residence" of these creditors and that they did not have "actual or constructive notice of the filing of the petition in bankruptcy."

[1] On the specific question whether a debt is "duly scheduled" under sections 7 and 17 of the Bankruptcy Act, 11 U.S.C.A. §§ 25, 35, all the authorities cited hold that the designation of the city of residence, without the street and number, is sufficient to meet the terms of the Act. The leading case is Kreitlein v. Ferger, 238 U.S. 21, 35 S.Ct. 685, 689, 59 L.Ed. 1184 where the only address given in the schedule was "C. Ferger, Indianapolis." In a suit in the State Court to enforce a prior judgment against the bankrupt it was contended that the listing was insufficient because it failed to give the street and number of the creditor, and because it used the initial "C" instead of the full name "Charles" in giving the name of the creditor.

The Supreme Court rejected both contentions saying:

"It is said that Kreitlein might have examined the directory, but the suggestion presupposes that at the time of making the schedule the bankrupt had access to a directory, and overlooks the fact that even if the address given therein was correct when made, the creditor may have moved before the book was issued, so that if notice was mailed to an incorrect street address the creditor might contend that such specific address was not required by statute, and that the burden of the mistake was cast on the bankrupt. We are here dealing with a general rule applicable to cases where the parties reside in different parts of the country, as well as to instances where they lived in the same city. The rule is the same as to both. There certainly is no presumption that bankrupts have access to directories containing the street addresses of their creditors throughout the land; and, if the fact was essential, the question as to whether the bankrupt

had access to a directory, or whether it was correct, were matters of proof, none of which was made in the present case."

As to the specific question involved here the Court said:

"Both as to the use of initials and omission of street address the act must be given a general construction, and in the light of the fact that letters directed to persons by their initials are constantly, properly, and promptly delivered in the greatest cities of the country even when the street number is not given. When it is considered that the schedule must not only include claims of recent origin, but debts which have accrued many years before, and where the creditor may have changed his residence, it becomes evident that to lay down the general rule that the schedule must give the name of the creditor and the city and street number of the residence of those living in the largest cities would, in a multitude of cases, destroy the beneficent effect of the bankruptcy act."

The rule of the Kreitlein case was followed in Kundert v. Riese, 225 Wis. 276, 274 N.W. 286; Claflin v. Wolff, 88 N.J.L. 308, 96 A. 73; Freedman v. Cooper, 126 N.J.L. 177, 17 A.2d 609; Collier on Bankruptcy, 13th Ed., p. 631; and is recognized in Brown v. Tropp, 106 Cal.App. 605, 289 P. 648. No case has been cited and we have found none that holds that a failure to give the street and number of the creditor's residence renders the schedule invalid or, ipso facto, effects the result that the debt was not "duly scheduled" within the terms of the Bankruptcy Act. Authorities cited by respondent are in apparent conflict, but, upon examination, are readily distinguishable. Brown v. Tropp, supra; Van Denburgh v. Goodfellow, 19 Cal.2d 217, 120 P.2d 20; and Marlenee v. Warkentin, 71 Cal.App.2d 177, 162 P.2d 321, are all cases where the bankrupt gave the wrong address. No one of them holds that a compliance with the Bankruptcy Act requires the "street and number" to be given. The Van Denburgh case rests upon this solid ground: (19 Cal.2d at page 222, 120 P.2d at page 23) "It is well settled that a debt is not duly scheduled if the bankrupt has listed the creditor's address incorrectly. See cases cited under 11 U.S.C.A. § 25, note 23; Brown v. Tropp, 106 Cal.App. 605, 289 P. 648; Parker v. Murphy, 215 Mass. 72, 102 N.E. 85, 87; In re D'Alessio, D.C., 24 F.Supp. 563." The judgment therein was reversed because "there is no evidence to support the finding of the trial court that plaintiff's address was properly set forth in defendants' bankruptcy schedules. The evidence establishes without contradiction that 1010 Title Guarantee Building was not the address of plaintiff, or of the estate of Mrs. Clark, or of plaintiff's attorneys. Since defendants could easily have determined plaintiff's correct address, their good faith in listing the debt is immaterial. See Fible v. Crabb, 129 Ky. 461, 112 S.W. 576."

In the Marlenee case the schedule failed to show the residence of the creditor, and failed to state that such residence was unknown to the bankrupt. The trial court found that such residence was well known to the bankrupt and that his failure to state it in the schedule was deliberate. The judgment was affirmed on the ground that this failure of the bankrupt was a non-compliance with the Bankruptcy Act.

Other authorities are cited to the point that the bankrupt must use reasonable diligence to ascertain the correct address of the creditor, but, like those preceding, these authorities involve cases where either no address or an incorrect address was given. No one of these holds that the "street and number" is required as a matter of law. The rule of all these cases rests squarely on fraud. If the bankrupt purposely gives a false address, or refrains from giving any address when the true address is known to him the decisions hold that such act is done for the fraudulent purpose of preventing proper notification to the creditor.

[2] Respondents argue that appellant did not use due diligence to ascertain the "street and number" of the residence of the creditors. It is said in argument that Marian S. Schmidt was the widow of Herbert A. Schmidt, but there was no proof of that fact, whereas it was stipulated that appellant did not know either Marian S. Schmidt or Carl Bender. Neither name appeared in the San Francisco telephone directory. The name of Herbert A. Schmidt did appear in that directory. But Marian S. Schmidt may have been a sister or a daughter of the deceased, or one unrelated to him. Hence, if the bankrupt had guessed wrong in giving her address as the street and number listed under the name of Herbert A. Schmidt he would have been confronted with the same difficulty as that found in the Van Denburgh case, supra, where it was held that a wrong

address vitiated the notice. Since the bankrupt chose to follow the rule of the United States Supreme Court announced in the Kreitlein case, supra, he cannot be charged with fraud in the preparation of his schedule.

Appellant argues that under section 39 of the Bankruptcy Act, 11 U.S.C.A. § 67, the ruling of the referee that the residences as given in the schedule are sufficient is a judicial determination of that issue binding upon the state courts. He cites Claflin v. Wolff, N.J., supra, 96 A. at page 77, where the New Jersey court said: "* * * we must not lose sight of the fact that section 39, subdivision 2, of the Bankruptcy Act requires the referee to examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended. Obviously this provision was intended that the referee in bankruptcy shall judicially pass upon, among other things, the completeness of the listing of the creditors, the addresses given by the bankrupt in the schedule, and if found to be incomplete to cause the same to be amended. For it is to be borne in mind that the bankruptcy act casts the duty of giving the various notices required to be given to creditors in the various stages of the bankruptcy proceedings upon the referee."

There seems to be a solid foundation for this rule. Since the Act requires the referee to "examine all schedules * * *, and cause such as are incomplete and defective to be amended" (11 U.S.C.A. § 67) the presumption follows that this duty was performed. If in that capacity the referee followed the rule of the United States Supreme Court announced in the Kreitlein case and found that the listing of the creditors' residences as "San Francisco, Calif." was sufficient, without the addition of the street and number, that finding should control the State courts, particularly where there is no evidence of fraud. But it is not necessary for us to hold that the ruling of the referee is res judicata of the issue of the sufficiency of the schedule. Its sufficiency has been determined by the rule in the Kreitlein case.

[3, 4] The appellant further argues that respondents are presumed to have had notice of the bankruptcy proceedings, though they may have been without actual knowledge of them. The conceded facts are that the notices were duly mailed to the creditors at the addresses given in the schedule. It was stipulated that they would testify that they did not "receive" the notices and that they had no "actual knowledge" of the proceedings. The evidence was that the letters were duly directed and mailed. From this the appellant argues the presumption follows that they were "received in the regular course of the mail." C.C.P. § 1963, sub. 24. Respondents' testimony that they did not "receive" the notices is not necessarily in conflict with the presumption that the envelope and its contents were received at the addresses given because they may not have opened the envelopes to examine their contents. But the point is not important since, if the debt is duly scheduled, the creditor is charged with constructive notice of the proceedings, though he may have failed to have received the written notice mailed to him. 8 C.J.S., Bankruptcy, § 577, p. 1531. Hence, assuming that the trial court properly found that respondents did not have actual knowledge of the bankrupt proceedings, it was in error when it found that they did not have constructive notice. All the authorities hold that a proper scheduling of the debt is constructive notice to the creditor.

The respondents suggest that there may have been a defect in the schedule in that Marian S. Schmidt and Carl Bender are listed as creditors individually, without designation of their representative capacities as executors. The judgment which is the basis of the debt was taken in the name of "Marian S. Schmidt and Carl Bender, as executors of the last will and testament of Herbert A. Schmidt, deceased, and Marian S. Schmidt, individually, plaintiffs, vs. Fletcher Hamilton, defendant." The complaint herein recites that "Marian S. Dill, formerly Marian S. Schmidt, individually is entitled to all of the proceeds of the said judgment * * * by reason of * * * certain order and orders made by the" court in the probate of said estate. It cannot be questioned that the schedule was sufficient as to Mrs. Marian S. Schmidt in her individual capacity. From this appellant argues that the schedule was sufficient as to all parties under the rule that notice to one of several executors, administrators, trustees, co-plaintiffs or co-defendants is notice to all the others. 46 C.J. 563; 21 Am.Jur. 802; 115 A.L.R. 390(Ann.). But it should be noted that if this be accepted as a rule of de-

cison there is scant authority for it, particularly when it is applied to joint-plaintiffs or joint-defendants. We prefer to rest our decision upon the firmer ground that since the real and only party having any interest in the judgment had been properly scheduled under the rule of the Kreitlein case, she must be presumed to have had constructive notice of the bankruptcy proceedings and is now foreclosed from asserting that the debt of the judgment was not discharged.

The judgment is reversed with directions to enter judgment for the defendant.

GOODELL and DOOLING, JJ., concur.



73 Cal.App.2d 847

SWARTHOUT v. GENTRY.

Civ. 3407.

District Court of Appeal, Fourth District, California.

April 5, 1946.

Hearing Denied May 27, 1946.

1. Judgment ⇐217

Generally, a decree fixing liability and rights of the parties and referring the case to a master or subordinate tribunal for a judicial purpose, such as the statement of an account, upon which a further decree is to be entered, is not a "final decree".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Decree".

2. Judgment ⇐217

Where no issue is left for future consideration except the fact of compliance or noncompliance with terms of the first decree, the decree is "final", but where anything further in the nature of judicial action on the part of the court is essential to final determination of the rights of the parties, the decree is "interlocutory".

See Words and Phrases, Permanent Edition, for all other definitions of "Interlocutory Decree".

3. Appeal and error ⇐78(5)

A judgment appointing referees to partition partnership property was an "interlocutory" and not a "final judgment" from which an appeal could be taken, where provisions in judgment disclosed that much was left to future judicial determination by trial court. Code Civ.Proc. §§ 752 et seq., 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Interlocutory Judgment".

Appeal from Superior Court, San Bernardino County; James M. Allen, Judge.

Action for dissolution of partnership and partition of real property by Albert Swarthout against J. Dale Gentry, who filed a cross-complaint. From the judgment, the defendant appeals and the plaintiff files a motion to dismiss the appeal.

Appeal dismissed.

Duckworth, Mussell & King and Fred A. Wilson, all of San Bernardino, for appellant.

William Guthrie and Donald W. Jordan, both of San Bernardino, and P. N. McCloskey, of Los Angeles, for respondent.

MARKS, Justice.

This is a motion to dismiss an appeal from a judgment which defendant maintains is final and which plaintiff argues is only interlocutory and therefore not appealable. The appeal is also submitted on the merits but if the motion is granted there will be no occasion to consider the merits of the cause.

Plaintiff brought this action alleging that he and defendant were partners in the cattle business; that the assets of the partnership consisted of personal property; that he and defendant owned real property as tenants in common. He sought a dissolution of the partnership and a partition of the real property. Defendant denied that any real property was owned by the parties as tenants in common. He alleged the real and personal property belonged to the partnership and sought its dissolution. The trial court found in favor of plaintiff at the first trial. The judgment was reversed on appeal principally because the evidence failed to support the finding that the real property was owned by the parties as tenants in common but instead disclosed it was an asset of the partnership of Gentry and Swarthout. Swarthout v. Gentry, 62 Cal.App.2d 68, 144 P.2d 38.

No amended pleadings were filed and at the opening of the second trial the following stipulation was entered into: "That the parties out of court have entered into a fair and equitable settlement of the issues respecting mutual accounting and credit to be allowed one or the other, and that by reason thereof there is no indebtedness of the partnership to either partner and no indebtedness of either partner to the other as respect to the partnership operations and property, and it is further stipulated that the only issue for determination by the Court is the distribution of the partnership assets."

The trial court found that a division of the partnership real property between the two partners would be the most fair, just and equitable method for its disposition and could be made "without serious loss to the partners or either of them", and that the partnership properties could not be sold and the sale price divided "without serious prejudice and loss to the partners." The trial court further found "that it is necessary that such division be effected by determination of this court and that such determination can be most practicably, equitably and properly effected by the appointment of referees in conformity of the practices and provisions set forth and provided for in Chapter IV, Title 10, of Part 2, of the Code of Civil Procedure of the State of California, and by the taking and carrying out of such proceedings by such referees and by this court as are provided for in the case of partitions of real property by the provisions of such Chapter IV."

In the judgment three referees were appointed to partition the property with the following powers, among others:

"It is further ordered, adjudged and decreed that said referees are hereby authorized, whenever it shall be to the advantage of the parties, to set apart portions of the properties for pipelines, ways, roads, streets or other easements necessary or convenient for the use of the parties, or either of them, their heirs and assigns, in and about the beneficial use of the respective properties set aside to them and each of them; and,

"It is further ordered, adjudged and decreed that if it appears that partition cannot be made equal between the parties according to their respective rights without prejudice to the rights and interests of either of them, the Court shall adjudge compensation to be made by one party to the other on account of the irregularity, and the referees are directed to specify in their report the facts showing such inequality and the amount of compensation required to be made on account of inequality. * * *

"It is further ordered, adjudged and decreed that either party to the action, after giving at least ten days notice in writing to the other party of his intention to do so, may move the court to confirm, change, modify, or set aside such report; that the court may appoint new referees."

In this connection it should be noted that the sections of the Code of Civil Procedure adopted by the trial court, under which the division of the partnership property is to be made, provide that partition may be made when property is owned by cotenants as joint tenants, or tenants in common, or when there is a life estate with a remainder over, and do not by their express terms extend to property owned by a partnership which in California is a separate estate. Sec. 682, Civil Code. However, this question pertains to the main appeal and need not be noted further here although it is stressed in the brief filed by appellant in resisting the motion to dismiss the appeal.

It is clear from the record and the stipulation already quoted, that at the second trial the plaintiff abandoned his original contention that the real property was owned by himself and defendant as tenants in common and agreed with the holding on the former appeal that the real and personal property involved was owned by the partnership of Gentry and Swarthout. Therefore the action must now be regarded as one for dissolution of the partnership under the allegations of the cross-complaint.

The question of whether a judgment is final or merely interlocutory has been a close and troublesome one and numerous appeals have been taken out of an abundance of caution, because of that uncertainty, to protect the rights of an appellant against a possible holding that a judgment although termed interlocutory was in fact final (Heck v. Heck Bros., 57 Cal.App.2d 599, 134 P.2d 853), which may be the reason for the appeal before us.

[1] The rule in effect now is stated in Gunder v. Gunder, 208 Cal. 559, 282 P. 794, 795, as follows: "We are persuaded from an examination of the authorities that

the rule adopted by the courts of this state and applicable to the present case is based on the desirability of subjecting the parties to but one appeal at the determination of the entire controversy between them (citing cases), and is stated in Pomper v. Superior Court, 191 Cal. 494, at page 496, 216 P. 577, as follows: 'The general rule is that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final.' "

[2] This rule was further amplified in Bakewell v. Bakewell, 21 Cal.2d 224, 130 P.2d 975, 978, as follows:

"The general test for determining whether the judgment is final is 'that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11, 17. * * *

"On appeal from the final judgment the rulings and decision of the court on all issues are reviewable. Code Civ.Proc. § 956. Only one final judgment may be entered in an action. Middleton v. Finney, supra [214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104]; Doudell v. Shoo, 159 Cal. 448, 114 P. 579. The fact that the court in the judgment before us assumed improperly to establish certain rights of the parties and to make orders therein effective immediately is not alone sufficient to render it a final judgment." See, also, White v. White, 28 Cal. App.2d 524, 79 P.2d 759; Heck v. Heck Bros., supra.

[3] It clearly appears from the portions of the judgment already quoted that much remains of a judicial nature to be finally settled by the trial court.

The referees may report on easements and rights of way that are necessary or convenient for use by one party over property of the other. Of course such a report could only amount to a recommendation with final decision resting in the court. This is clearly a judicial matter reserved for future determination.

The referees are required to report any inequality in value in the properties awarded to the partners and to recommend the amount to be paid by one to the other. The trial court would have to make an award of such amount in a final judgment. This statement is made without any intention of holding that there is power in the court to make such an award in an action for dissolution of a partnership.

Finally the right is given to either party to move "to confirm, change, modify or set aside such report" with the further power reserved to the court to "appoint new referees" presumably so the entire proceeding may be repeated if the partition made by the first referees does not meet the approval of the court.

Clearly much is left to future judicial determination by the trial court. The judgment before us is an interlocutory, not a final judgment from which an appeal may be taken, Sec. 963, Code Civ.Proc., and "it will not be assumed that the trial court will attempt to enforce those provisions of the judgment which are improperly declared to be immediately effective." Bakewell v. Bakewell, supra.

The appeal is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.



73 Cal.App.2d 828

MERCHANTS ICE & COLD STORAGE CO. v. GLOBE BREWING CO. et al.

SOZZI v. MERCHANTS' ICE & COLD STORAGE CO. et al.

Civ. 12905.

District Court of Appeal, First District, Division 2, California.

April 3, 1946.

Rehearing Denied May 3, 1946.

1. Fraud ⇐43

A single false representation, if sufficiently pleaded, would render cross-complaint for damages for fraudulently inducing cross-complainant to advance money to corporation invulnerable to general demurrer.

2. Fraud ⇐41

A cross-complaint, alleging that cross-complainant's attorney induced cross-com-

plainant to invest designated amounts of money in corporation in reliance on attorney's false representations as to corporation's assets and profits, was sufficient to state cause of action for damages for fraudulent misrepresentations.

3. Appeal and error ⇐837(4)

On appeal from judgment of dismissal entered after demurrers to cross-complaint were sustained, reviewing court would merely pass on sufficiency of cross-complaint as a pleading and would not consider matters not within the four corners of the cross-complaint.

4. Appeal and error ⇐863

On appeal from judgment of dismissal entered after sustaining of demurrers to cross-complaint for damages for fraudulently inducing cross-complainant to advance money to corporation, reviewing court would not determine whether cross-complainant should have been put on his guard with regard to the representations much earlier than he alleged.

5. Conspiracy ⇐9

A civil wrong resulting in damage, and not the conspiracy, constitutes the cause of action for damages from conspiracy to defraud.

6. Pleading ⇐195

A cross-complaint for damages from persons who allegedly entered into conspiracy fraudulently to induce the cross-complainant to invest money in corporation stated a cause of action for damages based on fraud and was not subject to demurrer as uniting without separately stating a purported cause of action for damages for conspiracy with a cause of action for fraud.

7. Fraud ⇐31

A person induced to advance money to corporation on alleged fraudulent misrepresentations could sue in assumpsit, or on an implied contract to repay the money, or for damages based on the fraud.

8. Action ⇐38(4)

Acts of fraud which are part of one entire scheme constitute but one cause of action.

9. Fraud ⇐43

A cross-complaint for damages for fraudulently inducing cross-complainant to advance to corporation money and stock which cross-defendants promised to repay cross-complainant stated a cause of action for fraud and not a cause of action in assumpsit on the basis of a contract for repayment, where the important allegation was that cross-complainant was induced to lend the money and stock by the fraudulent representations, and the allegation of a promise of repayment was but incidental to the loss of the money and stock.

10. Fraud ⇐44

A cross-complaint, alleging in detail false representations made to cross-complainant to induce advancement of money and stock to corporation which was to be reorganized, need not allege terms of written contract relating to proposed reorganization, where proposed reorganization was not alleged to be one of the misrepresentations.

11. Limitation of actions ⇐179(2)

A cross-complaint for damages for fraudulent misrepresentations filed within three years after June, 1938, was not barred by limitations, where cross-complaint alleged facts sufficient to show that cross-complainant acquired knowledge of facts sufficient to put him on inquiry in June, 1938. Code Civ.Proc. §§ 335, 337; § 338, subd. 4; § 339, subd. 1.

On Petition for Rehearing.

12. Appeal and error ⇐832(4)

A rehearing will not be granted for the purpose of considering a suggestion of error made for the first time in the rehearing petition.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Suit to foreclose a chattel mortgage by Merchants' Ice & Cold Storage Company, a corporation, against the Globe Brewing Company, a corporation, L. L. Sozzi, Pacific Empire Holdings, Inc., a corporation, the Pacific Empire Corporation, a corporation, M. Maffei, A. J. Scampini, and others. L. L. Sozzi filed a cross-complaint against the Merchants Ice & Cold Storage Company, the Pacific Holdings, Inc., the Pacific Empire Corporation, M. Maffei, A. J. Scampini, and others. From the judgment, L. L. Sozzi appeals.

Reversed with directions.

Charles Reagh, of San Francisco, for appellant.

Joseph P. Lacey, of San Francisco (J. A. Pardini, of San Francisco, of counsel), for respondent A. J. Scampini.

A. J. Scampini, of San Francisco, for respondent Thos. H. Wingate, receiver for Pacific Empire Holdings, Inc., and respondent Pacific Empire Corp.

GOODELL, Justice.

This is an appeal from a judgment of dismissal entered after demurrers were sustained to appellant's second amended cross-complaint and appellant declined to amend.

Merchants' Ice & Cold Storage Co. filed suit against Globe Brewing Co., the appellant Sozzi, Pacific Empire Holdings, Inc., Pacific Empire Corporation, A. J. Scampini and one M. Maffei for the foreclosure of a chattel mortgage. Appellant filed therein an answer and cross-complaint alleging fraud and joining as cross-defendants said Ice Company, said Maffei, and the respondents herein. After a demurrer of the Ice Company thereto was sustained appellant filed an amended cross-complaint. Thereafter the Ice Company dismissed its foreclosure complaint with prejudice. A motion was then made by the remaining cross-defendants to dismiss the amended cross-complaint for failure to state a cause of action, whereupon appellant filed his second amended cross-complaint, now before the court. The Ice Company filed an answer thereto without demurring. Separate demurrers thereto, filed by the cross-defendants Maffei, Scampini and the two Empire corporations, were sustained with leave to amend, but appellant declined to do so and the judgment was entered from which he appeals.

In his cross-complaint appellant alleges that the two Empire corporations own the stock of Merchants' Ice & Cold Storage Co., and completely dominate and control it, and that on February 10, 1936, Scampini, Maffei, and others entered into a conspiracy with the Ice Company and the two Empire corporations to induce appellant to invest large sums of money nominally in Globe Brewing Co. but actually for the benefit of the Ice Company and the other cross-defendants. It is alleged that pursuant thereto respondent Scampini, who was appellant's attorney, made the following representations to appellant: that Globe Brewing Co. was in involuntary bankruptcy; that $25,000 was required to effect a complete reorganization of that concern; that if appellant would advance $17,500, the Ice Company, which was one of Globe's creditors, would advance $7,500; that the assets of Globe were worth $300,000 and from $65,000 to $75,000 was required to clear up its liabilities; that Herbert Fleishacker, Tom Walker, and Grace Bros., Inc., all were interested in purchasing the brewery; that despite receivership the brewery was operating at a profit and had in fact made $24,000 in one month; that Globe could easily be sold at a profit of $100,000 within thirty days if appellant could raise the sum asked. Appellant informed Scampini that he could raise $14,000 only, whereupon Scampini agreed personally to invest the remaining $3,500.

In specifying the falsity of the above representations, the cross-complaint alleges that it was true that Globe was in bankruptcy and that the Ice Company was a creditor thereof, but that in every other particular the representations were false.

The cross-complaint alleges also that at the time of these representations Scampini was attorney for and an officer of the Ice Company and its subsidiary, Merchants' Ice Acceptance Corporation but that this fact was unknown to appellant and all the respondents joined in concealing it from him; that all the respondents knew the falsity of the representations made by Scampini and caused them to be made either with knowledge of their falsity or in reckless disregard of their truth or falsity, to induce appellant to invest his money in Globe.

Thereafter, on February 15, 1936, appellant entered into a written contract with the Acceptance Corporation. This contract, according to the cross-complaint, was prepared by Scampini and provided that his law firm should be retained by both the appellant and the Acceptance Corporation to effect the reorganization of Globe. Appellant alleges that between February 15 and March 30, 1936, in reliance on the representations, he turned over to the cross-defendants said $14,000; that Globe was reorganized (prior to May 11, 1936) and appellant was made a vice-president thereof; that after 90 days had elapsed he inquired why the sale had not been consummated, and was informed by Scampini that during the delay in reorganization said Walker had become interested in the reorganization of another brewery, but that Grace Bros., Inc., were still investigating; Scampini represented that in the mean-

time Globe was earning a substantial profit. It is alleged that Globe in fact never operated at a profit after the reorganization.

Scampini thereafter informed appellant that further capital was required to continue the operation of the brewery, and accordingly appellant turned over to Globe 3,050 shares of "Italo Pete" stock which he owned, to be used by it as collateral security for a loan from the Bank of America; Globe failed to repay this loan and the bank sold the appellant's stock for $17,000 and applied that amount to the obligation. The cross-defendants, it is alleged, agreed to repay this sum to appellant or to cause Globe to do so.

Thereafter, it is alleged, Scampini and Maffei informed appellant that it was necessary to secure still further working capital to keep the brewery in operation until it could be sold as originally represented, and that appellant advanced approximately $28,051.19 between May 23, 1936, and November 5, 1937, as a loan to Globe in reliance on the representations previously made and in full faith and confidence in Scampini because he was appellant's lawyer and a "co-adventurer"; that the total sum turned over to the cross-defendants and to Globe by appellant in reliance on all these representations (including the stock which was lost to appellant) amount to $51,051.19, no part of which has been repaid; that the assets of Globe were distributed in bankruptcy but the liquidation left nothing for the creditors, and no part of the assets were distributed directly or indirectly to appellant.

Appellant alleges that he remained in ignorance of the falsity of the representations made by Scampini until June 16, 1938. On or about June 1, 1938, appellant engaged a firm of accountants to examine charges for refrigeration made against Globe by the Ice Company; the accountants on June 16, 1938, reported substantial overcharges and appellant requested Scampini to commence action against the Ice Company. Scampini replied that he could not do so because he had long been attorney for and a director of the Ice Company. Appellant alleges that he thereupon launched an investigation and learned the falsity of the representations. The demand was for said $51,051.19, and interest.

The three demurrers before the court set up the following grounds: That the cross-complaint fails to state a cause of action; that several causes of action are improperly united and not separately stated; that the pleading fails to set forth the written contract between appellant and Acceptance Corporation, and that the action is barred by the statute of limitations.

[1] One of the representations in the case at bar was that the assets of Globe were worth $300,000, and it is alleged that their real value did not exceed one-tenth thereof. It was represented that between $65,000 and $75,000 would clear up the Globe's liability while the allegation is that in fact $119,540 was required to do so. It was represented that despite bankruptcy proceedings Globe was operating at a profit and had made a profit of $24,000 in a single month, while the allegation is that it was not operating at a profit, nor had it made $24,000, in one month nor any sum approximating that amount. These are but three of the representations, definitely stated to have been made, and as definitely stated to have been false. It is not necessary to repeat the others, for one false representation if sufficiently pleaded would render the pleading invulnerable to general demurrer. See Klutts v. Rupley, 58 Cal.App.2d 560, 137 P.2d 496. Reliance upon the representations is pleaded; the fiduciary relationship is fully pleaded; the $14,000 first advanced, the loss of the 3050 shares of "Italo-Pete" stock, and the further cash investment of $28,051.19 all are alleged, which sufficiently set up the appellant's damages.

[2] Respondents have cited numerous fraud cases on general and well-settled propositions, but they do not convince us that the pleading in this case is insufficient. As was said in Burckhardt v. Woods, 124 Cal.App. 345, 350, 12 P.2d 482, 484 (which has many features in common with the instant case), "this court is unable to discover any such defect therein as should result in a declaration that the complaint fails to state a cause of action. * * * it would appear that in all essential particulars the complaint substantially conforms to the legal requirements in an action for damages alleged to arise from the fraudulent acts of the defendants." It falls squarely within the familiar rules restated in the recent case of Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958.

[3] Respondents depart from the four corners of the pleading and tell us in their brief that appellant, instead of being merely vice-president of Globe, was in fact its

president and active manager "and knew more about it than any of the cross-defendants." This might be readily established at the trial, but it is hardly necessary to repeat what was said in Mox Incorporated v. Woods, 202 Cal. 675, 676, 262 P. 302, "* * * we are merely to pass upon the sufficiency of the complaint as a pleading."

[4] Respondents also argue that appellant must have been put on his guard with respect to the representations, or some of them, much earlier than he alleges. Nicolaisen v. Toffelmier, 97 Cal.App. 342, 275 P. 823. It may be that the evidence will show that such was the case, but we are confined to the allegations of the cross-complaint. The case last cited and its companions (found at Brewis v. Toffelmier, 97 Cal.App. 329, 275 P. 819 and Flores v. Toffelmier, 97 Cal.App. 339, 275 P. 824) were appeals after trials on the merits where, of course, all such matters as the plaintiff's negligence, knowledge and notice and means of acquiring knowledge were before the court. In French v. Freeman, 191 Cal. 579, 589, 217 P. 515, 519, a rescission case, it is said: "The rule that a person who has discovered that he has been cheated in one particular is put on inquiry as to other possible frauds must be applied with reference to all the circumstances of the case, and is, of course, a question for the trial court to determine." This rule was followed and applied in Wolfson v. Ocean Park Realty Corp., 114 Cal.App. 127, 130, 299 P. 579. When the respondents file their answers the plea of statute of limitations will still be available to them, and whether such plea is sustained will depend, of course, on what the evidence develops.

[5, 6] One of the grounds of special demurrer is that the appellant has united without separately stating them, a purported cause of action for damages for conspiracy with one for fraud and one for money had and received. Little time need be consumed respecting conspiracy. It is true appellant alleges that respondents and others *conspired* in the commission of the fraud, but it is definitely settled that "it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action." Burckhardt v. Woods, supra, at page 351 of 124 Cal.App., at page 485 of 12 P.2d, and cases cited.

[7-9] With respect to the contention that the pleading discloses a case based either on express or implied contract: It is perfectly clear that appellant has pleaded a cause of action for damages based on fraud. While it is true that he could have sued in assumpsit on an implied contract to repay the money (Firpo v. Pacific Mutual, etc., Co., 80 Cal.App. 122, 251 P. 657) he did not elect to do so. Appellant has alleged several acts of fraud, but the rule is "that acts of fraud which are part of one entire scheme constitute but one cause of action." 1 Cal.Jur. 351, citing Raynor v. Mintzer, 67 Cal. 159, 163, 7 P. 431. See, also De Leonis v. Walsh, 140 Cal. 175, 73 P. 813; Divani v. Donovan, 214 Cal. 447, 453, 454, 6 P.2d 247; Nevin v. Gary, 12 Cal.App. 1, 4, 106 P. 422; Finch v. McKee, 18 Cal.App.2d 90, 93, 62 P.2d 1380; Heffernan v. Bennett & Armour, 63 Cal.App.2d 178, 185, 146 P.2d 482; Conger v. White, Cal.App., 158 P.2d 415. The allegation that the respondents agreed to repay, or cause the Globe to repay, to appellant the sum for which his 3050 shares were sold discloses one of the circumstances of the fraudulent transaction. It cannot be said that by this cross-complaint appellant seeks to recover in assumpsit on the basis of a contract with the respondents for the repayment of that sum. The important allegation is that he was induced to lend the stock by the fraudulent representations of the respondents. Its loss is one of the elements of his damages. The allegation of a promise of repayment is but incidental.

[10] In this case, as in Burckhardt v. Woods, supra, the cross-defendants sought by demurrer to compel the pleader to set out the contract entered into between appellant and the Acceptance Corporation. The demurrer says that it appears from the pleading "that all of the negotiations and discussions alleged to have taken place * * * prior to February 10, 1936, or thereabouts, were merged into and gave rise to a written contract between the cross-complainant and Merchants Ice Acceptance Corporation relating to the proposed reorganization of Globe Brewing Company." The first answer to this is that *it does not appear from the pleading that any negotiations or discussions were merged in the written agreement.* The allegation is simply that such contract was made between the Acceptance Corporation and ap-

pellant; that it was drawn by respondent Scampini and provided as one of its terms that Scampini's law firm be retained by both parties to effect the proposed reorganization of Globe. The second answer is that the contract was with only one of the respondents and was not with Scampini or any of the others. It is alleged to have provided also for an extension of 90 days, but the cross-complaint does not pretend to allege that the subject matter of the contract was the representations theretofore made by Scampini or any one else, which formed the basis of this action. It appears rather that the contract had to do with the reorganization of the Globe. Thirdly, it was not necessary for appellant to plead what the nature of the proposed reorganization of Globe was to be, or any of the other matters mentioned in the demurrer, and therefore no uncertainty was created by such omission. Whatever the contract covered may be brought out by way of defense. In Burckhardt v. Woods, supra, the complaint recited that the plaintiff had been induced to lend $5,000 to a corporation. A general objection to the sufficiency of the complaint was raised by demurrer on the ground that it "neither sets up according to its legal effect, nor in hæc verba the terms of the agreement * * *." In rejecting this argument, the court said: "In alleging as he has the situation of the respective parties to the transaction and in complete detail the false representations which were made to him by the defendants, plaintiff has so thoroughly notified the defendants of the nature and character of his accusation against them that any further specific allegations with reference to the precise arrangement which may or which may not have been agreed upon by the parties would be but evidentiary of the facts which possibly may have surrounded or entered into the transaction, and which consequently were unnecessary of declaration by plaintiff in his complaint." There is no merit in the contention that the ruling can be supported on this ground.

[11] The respondents by demurrer invoke the statute of limitations. Sec. 335; sec. 337; sec. 338, subd. 4; and sec. 339, subd. 1, Code Civ.Proc. The cross-complaint was filed more than three years after February 15, 1936, but within three years after June 16, 1938, which was the date of discovery alleged by appellant. The application of the discovery provision of subd. 4 of sec. 338 received exhaustive consideration in the recent Hobart case, supra, where the court said that the statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. The court quoted with approval the following language in Tarke v. Bingham, 123 Cal. 163, 55 P. 759, 760: "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.* (Italics added)." In the Hobart case a prior inquiry would have disclosed the true state of the facts relied upon. The court concluded, however, that it could not hold, as a matter of law, that any of the circumstances known to the plaintiff should have put a reasonably prudent person on inquiry, stressing two factors: the fiduciary relationship which existed between the parties and the fact that the plaintiff's evidence disclosed certain factors that may have tended to discourage the making of an exhaustive independent investigation. A parallel situation is found the instant case. Here the relationship of attorney and client existed between Scampini and the appellant and the cross-complaint alleged facts which likewise tended to discourage independent investigation. Thus it is alleged that when the contract was prepared on February 15, 1936, Scampini advised the appellant that it was necessary to extend the reorganization of the brewery a period of ninety days because legal technicalities required a longer time than he had been led to believe it would take. When the appellant inquired why no sale had been effected after ninety days, Scampini advised him that Walker was delaying the deal because he had become interested in another brewery during the delay incident to the reorganization; that Grace Bros. were still investigating, and that in the meantime it would be necessary to operate the Globe. Appellant acquired knowledge of facts sufficient to put him upon inquiry in June, 1938, when Scampini advised him of his relationship with the Ice Company which,

according to the allegations, was the first time appellant knew that Scampini had been an attorney and a director of the Ice Company for a long time. His consenting in the agreement that Scampini could act as attorney for the *Acceptance Corporation* in reorganization matters, while acting as appellant's attorney, did not put him on notice that Scampini at that time already was an attorney and a director for the Ice Company and had been for some time. Following this information coming to him he at once started his investigation.

The judgment appealed from is reversed with directions to the trial court to overrule the demurrers.

DOOLING, J., concurs.

NOURSE, Presiding Justice (concurring).

I concur in the judgment with reluctance. The unverified cross-complaint is manifestly sham, and if a motion to strike had been made it should have been granted. But since the appeal is on the demurrer we must assume that the statements of appellant's counsel are true though he was not willing to have his client verify them.

On Petition for Rehearing.

NOURSE, Presiding Justice.

[12] In their petition for rehearing respondents argue for the first time that their demurrer was good because appellant's cross-complaint did not show that it arose out of the transaction sued on (sec. 442, Code Civ.Proc.) The record did not contain the original complaint and respondents now attempt to state its contents in their petition. When respondents dismissed, the only affirmative pleading remaining was the cross-complaint, and on appeal the sole ground of attack was that it did not allege fraud. It has been repeatedly held that a rehearing will not be granted for the purpose of considering a suggestion of error made for the first time in the petition. 2 Cal.Jur. 790; Conner v. East Bay Municipal Utility Dist., 8 Cal.App. 2d 613, 619, 47 P.2d 774, 48 P.2d 982; Ocean Park Pier Amusement Corporation v. City of Santa Monica, 40 Cal.App.(2d) 76, 87, 104 P.2d 668, 879.

Rehearing denied.

73 Cal.App.2d 871

EDGAR et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 3191.

District Court of Appeal, Fourth District, California.

April 8, 1946.

Rehearing Denied April 26, 1946.

Hearing Denied June 6, 1946.

1. Trusts ⇐247

Where trustee sold arid trust land by mistake and on discovering mistake, after purchaser had drilled wells producing irrigation water, repurchased land for beneficiaries under an agreement by which recovery of possession was delayed for five years, beneficiaries' election to seek restoration of the property with its fruits was not dependent upon the situation thus created by the trustee but related back to the original wrongful sale and beneficiaries were entitled to the actual fruits of the land for the full period until it was completely restored. Civ.Code, § 2237.

2. Trusts ⇐247

Where trustee sold arid trust land by mistake and on discovering mistake, after purchaser had drilled wells producing irrigation water, repurchased the land under an agreement whereby the purchasers remained in possession under a five year lease, during which period purchasers actually furnished water produced on the trust land for the irrigation of an adjoining tract, water sold to irrigate adjoining land was a product of the trust land and the net value thereof was a part of the actual fruits of the trust land to which beneficiaries were entitled as against trustee. Civ.Code, § 2237.

3. Trusts ⇐262

Where trustee sold arid trust land by mistake and on discovering mistake, after purchaser had drilled wells producing irrigation water which was also used to irrigate an adjoining tract, repurchased the land for the beneficiaries, in determining the net value of the water used on the adjoining land, as part of the fruits of the trust land, the records of the purchasers covering entire enterprise conducted by them and showing a net profit of the trust land and adjoining land, could not be taken as indicating the net value of the water removed from the trust land. Civ.Code, § 2237.

4. Trusts ⇐247

Restoration of trust land to the trust with its "fruits" requires in addition to restoring the title an accounting for what the land produced over the period in which the beneficiaries were deprived of its possession. Civ.Code, § 2237.

See Words and Phrases, Permanent Edition, for all other definitions of "Fruits".

5. Trusts ⇐247

Where trustee through mistake conveyed trust lands, the true test as to what were the fruits of the land, to which beneficiaries were entitled from time of the wrongful conveyance until possession was regained, was what the land produced for those to whom it had been wrongfully conveyed and who stood in the position that the beneficiaries should have occupied. Civ.Code, § 2237.

Appeal from Superior Court, Kern County; Frank Lamberson, Judge.

Action by Laura B. Edgar, as administratrix etc., and others against the Bank of America National Trust & Savings Association and others, seeking the restoration of certain trust property, together with the value of the water and other fruit and products produced thereon. From the judgment the plaintiffs and certain defendants, as beneficiaries of the trust, appeal.

Reversed and remanded for another trial.

John W. Preston, of Los Angeles, and Jesse W. Curtis, of San Bernardino, for appellants.

Louis Ferrari, G. D. Schilling, and U. A. Gribble, all of San Francisco, Harvey, Johnston & Baker, of Bakersfield, and Erskine & Erskine, of San Francisco, for respondent.

BARNARD, Presiding Justice.

The respondent bank, as trustee, held title to 80 acres of land without the right to sell or lease the same under the circumstances material here. The property was acquired in 1921 for a recited purchased price of $8,000 and for the next fifteen years it was rented only for grazing purposes, the rentals not exceeding the amount of the taxes. From 1932 to 1935 the taxes, averaging about $6 a year, were allowed to become delinquent.

In the fall of 1936, D. C. Scott and E. G. Stahl, believing they could develop water on this 80 acres, sought to buy that property and, as a part of the project they had in mind, also leased about 900 acres of adjoining and surrounding land at a rental varying from 50¢ to $1 per acre. In December, 1936, the respondent bank, in violation of its trust but in the belief that it owned the 80 acres, sold the same to Scott and Stahl for $800, payable in installments. The bank sold the surface rights only and there is no controversy respecting any possible oil rights, which were specifically reserved. Early in 1937 Scott and Stahl drilled two wells on the trust land, complete with casing, at a cost of $4,100. These wells produced about 1200 gallons of water per minute each, which proved sufficient to irrigate about 1000 acres of land. On March 1, 1937, Scott and Stahl leased the trust land and subleased the adjoining 900 acres of land to Sample Bros. for a period of five years and five months, expiring on August 1, 1942, with the right to use water produced on the 80 acres both on that land and on the adjoining 900 acres. The Samples agreed to and did pay Scott and Stahl a rental of $5 per acre per year for both the 80 acres and the 900 acres. They also agreed to pay the cost of drilling the wells, with the casing, these amounts to be deducted from the rentals due. They also agreed to operate the pumps and deliver the water to various portions of the land at their own expense. The Samples used the water so produced for that purpose until August 1, 1942, with great success and produced crops of great value. It now appears that on the expiration of those leases Scott and Stahl acquired two 10-acre tracts adjoining the trust land on the north and on the south, and drilled thereon two wells from which the 900 acres were then irrigated.

On the discovery of its error in selling the land the bank began negotiations with Scott and Stahl in an effort to repurchase the 80 acres and have it restored to the trust. As a result, Scott and Stahl on March 10, 1938, gave the bank a quitclaim deed to the 80 acres, which deed contained the reservation that Scott and Stahl were to retain the use and occupancy of that land until August 1, 1942, and further provided that Scott and Stahl should pay to the bank $200 in cash and $400 on the first of August of each year from 1938 to 1941, both inclusive. It is admitted that pursuant to the latter provision $1,800 was paid to the bank. It clearly appears that by this deed the bank immediately reacquired no

more than the legal title to the 80 acres, with a provision making possible the complete restoration of the property to the trust on August 1, 1942. It is admitted that the bank paid Scott and Stahl for this deed a net amount of $4,700 over and above the $800, for which it had originally sold the land.

On a former appeal (see Edgar v. Bank of America, 50 Cal.App.2d 827, 123 P.2d 885, where some of the facts are more fully stated), a judgment against the bank for $25,000 was reversed on the ground that it was based upon several measures of recovery without any election to rely upon any one of them in particular. It was there pointed out that, under section 2237 of the Civil Code, where trust property has been wrongfully disposed of by the trustee the beneficiaries of the trust may, at their option, either compel the trustee to replace the property "with its fruits" or compel the trustee to account for its proceeds with interest.

Thereafter, the plaintiffs, having elected to seek the restoration of the property with its fruits, filed an amended complaint in which they asked to have the 80 acres fully restored to the trust and to have the bank account to the trust for the value of the water and other fruits and products produced thereon between December 28, 1936 and August 1, 1942. The case was retried and the court found, among other things, that Scott and Stahl had retained possession of the 80 acres up to August 1, 1942; that the 80 acres had been enhanced in value in the amount of $4,100, being the cost of the wells and casing; that the $1,800 paid to the bank by Scott and Stahl under the terms of the quitclaim deed was the reasonable rental value of the 80 acres as improved by the wells; that the only income derived by the bank from the 80 acres from December 28, 1936 to August 1, 1942, was this $1,800 paid under the quitclaim deed; and that the fruits of said land acquired by the bank from December 28, 1936 is the said sum of $1,800. As conclusions of law, it was found that the 80 acres should be restored to the trust; that the bank should restore and pay to the trust the fruits of the land it had thus received in the amount of $1,800, with interest thereon from August 1, 1942; that the bank has a lien on the 80 acres to secure the payment to itself of the sum of $4,100, being the amount which the value of the land had been increased by the improvements; that the $1,800 thus owed by the bank should be credited on the $4,100 thus owed to it; that the land should be sold and the balance due to the bank should be paid from the proceeds of the sale; and that the bank should recover its costs. Judgment was entered accordingly, with the appointment of a commissioner to sell the land. From this judgment the beneficiaries of the trust have appealed.

There is no dispute as to the general facts, and little, if any, dispute as to the general rule of law applicable. Both parties agree that by virtue of the election thus made the appellants are entitled to a restoration of the trust land with its fruits. There is a strong disagreement between them with respect to what may properly be considered as such fruits. Moreover, the appellants have conceded at the trial, and here, that the amount representing the fruits of this land for this period, to which they are entitled, should be reduced by the sum of $4,100 representing the amount by which the value of the land was enhanced through the installation of the wells. It may be observed, in passing, that this concession was rather liberal in view of the fact that, in the absence of other available land, these wells seem much larger than were needed for the 80 acres, and there was also some depreciation.

The land being returned and it being thus admitted that the appellants should be charged for the enhanced value of the land, the essential question here is as to what may be said to constitute the fruits of this land during the period from the date of the wrongful conveyance up to August 1, 1942, when possession was finally restored to the trustee. The main controversy is over the question as to whether the water removed from the 80 acres and used on the 900 acres should be considered and accounted for as a part of the fruits of the 80 acres.

The appellants contend that the findings, to the effect that the $1,800 received by the bank was not only the reasonable rental value of the land but constituted its fruits for the period in question, are not supported by the evidence. It is argued that these findings fail to take into consideration the net value of the water produced on the 80 acres and taken to and used on the 900 acres; that it clearly appears that the $1,800 received by the bank does not include any part of the water thus removed from the 80 acres because that amount was fixed on the basis of $5 per acre per annum for the trust land, which was the precise amount paid as rental for the 900 acres;

that this $5 per acre was paid for only a part of the period in question; that the water thus removed from the 80 acres was the principal and most valuable part of the fruits and products of the trust property; and that the net value of the water so taken from the trust land not only could be but was determined with absolute accuracy. In support of this last contention they rely on the books kept by Scott and Stahl showing their receipts and disbursements for the period in question, which were introduced in evidence. These books covered the entire enterprise, including both the trust property and the 900 acres. These books show that Scott and Stahl received during the five-year period some $25,000 from the Samples as rentals on both the 900 acres and the 80 acres at $5 per acre per year, and that after deducting the rentals and other expenses paid by Scott and Stahl, including the $1,800 paid to the bank, the balance of their net income from the project was $15,697.37. It is argued that this net income, thus received by Scott and Stahl, constitutes the fruits of the 80 acres for the period in question; that the $4,100 chargeable to the appellants for the improvements to the land and the $1,800 already paid to the trustee should be deducted from this amount; and that the balance of $9,797.37 is the net value of the water extracted from the trust property and is the amount for which the appellants should have judgment, in addition to the restoration of the land.

It is also argued that the appellants offered to prove by three witnesses that the reasonable market value of water in the vicinity of the trust land was at least $15 per acre per annum, that this evidence was excluded, and that on the basis of this evidence it could have been established that the net value of the water taken from the 80 acres was more than $5 per acre per year, for the 900 acres.

The respondent, while admitting that under the circumstances the remedy of specific reparation became available to the appellants and that under their election they are entitled to a restoration of the property with its fruits, contends the rents paid it by Scott and Stahl (the $1,800 paid pursuant to the quitclaim deed) constitute the fruits of the 80 acres, and that this court so held on the former appeal. 50 Cal.App.2d 827, 123 P.2d 885. It is argued that the quitclaim deed given to the bank by Scott and Stahl on March 10, 1938, was not only a reconveyance of the 80 acres to the bank but was also, in effect, a lease of the property by the bank to Scott and Stahl; that in order to reacquire the trust property the bank was compelled to permit Scott and Stahl to retain possession of the land up to August 1, 1942 (the expiration of their leases to the Samples); that Scott and Stahl would not have resold the property to the bank unless it had agreed to lease it to them for that period; that when the bank reacquired the property it again held it in trust "subject to appellants' right to reject the remedy of specific reparation and to elect one of their other remedies"; that the appellants, having elected to seek specific reparation, the restoration of the property with its fruits, must take under the situation as it then existed, and are entitled only to the rents which were paid to the bank by Stahl and Scott under the implied lease contained in the quitclaim deed, or the sum of $1,800, which constitutes the entire fruits of the property for the period in question. It is further argued that the appellants' real contention is that the bank was negligent in thus leasing the 80 acres to Scott and Stahl at too low a rental, that this issue was not pleaded, and that, in any event, there is evidence that the rent paid by Scott and Stahl for the 80 acres was its reasonable rental value and further evidence that after that lease expired on August 1, 1942, Scott and Stahl acquired two 10-acre parcels adjoining the trust property and drilled two new wells from which they irrigated the 900 acres, which indicates that they would have refused to lease the 80 acres from the bank if the bank had sought to charge a higher rental therefor.

Both parties concern themselves with the "equities" of the existing situation. In this regard it may be noted that under the judgment as entered the respondent, by deferring the time of possession, secured a final return of the property at a cost of $4,700, less a credit of $4,100 for improvements made by others, or a net cost of $600 to the bank for its mistake, including the delayed complete return of the property. On the other hand, the appellants, after crediting the $1,800 which was paid to the bank, must pay an additional $2,300 to get the property back into the trust. While it is said that they are now getting land with water instead of arid land they are not only paying for improvements but for unnecessarily large improvements. While they are compelled to accept for only a part of the time the same rental as that paid for the adjoin-

ing land without water, they have been deprived of the full use of the land during more than five years, during which its possession would apparently have been much more valuable to the appellants than it will now be. Moreover, the discovery of water on the land might well have occurred if the bank, instead of making its mistake and selling at so cheap a price, had made a lawful arrangement with Scott and Stahl or with some one else.

[1] Turning more specifically to the contentions of the parties it rather clearly appears that those of neither party can be fully sustained. The $1,800 paid to the bank was not the full fruits of this land, and this court did not so hold on the former appeal. Scott himself testified that while $5 an acre was a reasonable rental for the whole 1000 acres, it was "a pretty cheap price for that eighty acres." The quitclaim deed given to the bank in 1938 was not merely a reconveyance of the title and a new lease freely made. Not only did the bank have no right to make such a lease under the provisions of the trust but it clearly appears, and it is admitted, that the bank was acting under compulsion in that regard. It thus secured a reconveyance at a much less figure than would otherwise have been possible and, by agreeing to the delayed possession, it actually received a value greatly in excess of the $1,800 which was paid to it in cash. The appellants' election to seek restoration of the property with its fruits was not dependent upon the situation thus again created by the bank. That election was not made until after August 1, 1942, when, for the first time, the bank was in a position when it could make a full restoration of the property. That election related to the original wrongful sale of the land, and to the fact that restoration was then possible. Having so elected, the appellants were entitled both to restoration and to the actual fruits of the land for the full period until it was completely restored in 1942. The appellants were not attempting to change the issue to one of negligence on the part of the bank in leasing the 80 acres at too low a rental, and the issue pleaded and presented was with respect to what were the actual fruits of the land.

[2] It appears without question that during this period Scott and Stahl actually furnished water produced on the 80 acres for the irrigation of the other 900 acres. While, as to them, it was a part of their entire deal, in practical effect they sold water produced on the 80 acres which was sufficient to irrigate the 900 acres. This was a product of the 80 acres, as much as was any rental received for the use of the surface thereof. The net value of what they received for this part of the water was a part of the actual fruits of the 80 acres during this period. This figure, when determined, should be added to the net returns received by Scott and Stahl as rentals for the use of the surface of this 80 acres in order to ascertain the actual fruits of this land.

[3] While the appellants' contention, that the net value of the water produced on the 80 acres and used on the 900 acres should be considered as a part of the fruits of this land, must be sustained their further contention that this net value was accurately fixed by the books kept by Scott and Stahl is erroneous. These accounts cover the entire enterprise conducted by Scott and Stahl and the profit thus shown is the net return to them from the combined operation of both the trust property and the 900 acres. That figure, standing alone, obviously cannot be taken as indicating the net value of the water removed from the 80 acres. It also appears that the court properly rejected the evidence which was offered to prove that the reasonable market value of water in the vicinity of the trust land was $15 per acre per annum. The issue here was as to what this land actually produced during the period in question, and what the water might have been worth to others was not material.

[4] Restoration of the land, with its "fruits", requires, in addition to restoring the title, an accounting, on some basis, for what the land produced over the period in which the appellants were deprived of its possession. As was said in Work v. County Nat. Bank, etc., Co., 4 Cal.2d 532, 51 P.2d 90, 93, "The alternative remedies * * * are all aimed to make the beneficiary whole * * *. The only way the trust properties can be 'replaced' is to permit the respondents to receive what they would have received had appellant been faithful to its trust." Obviously, what was received by the Samples from the use of the 80 acres is not the true test, as that would include the results of their work and skill in farming the land. Nor does the $1,800 paid to the bank represent the real fruits of the land for this period. That is merely an amount which the bank was compelled to accept because of the situation resulting from its own error.

Moreover, that is not all the bank received. It received an additional value through regaining the title on favorable terms, by further deferring possession and use of the land.

[5] Under the circumstances here, the true test as to what were the fruits of this land during this period is what it produced for those to whom it had been wrongfully conveyed, and who stood in the position that the appellants should have occupied. The "fruits", with which we are here concerned, is the net amount produced from the 80 acres and received by Scott and Stahl who actually exercised the rights of ownership during that period. What they were able to do with the land and what they received for the use thereof constitutes the actual production and fruits of the land. This cannot fairly be measured by the $5 per acre rental paid to them for that land, along with the other 900 acres. The 80 acres, with its supply of water, produced much more than a proportionate share of the total return. The water taken for use on the other land was an important part of that return and of the fruits of the 80 acres.

The net value or return to Scott and Stahl from the water thus removed from the 80 acres should have been determined and included as one of the fruits of the property. This net return from a specific operation which was carried out is such part of the $5 per acre per annum which Scott and Stahl actually received as rental for the 900 acres, less their expenses, as should properly be credited to the water taken from the 80 acres while allowing a proper proportion to the use and productivity of the 900 acres, since both elements contributed to the net profits realized by them on the entire deal. This figure, when determined, should have been added to the net amount received by Scott and Stahl as rental for the surface of the 80 acres. (Apparently this rental was $2,000 and not $1,800.) From this total should have been deducted the amount by which the value of the 80 acres was enhanced through the improvements made. The remainder, with a proper allowance for interest, would constitute the fruits of this land to which the appellants were entitled.

There is no evidence in the record from which the net value of the water taken from this 80 acres, as thus indicated, can be determined. That value is one which must be established in the trial court. The cause should be retried on the real issues presented by the pleadings and not on the exact theories here presented by either side, neither of which is fully sustainable.

After this cause was argued the parties filed a stipulation as to certain facts, with the further stipulation that it should be considered as a part of the record on appeal, subject to an objection by the appellants that these matters are incompetent, irrelevant and immaterial on this appeal. It appears therefrom that some nine months after this judgment was entered an agreement was reached by which the bank, with the consent of the beneficiaries, conveyed the surface rights in the 80 acres to D. C. Scott; that Scott paid the beneficiaries $10,000; that Scott was also to deposit $5,500 in escrow to be used to pay any amount finally adjudged in this action to be due to the bank; that the making of the stipulation is not to prejudice the right of the beneficiaries to prosecute to a final conclusion their claims against the bank by reason of its breach of trust; and that the judgment shall be deemed to have been executed solely to the extent that the real property shall be deemed to have been restored to the trust and to be now held by the bank as trustee.

The appellants have since filed, without a stipulation making this a part of the record, two affidavits stating that Scott did not deposit the $5,500 above referred to, and that by subsequent agreement of all parties $5,500 of the $10,000 purchase price is being retained by the title company to abide the final result of this action and to cover any amount that may ultimately be found due to the bank.

The respondent, in a supplemental brief, argues that these facts show the value of the land as finally returned to the trust and have a bearing upon the equities of the situation. It is also argued that these facts render moot the question raised as to whether the bank was entitled to a lien on the 80 acres to secure the payment of the amount of its judgment.

Not only has this entire matter no important bearing here, but the question raised as to this lien, and a further question with respect to costs in the trial court, require no consideration here since the judgment must be reversed.

The judgment is reversed and the cause remanded for another trial.

MARKS and GRIFFIN, JJ., concur.

LONG BEACH CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. STEWART et al.

Civ. 15107.

District Court of Appeal, Second District, Division 1, California.

March 30, 1946.

Rehearing Denied April 23, 1946.

Hearing Granted May 27, 1946.

1. Eminent domain ⇐222(4)

In action by high school district to condemn realty formerly used as farm land, but which had been zoned by city as residential district, instructions, which in effect prevented jury from considering possible industrial uses of the realty in assessing damages, were not erroneous.

2. Eminent domain ⇐124, 134

In eminent domain proceedings, damages must be measured by market value of land at time it is taken, in view of all purposes to which it is naturally adapted, and not by the value for a special purpose.

3. Evidence ⇐543(3)

Where witness stated in condemnation proceedings that he had not given matter sufficient study to determine fair value of land for industrial purposes, witness could not express an opinion as to land's value for industrial purposes.

4. Appeal and error ⇐1056(1)

In condemnation proceedings, sustaining objection to any statement of value by landowners' expert witness as to value of land from standpoint of industrial site because it had been zoned by city as residential district, if error, was not prejudicial where expert's testimony that land's value for industrial use was at least double the amount of its value for residential use, was not stricken, and verdict for landowners was considerably larger than expert's estimate of value.

5. Evidence ⇐501(7), 555

Owner of realty was not an "expert witness" within statute providing that, whenever an expert witness gives his opinion, he may, on direct examination, be asked to state the reason for such opinion, and hence trial court in condemnation proceeding did not err in refusing to permit landowner, after stating his valuation of the land, to state on what he based his valuation. Code Civ.Proc. § 1872.

See Words and Phrases, Permanent Edition, for all other definitions of "Expert Witness".

6. Appeal and error ⇐1056(1)

In condemnation proceeding, refusing to permit landowner to state what the basis was for his valuation of the land, if error, was not prejudicial, where landowner testified in some detail as to the history, surrounding conditions, and almost every possible fact on which his opinion must have been based.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Condemnation action by the Long Beach City High School District of Los Angeles County against Irwin Stewart and another to condemn defendants' realty for use as a junior high school. From an interlocutory judgment assessing defendants' damages in the sum of $20,000, the defendants appeal.

Judgment affirmed.

Dechter, Hoyt, Pines & Walsh, of Los Angeles, and Houser & Houser, of Long Beach, for appellants.

Harold W. Kennedy, Co. Counsel, and Ernest R. Purdum and Jesse J. Frampton, Deputy Co. Counsels, all of Los Angeles, for respondent.

DORAN, Justice.

This appeal is from an interlocutory judgment entered in an action to condemn appellants' property for use as a junior high school. The issues as to public necessity and suitability of the property for the purposes stated, were heard by the court without a jury and determined adversely to appellants' contentions. Thereafter, a jury awarded the owner, Irwin Stewart, hereinafter referred to as appellant, damages in the sum of $20,000 for the taking of Parcel No. 1. This parcel, with which the present appeal is concerned, is located on the southwest corner of Santa Fe Avenue and Columbia Street in Long Beach. It was acquired by appellant in 1905 since which time the property has been used as a home and for farming operations. In 1906 the appellant built an eight room frame house, together with a barn, storeroom and shed. A garage and a shop now used by appellant's son as a machine shop, were later constructed. The subject property was zoned in 1941 by the City of Long

Beach as a residential district for single family dwellings; it is characterized by appellant as industrial property previous to that date although it was originally farm land. Appellant's parcel is unimproved as to gas, sewers and streets. The land abuts the Union Pacific railroad running to San Pedro, and a high power line of the Southern California Edison Company runs parallel to its west border, the right of way therefor having been sold by appellant to such company.

In respect to value there is the appellant's testimony that the parcel was worth $5000 per acre, or a total sum of about $80,000 for the sixteen acres approximately, involved herein. Appellant's expert witness, eminently qualified, placed the fair market value at $17,500 as of July 1, 1944. The respondent's appraiser testified that the fair market value for subdivision purposes was $13,500. The appellant's expert, on cross examination stated that other properties in the district had been sold within the past three years at a price of about $600–700 per acre, but that such properties were not as favorably located as appellant's real estate and that prevailing conditions were different.

It is appellant's contention that: "That instructions to the jury were erroneous, confusing and misleading as to the elements to be considered in fixing *present* reasonable market value and, in effect, limited consideration of the jury to the *present available use* of the property and eliminated adaptability to higher uses and the effect thereof on value." In this connection Instruction No. 21 is particularly referred to and characterized as "highly confusing and prejudicial." It is admitted in appellant's brief that this instruction correctly told the jury, "It is not proper to take into consideration speculative or conjectural uses or enterprises or the profits which may result therefrom," and "You are not to consider uses which are remote and speculative only in their nature". Appellant claims however, that "the court destroys the entire effect of such instruction by further stating, *'and you should not consider possible future uses under altered circumstances which may or may not arise.'*"

A somewhat similar situation is alleged to exist as to Instruction No. 26. As modified by the court, this instruction stated: "You should estimate the compensation to the owner by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as may be reasonably expected in the immediate future.* You should give consideration to all pertinent circumstances including the location and surroundings of and other factors *affecting the use or uses to which it could reasonably be put.*" (Italics added.) This instruction was given as requested by the appellant except that the trial court struck out the words "highest and best" preceding the word "use" in the last italicized portion of the instruction, substituting therefor the words "use or uses."

In like manner complaint is made in respect to Instruction No. 28 where the court again deleted from appellant's request, the words "the highest and best use," and told the jury: "You should consider *all of the uses to which the property is suitable and available, having regard not only to the existing business or wants of the community, but also those that may reasonably be expected in the immediate future.*" (Italics added.) It is insisted that the insertion of the word "available," which was not in appellant's request, 'limits the entire instruction to the fact that under the evidence the property was *available* only for residential purposes," and removed from the jury consideration of adaptability of the property to a "higher and better use."

[1] The objections to instructions may be considered together since they are fundamentally the same, namely, that the jury was prevented from giving proper consideration to possible industrial uses of property which was zoned for residential occupancy at the time of the condemnation. To the respondent's assertion that, considering the instructions as a whole, the jury was properly instructed and not misled, appellant replies that "the erroneous, misleading and confusing" nature of the particular instructions "becomes all the more apparent" when the charge is viewed as a whole. With the appellant's contentions it is impossible to agree. Instructions 26 and 28, requested by appellant and given in slightly modified form, clearly inform the jury that consideration may be given not only to the present available uses permitted by the zoning regulations but also to such uses "as may be reasonably expected in the immediate future," and that the jury "should consider all of the uses to which the property is suitable and available." While in-

dividual instructions might conceivably have been improved in respect to terminology, no error is apparent when the charge is viewed as an entirety.

[2] In Sacramento, Southern R. Co. v. Heilbron, 156 Cal. 408, 412, 104 P. 979, it is stated that in eminent domain proceedings, "damages must be measured by the market value of the land at the time it is taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted." In that case, as in this, there was criticism of certain instructions concerning value, but in view of the whole charge, it was held that the jury could not have been misled. Note may also be taken of Central Pac. R. Co. of California v. Pearson, 35 Cal. 247, 262, holding that testimony in relation to the value of wharf privileges was improperly received "for the obvious reason that the party claiming the compensation had no wharf franchise. The mere fact that the party might at some future time obtain * * * a wharf franchise * * * is altogether too remote and speculative." City of Beverly Hills v. Anger, 110 Cal.App. 626, 294 P. 476, 478, upon which appellant relies, contains nothing which is inconsistent with the cases hereinbefore cited, and is not authority for appellant's present contentions. In the City of Beverly Hills case the court held that although zoning ordinances and restrictions would have an influence upon market value, "It was, however, singly and only, the market value of the land as of the stated time that the jury was expected to ascertain and declare, in accordance with the evidence." It was also there held that there could be no presumption that the property would be rezoned for "income producing purposes."

[3, 4] A further contention is that the trial court erred "in limiting the testimony of qualified expert witnesses as to the present market value * * * to a consideration of the use to which the property was then available under existing zoning restriction," without consideration of other uses to which the property was "adaptable." The appellant's expert had testified that the highest and best use "subject to existing zoning conditions * * * is that of a potential single residential subdivision," but that the highest and best use for which the property was "naturally adapted" was "industrial purposes"; that the value was "considerably higher" for industrial than for residential use—"at least double the amount." This witness further said, "I haven't given it sufficient study to determine its fair value for industrial purposes." After this testimony had been received the trial court sustained an objection "to any statement of value * * * considered from the standpoint of an industrial site," but it does not appear that the testimony in question was stricken. Much that has already been said in reference to instructions concerning value, is equally applicable to appellant's present objection, particularly the rule prohibiting consideration of remote and speculative value. Whatever other reasons may have been present, the trial court was undoubtedly correct in holding that the appellant's expert should not express an opinion as to value for industrial purposes in view of the witness' own statement, "I haven't given it sufficient study" to determine such value. The various elements bearing upon the question of value were gone into in considerable detail on both direct and cross-examination and it does not appear that the appellant was deprived of any substantial right. With a verdict of considerably more than the estimate of appellant's expert, arrived at after the jury had viewed the property, it seems obvious that no prejudice resulted. And, since the evidence in question was not stricken, appellant apparently had the advantage of the very evidence which is now demanded.

[5, 6] Finally, the appellant's brief presents the point that "The Court erred in refusing to permit the owner, who testified as to his opinion of the value, to state the basis and reason for his opinion, as provided in Section 1872, C.C.P." The appellant had placed the value of the property at $5000 an acre, and the trial court then sustained an objection to the question on direct examination,—"Now what do you base this valuation upon?" Section 1872 of the Code of Civil Procedure, relied upon by appellant in this connection, provides that "Whenever an *expert witness* gives his opinion, he may, upon direct examination, be asked to state the reason for such opinion." (Italics added.) The case of Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 534, 28 P. 681, cited to sustain this position, merely held that an owner "was competent to give an opinion as to the value of her own land, within the general rules on that subject. She had a particular knowledge of it, being a resident upon it,

and had owned it for over twenty years." The owner is not there designated as an "expert," and appellant can derive no benefit from the provisions of Code Civ. Proc. Section 1872 which by its terms, relate only to "expert" witnesses. Quote obviously, not all opinion evidence is of an expert nature, and, says 10 Cal. Jur. page 1023, "It is a recognized rule that the owner of property, *whether generally familiar with such values or not,* is competent to estimate its worth * * * And, it has been held, it is proper to let the owners of destroyed personalty testify regarding its value *even though they are not experts.*" Moreover, it may be noted that, at the trial, appellant's counsel apparently did not consider the owner as an expert witness, for, upon objection being made, Mr. McConnell, acting as appellant's attorney, stated: "I am asking his opinion as owner. * * * He has a right to give that. *He does not have to be an expert.*" (Italics added.) And in any event, the record discloses that the appellant testified in some detail as to history, surrounding conditions, and almost every possible fact upon which his opinion must have been based; hence no prejudice could have resulted.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



73 Cal.App.2d 796

KADOTA FIG ASS'N OF PRODUCERS v. CASE-SWAYNE CO. et al.

Civ. 7225.

District Court of Appeal, Third District, California.

April 2, 1946.

Rehearing Denied May 2, 1946.

Hearing Denied May 27, 1946.

1. Associations ⇐4
Joint-stock companies and business trusts ⇐3½
Names ⇐10
Partnership ⇐64

Compliance with code sections which forbid the maintenance of an action by an individual, association, partnerships, or business trust doing business under a fictitious name unless and until a certificate has been filed with the county clerk and published giving the names and addresses of the individuals operating under such fictitious name and forming such association, partnerships or business trust, may be shown at any time before trial. Civ.Code, §§ 2466, 2468.

2. Joint-stock companies and business trusts ⇐3½

Where a plaintiff is organized as an unincorporated co-operative association subject to power of replacement and periodical election of its officers or trustees by shareholders or members in accordance with its written agreement of association and is not a pure trust, but is a business or Massachusetts trust, under such circumstances it must be treated as a copartnership business and, in dealing under a fictitious name, it is not authorized to maintain action without publishing and filing a certificate designating names of its members. Civ.Code, §§ 2466, 2468.

3. Trusts ⇐246

The trustees of a common-law trust or an absolutely true trust may maintain an action in their own names.

4. Trusts ⇐261

When an action is brought by trustees for benefit of others, complaint must so allege.

5. Parties ⇐6(1)

The reason for requirement that action be prosecuted in name of real parties in interest is to save defendants from a multiplicity of suits and from further annoyance and vexation and to fix and determine real liability, if any, which is alleged in complaint. Code Civ.Proc. § 367.

6. Joint-stock companies and business trusts ⇐15(1), 17

In a true trust, in which trustees have complete control of business, they are exempt from direct personal liability to creditors; but, if trustees are subject to control of creators of trust, creators are liable as partners.

7. Partnership ⇐153(1)

All partners are liable jointly and severally for everything chargeable to partnership by reason of a partner's wrongful act or breach of trust and are jointly liable

for all other debts and obligations of the partnership. Civ.Code, § 2409.

8. Partnership ⇐218(3)

Whether a partnership exists is ordinarily a question for determination of court from facts adduced and inferences to be drawn therefrom.

9. Partnership ⇐197

The code section providing that two or more persons who are associated to do business under a common name may be sued under such common name whether it contains names of associates or not does not authorize such persons to institute and maintain an action as plaintiffs under a business name which fails to disclose the individual members. Code Civ.Proc. § 388, Civ.Code, §§ 2466, 2468.

10. Agriculture ⇐6

Where complaint described plaintiff as "Kadota Fig Association of Producers, a growers cooperative association" and as organized under the Capper-Volstead Act, which act does not require incorporation of organizations set up under it, and failed to allege compliance with fictitious name statute or facts showing exemption therefrom, complaint was demurrable for want of capacity to sue. Civ.Code, §§ 2466, 2468; Code Civ.Proc. §§ 367, 430; Capper-Volstead Act, 7 U.S.C.A. § 291.

11. Agriculture ⇐6

The constitutional definition of the term "corporations" as used in article therein as including all associations and joint-stock companies having any of the powers of corporations not possessed by individuals or partnerships, providing that all such corporations shall have right to sue and be sued, does not require that cooperative growers association be classed as a corporation so as to be entitled to sue in its own name without compliance with fictitious name statute. Civ.Code, §§ 2466, 2468, Code Civ.Proc. § 367; Agricultural Code § 1191 et seq.; Capper-Volstead Act, 7 U.S.C.A. § 291; Const.Cal. art. 12, § 4.

12. Pleading ⇐225(2)

Where plaintiff was described as a growers co-operative association, but nature of plaintiff association did not appear from face of complaint so that it could not be determined therefrom that plaintiff was in fact a copartnership and had not complied with fictitious name statute, the court abused its discretion in dismissing the action without giving plaintiff leave to amend after sustaining demurrer for want of capacity to sue regardless of affidavit of defendants supporting position of trial court. Civ.Code, §§ 2466, 2468; Code Civ.Proc. §§ 367, 369, 388, 430; Agricultural Code § 1191 et seq.; Capper-Volstead Act, 7 U.S.C.A. § 291.

13. Pleading ⇐216(2)

On hearing of a demurrer court is bound by facts as alleged in pleadings of fact by the demurrer and it is not entitled to consider facts presented to it through medium of an affidavit.

14. Abatement and revival ⇐29

An objection to the maintenance of an action on ground that plaintiff has not complied with provisions of fictitious name statute by filing and publishing certificate required thereby is a mere matter of abatement pending trial which has result of suspending trial until statute is complied with and is not jurisdictional. Civ.Code, §§ 2466, 2468.

15. Associations ⇐4
Joint-stock companies and business trusts ⇐3½
Names ⇐10
Partnership ⇐64

Where an individual, association, partnership, or business trust, doing business under a fictitious name, fails to file and publish the certificate required by fictitious name statute, before commencing an action, opportunity should be given to comply with such statute before action is finally dismissed for want of capacity to sue, since statute forbids maintenance of action until certificate has been filed and publication has been made, rather than commencement of action. Civ.Code, §§ 2466, 2468; Code Civ.Proc. § 430; Agricultural Code, § 1191 et seq.; Capper-Volstead Act, 7 U.S.C.A. § 291.

16. Abatement and revival ⇐78

The grounds for a mere abatement of an action may be waived.

17. Pleading ⇐34(4)

Pleadings in abatement should be strictly construed.

18. Pleading ⇐8(9)

Allegation in demurrer that plaintiff had not legal capacity to sue was purely a conclusion of law and of itself tendered no issue of fact.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Kadota Fig Association of Producers, a growers co-operative association, against Case-Swayne Company, a partnership composed of Paul W. Case, Amos Swayne, and others, and Paul W. Case and Amos Swayne and others, individually. From a judgment of dismissal plaintiff appeals.

Reversed with directions.

See also 167 P.2d 523; 167 P.2d 529.

C. Ray Robinson, Samuel V. Cornell, and Margaret A. Flynn, all of Merced, for appellant.

Johnson, Harmon & Stirrat, of San Francisco, and Adams & Griswold, of Merced, for respondents.

THOMPSON, Justice.

The plaintiff has appealed from an order of the court sustaining defendants' demurrer without leave to amend, dismissing the action, and vacating a previous order in which it had sustained defendants' demurrer to the complaint for lack of capacity of plaintiff to maintain the action because of its failure to file the certificate required by sections 2466 and 2468 of the Civil Code, but had granted plaintiff leave to amend.

The theory upon which the court dismissed the action is that the association, as a business or Massachusetts trust, whose directors are subject to replacement and election by the shareholders, is not a true or pure trust, but on the contrary it must be treated as a copartnership (Goldwater v. Oltman, 210 Cal. 408, 420, 292 P. 624, 71 A.L.R. 871), and is therefore required to comply with the statute by filing the certificate disclosing the names of its members.

The appellant contends that since it is an unincorporated agricultural association organized under the federal Capper-Volstead Act, 7 U.S.C.A. § 291, it is exempt from the provisions of sections 2466 and 2468 of the Civil Code of California, and that the court erred in sustaining the demurrers and dismissing the action without granting plaintiff leave to amend the complaint since it does not appear from that pleading what the nature of the association is, or that it has not complied with the statute in that respect.

[1] One of the important questions on this appeal is whether the complaint can be amended so as to exempt the plaintiff from the necessity of conforming to sections 2466 and 2468 of the Civil Code, if those sections are applicable as the complaint now stands. It is not alleged that plaintiff, as "a Growers Cooperative Association," was *incorporated* under Division VI, Chapter 4, of the Agricultural Code, nor that it was *incorporated* under the federal "Capper-Volstead Act." It is merely alleged that it was *organized* under the last mentioned act, with its principal place of business in Merced, California. The Capper-Volstead Act does not require such producing and marketing associations to be incorporated. Nor does the complaint allege that plaintiff was doing business as a trustee for its individual farmer members. The complaint is based on an alleged breach of a written agreement with certain named individuals. If the organization is a trust, as plaintiff contends that it is, it does not appear whether it is a business trust, or whether, on account of the nature of the organization, it is deemed to be a mere copartnership. Assuming that the demurrer to the complaint was properly sustained for failure to allege facts sufficient to state a cause of action, it will still become necessary for us to determine whether the court abused its discretion in dismissing the action without permitting plaintiff to amend the pleading by stating facts showing that it is either exempt from the provisions of those sections of the Civil Code, or that it has complied therewith. It has been held that compliance with those sections may be shown at any time before trial.

A complaint, based upon a written agreement between the plaintiff and the defendants for an accounting and for money received, was filed in the name of "Kadota Fig Association of Producers, a Growers Cooperative Association," without naming the members, shareholders, trustees or directors. The only description of the nature of the organization is found in Paragraph I of the complaint. It recites "That it now is, and at all times herein mentioned has been, a Growers Cooperative Association organized under the Capper-Volstead Act, with its principal place of business in the City of Merced, County of Merced, State of California." Two separate demurrers were filed, on the chief grounds that the complaint fails to state facts sufficient to constitute a cause of action and "That the plaintiff has not legal capacity to sue." Sec. 430, C.C.P. The demurrers asked that the cause be dismissed. In support of their de-

murrers, Hugh H. Griswold, one of their attorneys, at the same time filed his affidavit averring that he had examined the Merced County records and found a document only affecting the plaintiff, entitled "Kadota Fig Association of Producers," which purports to be an agreement between certain farmers to cooperate in the raising of fruit and other farm products, as an unincorporated association without capital stock, with its principal place of business in Merced County; that the name of the association is fictitious, and that no certificate or affidavit of publication of the names of its members, as required by sections 2466 and 2468 of the Civil Code, was on file in the County Clerk's office. The alleged agreement of association is not otherwise before this court. Its terms do not appear in the complaint. July 7, 1945, the court made its order sustaining the demurrers "on the ground that the plaintiff has no legal capacity to sue by reason of its failure to comply with sections 2466 and 2468 of the Civil Code." The plaintiff was then granted thirty days to amend the complaint. On motion of counsel for the defendants, the court set the last mentioned order aside on July 18th, and dismissed an action. From that order the plaintiff has appealed.

[2-8] We assume the court correctly determined that if the plaintiff was organized as an unincorporated cooperative business association, with its principal place of business in Merced County, California, subject to the power of replacement and periodical election of its directors or trustees by the shareholders or members, in accordance with its written agreement of association, it is not a true or pure trust, as the plaintiff contends that it is, and that, on the contrary, under such circumstances, it must be treated as a copartnership business. Goldwater v. Oltman, supra. If the agreement of association created a copartnership with its principal place of business in Merced County, California, under a fictitious name, it would not be authorized to *maintain* this action without publishing and filing the certificate designating the names of its members as required by sections 2466 and 2468 of the Civil Code. The trustees of a common-law trust or an absolutely true trust may maintain an action in their own names. Coneland Water Co. v. Nickalls, 75 Cal.App. 212, 242 P. 518; 20 Cal.Jur. 493, sec. 12; 65 C.J. 1114, sec. 1073; C.C.P., sec. 369. When an action is brought by trustees for the benefit of others the complaint should so allege. The present action was not brought in the names of the alleged trustees. It was instituted in the fictitious name of the organization. The real parties in interest are the beneficiaries under the business agreement, and not the trustees or directors. The reason for requiring an action to be prosecuted in the name of the real parties in interest (C.C.P., sec. 367) is to save the defendants from a multiplicity of suits and from further annoyance and vexation, and to fix and determine the real liability, if any, which is alleged in the complaint. Andrews v. Glick, 205 Cal. 699, 272 P. 587; Los Robles Water Co. v. Stoneman, 146 Cal. 203, 210, 79 P. 880; 20 Cal.Jur. 490, sec. 10. The liability of trustees of a pure trust is quite different from that of copartners. In a real trust, in which the trustees have complete control of the business, they are exempt from direct personal liability to creditors. But if the trustees are subject to control of the creators of the trust, the creators are liable as partners. Goldwater v. Oltman, supra, 210 Cal. at page 418, 292 P. at page 628, 71 A.L.R. 871; Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal.App. 331, 276 P. 1047. All partners are jointly and severally liable for everything chargeable to the partnership, and the partners are jointly liable for all other debts and obligations. Civil Code, sec. 2409. The question of whether a partnership exists is ordinarily one for the determination of the court from the facts adduced and inferences to be drawn therefrom. Spier v. Lang, 4 Cal.2d 711, 716, 53 P.2d 138.

[9, 10] It is true that two or more persons who are associated to do business "under a common name" *may be sued* under such common name whether it contains the names of the associates or not. C.C.P., sec. 388. But that section does not authorize such persons *to institute and maintain an action, as plaintiffs,* under their business name which fails to disclose the individual members. Section 2468 of the Civil Code merely prohibits persons doing business under a fictitious name from *maintaining* an action without complying therewith and with section 2466 of the same code. The statute is relaxed with respect to suits *against* such persons conducting business in a common name. But that modification does not *apply to plaintiffs* who seek to maintain an action against other persons. In the case of Ginsberg Tile Co. v. Faraone, 99 Cal.App. 381, at page 384, 278 P. 866, at page 867, the court says:

"But it will be noted that the rule was relaxed with respect to defendants only. Had the Legislature intended to authorize or sanction a procedure such as that attempted here, obviously it would have been necessary simply to have provided that 'the associates may sue or be sued by such common name.' "

[11] The appellant argues that this cooperative association must be classified the same as a corporation under Article XII, Section 4, of the California Constitution. That section reads:

"The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons."

The same contention regarding the character of a Massachusetts trust, similar to the one which is here involved, was refuted by the opinion in Old River Farms Co. v. Roscoe Haegelin Co., supra [98 Cal.App. 331, 276 P. 1049], in which it was held that it is not classed as a corporation with the right to sue and be sued in the name of the association, because it was not "organized and existing *under the general laws.*" On the contrary, it was organized by an agreement of association and not under the general laws. In the case last cited it was held that since the association was not a pure trust its members were personally liable. The judgment against both the company and the individual members was affirmed. In accordance with that decision it was held in Lincoln v. Superior Court, 51 Cal.App.2d 61, at page 67, 124 P.2d 179, at page 182:

"It will be necessary to determine the status of a Massachusetts trust in this state. Regardless of what conflict of opinion might have heretofore prevailed, it has been settled in the case of Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal.App. 331, 276 P. 1047, that a joint stock company (of which a Massachusetts trust is one form) *is in effect a copartnership* * * * with the partnership property vested in trustees." (Italics added.)

We think the two cases last cited dispose of the appellant's contention adversely to it, that this cooperative association is deemed to be the same as a corporation with the right to sue and be sued in its name in the same manner as natural persons.

[12, 13] But, in spite of the foregoing conclusions, we are persuaded the trial court erred in sustaining the demurrers and dismissing the case for lack of capacity to sue, without permitting plaintiff to amend its complaint, since it does not appear from the face of the complaint what the nature of the plaintiff association is; that it is in fact a copartnership or that it has not complied with the provisions of sections 2466 and 2468 of the Civil Code. In determining "the lack of capacity to sue", the court relied on the affidavit which was filed, and not upon the allegations appearing on the face of the complaint. On the question of an alleged abuse of discretion in sustaining a demurrer without leave to amend the pleading, this court held, in National Automobile Ins. Co. v. Winter, 58 Cal.App.2d 11, at page 17, 136 P.2d 22, at page 26:

"On the hearing of a demurrer, therefore, the court is bound by the facts as alleged in the pleading attacked by the demurrer, *and it is not entitled to consider facts presented to it through the medium of an affidavit.* Mackay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 42 P.2d 341." (Italics added.)

In Ginsberg Tile Co. v. Faraone, supra, 99 Cal.App. at page 388, 278 P. at page 869, wherein defendant's demurrer and motion to dismiss the action for lack of capacity to sue, was granted, it was held that:

"The granting of the motion to dismiss was tantamount—so far as the question of amendment is concerned—to the sustaining of a demurrer without leave to amend."

Quoting with approval from James v. P. B. Steifer Min. Co., 35 Cal.App. 778, 788, 171 P. 117, the court said in the Faraone case, supra:

" 'While the demurrers were properly sustained, * * * the plaintiffs ought to be permitted to amend in order that the case may be decided upon the merits rather than upon technical rules of pleading. "Unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend." Payne v. Baehr, 153 Cal. 441, 447, 95 P. 895, 897.' "

The case of Andrews v. Glick, supra, upon which the respondent relies in support of the order dismissing this case for lack of plaintiff's capacity to sue, is not in conflict with what we have previously said regarding plaintiff's right to amend its pleading

if it so desires. In the Andrews case the action was not dismissed until after the answer had been filed. The fact affirmatively appeared, without dispute, that the plaintiff, as a copartnership, was maintaining the suit in the fictitious name of "Andrews-Cordano Plumbing Company," without complying with the provisions of sections 2466 and 2468 of the Civil Code. The fact that the plaintiff was a copartnership was alleged in the complaint. The answer admitted that fact. It was conceded by the pleadings on file. The answer further alleged that plaintiff failed to comply with the statute in question. No evidence by affidavit or otherwise was involved in that case or relied upon by the trial court. It was assumed that the admissions of the complaint and answer justified the court in dismissing the action because it appeared therefrom that the plaintiff lacked capacity to maintain the suit.

[14] An objection to the maintenance of an action on the ground that plaintiff has not complied with the provisions of sections 2466 and 2468 of the Civil Code by filing and publishing the certificate required thereby, is a mere matter of abatement pending the trial, which has the result of suspending the trial until the statute is complied with. It is not jurisdictional. Bryant v. Wellbanks, 88 Cal.App. 144, 150, 263 P. 332; California Savings & Loan Soc. v. Harris, 111 Cal. 133, 136, 43 P. 525; Ontario State Bank v. Tibbits, 80 Cal. 68, 22 P. 66, 1 C.J.S., Abatement and Revival, § 91, p. 129. In the authority last cited it is said:

"The failure of an individual or partnership plaintiff, doing business under an assumed, fictitious, or representative name, to comply with an applicable statute requiring the filing of a prescribed affidavit or certificate, is merely a matter in abatement, until the statute is complied with."

[15-18] In the Bryant case, supra [88 Cal.App. 144, 150, 263 P. 335], it is said that it is a sufficient compliance with section 2468 of the Civil Code if the certificate is filed and published "at any time before trial." The statute in question does not prohibit the instituting or commencement of an action for failure to file the certificate. It merely forbids the *maintenance* of the action "until the certificate has been filed and the publication has been made." Before an action is finally dismissed on that ground, prior to the trial the plaintiff should be given an opportunity to comply with the statute if it so desires. Moreover, in the present case, in the absence of an answer or competent evidence on the trial of that issue, it does not appear that plaintiff is a copartnership which is required to file the certificate. The grounds for a mere abatement of an action may be waived. Pleadings in abatement should be strictly construed. The allegation in the demurrer that the plaintiff had not legal capacity to sue is purely and only a conclusion of law, and of itself tendered no issue of fact. Ontario State Bank v. Tibbits, supra.

The judgment of dismissal is reversed and the court is directed to grant plaintiff a reasonable time within which to amend its complaint if it so desires.

ADAMS, P. J., and PEEK, J., concur.



73 Cal.App.2d 815

KADOTA FIG ASS'N OF PRODUCERS v. CASE–SWAYNE CO. et al.

Civ. 7231.

District Court of Appeal, Third District, California.

April 2, 1946.

Rehearing Denied May 2, 1946.

Hearing Denied May 27, 1946.

1. Agriculture ⇐6
Pleading ⇐225(2)

Where complaint described plaintiff only as "Kadota Fig Association of Producers, a growers cooperative association" and failed to allege compliance with code sections forbidding maintenance of action by individual, association, partnership, or business trust doing business under fictitious name until certain conditions are complied with, or facts showing its exemption therefrom complaint was demurrable for want of capacity to sue, but dismissal without leave to amend to show compliance with the code sections or exemption was error. Civ.Code, §§ 2466, 2468.

2. Appeal and error ⇐469

Where stay bond was personally passed upon and approved by authorized agent of surety company who inadvertently failed to sign bond and thereafter tele-

phoned judge and directed judge to sign agent's name for agent and validity of bond was subsequently ratified by surety company, court erred in sustaining defendants' motion to quash bond on ground that it was void for lack of due execution and not personally signed by agent and that it was not thereafter ratified in due time. Code Civ.Proc. § 946.

3. Principal and agent ⇐54

Where agent for surety company had previously passed upon stay bond, but inadvertently failed to sign it, and agent, by telephone, directed judge to sign agent's name, there was no improper delegation of authority by agent to judge and judge acted merely as the amanuensis for agent. Civ.Code. §§ 2309, 2349; Code Civ.Proc. § 946.

4. Signatures ⇐3, 4, 5

A signature to an instrument may be attached by the hand of a party thereto, by the hand of another at the request of a party, or by means of mark of a party when he is unable to write his name.

5. Signatures ⇐2

A signature may be written, printed, typewritten, engraved, or photographed.

6. Signatures ⇐4

A party may adopt his signature written by another person as valid and binding by subsequent approval or ratification even though signature was originally forged.

7. Principal and agent ⇐54

While, in absence of specific authority to do so, an agent may not delegate power to another to pass upon terms of a contract or to bind principal by its unauthorized execution, agent may nevertheless delegate to another power to perform purely mechanical acts with relation thereto. Civ. Code, § 2349.

8. Principal and agent ⇐54

Where agent for surety company gave judge authority to sign agent's name to a stay bond, the terms of which had been previously passed upon by agent, which act of judge, in writing agent's name upon bond, was purely mechanical, it was not necessary that judge's authority to sign name of agent be in writing. Civ.Code, §§ 2309, 2349; Code Civ.Proc. § 946.

9. Signatures ⇐4

Where signature of a party to an instrument is made by an amanuensis, signature need not be made in party's presence and it is sufficient if authorization to sign it is conveyed directly to amanuensis by telephone.

10. Appeal and error ⇐468

Where stay bond was timely filed but authorized agent of surety company neglected to sign it, and on last day for filing agent telephoned judge and requested judge to sign agent's name to the bond, which judge did, and thereafter company ratified the bond regardless of any irregularity, ratification related back to date upon which bond was originally entered into and upon which it purported to have been executed and was effective from that time and did not have the effect of extending the time of filing the undertaking. Code Civ.Proc. § 946.

11. Appeal and error ⇐468

The code section pertaining to effect of appeal, stay of proceedings, and release of property under levy does not specify any particular time within which a stay bond must be filed. Code Civ.Proc. § 946.

12. Appeal and error ⇐373(1)

Where stay bond was merely filed to preserve status quo with relation to custody of attached property pending appeal from judgment of dismissal, validity of bond did not affect appeal. Code Civ.Proc. §§ 940, 946.

13. Appeal and error ⇐455

Subsequent to the 1921 Amendment dispensing with necessity of filing an undertaking on appeal, all that is required to perfect appeal is to file with clerk the notice thereof. Code Civ.Proc. § 940; Rules on Appeal, rule 1(a).

14. Appeal and error ⇐169

A question not raised at the trial cannot be raised for first time on appeal.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Kadota Fig Association of Producers, a growers co-operative association, against Case-Swayne Company, a partnership composed of Paul W. Case, Amos Swayne and others, and Paul W. Case and Amos Swayne, and others individually, to recover a money judgment. From an order dismissing the action and discharging writ of attachment, plaintiff appeals.

Reversed.

C. Ray Robinson, Samuel V. Cornell, and Margaret A. Flynn, all of Merced, for appellant.

Johnson, Harmon & Stirrat, of San Francisco, and Adams & Griswold, of Merced, for respondents.

THOMPSON, Justice.

This is a suit to recover a money judgment against the defendants. The complaint is couched in three counts. Plaintiff levied an attachment upon personal property belonging to defendants. A demurrer to the complaint was sustained without leave to amend, on the ground that plaintiff lacked legal capacity to sue. The action was dismissed and the attachment was released. From the order dismissing the action and discharging the attachment the plaintiff appealed.

Pursuant to Section 946 of the Code of Civil Procedure, the plaintiff filed a surety stay bond in double the amount for which the suit was brought. The bond was executed by Glens Falls Indemnity Company, by J. J. Fluetsch, its duly authorized agent and attorney. The validity of the bond was subsequently ratified by the surety company. Upon defendants' motion to quash the bond the court held that the bond was void because it was not personally signed by the authorized agent and that the purported ratification thereof was ineffectual since it had the effect "to extend the time of filing said undertaking which, by statute, is limited to five days." The attachment was thereupon released and the sheriff was directed to deliver the money and personal property to defendants. From the last mentioned order the plaintiffs perfected a separate appeal.

[1] The first appeal, from the order sustaining the demurrer without leave to amend, for lack of capacity to sue, and from the judgment dismissing the action, is determined by the decision of this court which was this day filed in Kadota Fig Association v. Case-Swayne Company, Cal. App., 167 P.2d 518, which was a similar suit between the same parties. A detailed statement of that issue is contained in the opinion last mentioned. We there held, upon similar pleadings, that the court abused its discretion in dismissing the action without leave to amend. The judgment was reversed with directions to permit the plaintiff to amend its complaint, if desired, to allege facts showing its capacity to sue and its compliance with the provisions of Sections 2466 and 2468 of the Civil Code if necessary. Upon authority of that decision the order and judgment are reversed and the court is directed to grant plaintiff a reasonable time within which to amend its complaint to show legal capacity to sue and compliance with the said sections of the Civil Code in accordance with the opinion in the last mentioned case.

We will now consider the second appeal in this case. The questions to be determined upon that appeal are whether the trial court erred in holding that the surety stay bond, which was filed under section 946 of the Code of Civil Procedure, was void for failure of the surety company to properly execute it since it was not personally signed by the duly authorized agent of the company, and whether the subsequent approval and ratification of the bond by the surety company was ineffectual because it was not ratified within five days after the undertaking was filed.

[2] We are of the opinion the court erred in sustaining defendants' motion to quash the bond on the grounds that it was void for lack of due execution and that it was not thereafter ratified in due time.

The record fails to show when, if at all, the defendants gave plaintiff written notice of the entry of the order. The order quashing the bond was rendered August 8, 1945. Notice of appeal from that order was dated the following day. The surety bond was actually previously filed August 3, 1945. The surety company filed its duly acknowledged ratification of the bond, signed by "Arthur M. Colomb, Attorney", on August 6, 1945. The power of attorney, executed by Glens Falls Indemnity Company, authorizing J. J. Fluetsch to execute and issue surety bonds in behalf of the company was received in evidence. It is conceded Mr. Fluetsch had authority to issue the bond in question. It is admitted that the agent did not personally sign his name to the bond. The evidence is, however, undisputed that Mr. Fluetsch personally passed upon and approved the terms and conditions of that bond before it was executed and filed. He resided in Merced. He inadvertently prepared and signed two similar bonds for the same purpose aggregating the same amount and upon the same terms two days prior to its actual signing and filing. A similar bond, for the same purpose and amount and upon the same terms, was subsequently prepared in his office the day before it was signed and filed.

He immediately left Merced and went to Los Banos without personally signing the new bond. The following day, being the last day for filing the bond, he called Judge H. S. Shaffer, Judge of the Superior Court, in Merced, by telephone, and directed him to sign his, Fluetsch's name to the surety bond, as attorney in fact for the surety company. After that conversation, Judge Shaffer signed the name of J. J. Fluetsch, as attorney and agent for the company. The Judge then endorsed the bond as "approved" on July 20, 1945, and immediately filed it in the case. Mr. Fluetsch testified in that regard:

"I issued two bonds on a company printed form and in this case and affixed my signature to them, and I later found that the bonds were not the proper form. So a new form was substituted after this was found, and I was not in town, I was in Los Banos on that day, and it became necessary that the new bonds be issued on that particular day, the new bonds being issued to replace the two that we had issued previously, on the wrong form. So I instructed Judge Shaffer, H. S. Shaffer, to sign my name to the bonds that had been then prepared to be filed in this case. * * * I phoned my office * * * and we had a discussion about this matter * * * with Judge Shaffer; and I left instructions with him to sign my name to the bonds on the proper form but * * * in the same amount we had."

[3-7] The record clearly indicates, without conflict, that no authority or discretion was attempted to be delegated by the agent, J. J. Fluetsch, to Judge Shaffer, to determine whether the bond should be executed or to pass upon the terms and conditions thereof. That was previously done by the agent himself. Judge Shaffer merely acted as the amanuensis for the duly authorized agent of the company, and signed his name at the agent's request. A signature to an instrument may be attached by (1) the hand of a party thereto, (2) by the hand of another, at the request of a party, or (3) by means of the mark of a party when he is unable to write his name. Pitney v. Pitney, 55 Cal.App. 22, 29, 202 P. 940. It may be written, printed, stamped, typewritten, engraved or photographed. 58 C.J. 729, sec. 17. A party may also adopt his signature written by another person, as valid and binding, by subsequent approval or ratification, even though the signature was originally forged. 58 C.J. 728, sec. 16. In 17 C.J.S., Contracts, § 62, subsec. c, p. 413, it is said that "One may be bound by an agreement to which his signature is affixed by procuration, adoption, or ratification, as well as though it had been written by his own hand." While, in the absence of specific authority so to do, an agent may not delegate power to another to pass upon the terms of a contract or to bind the principal by its unauthorized execution, the agent may nevertheless delegate to another the power to perform purely mechanical acts with relation thereto. Sec. 2349, Civil Code; 2 C.J.S., Agency, § 136, p. 1360. That section of the code provides in part:

"An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

"1. When the act to be done is purely mechanical; * * *."

We do not hesitate to say that, under the circumstances of this case, the mere signing of the duly authorized agent's name to the surety bond, by Judge Shaffer, was purely mechanical. The appointment and authorization of the agent by the surety company does not prohibit that mechanical act. In the Pitney case, supra, wherein the validity of the grantor's signature to a deed to real property was challenged because, it was asserted, the manner of signing her name by mark did not conform to the statutory requirement, the court said [55 Cal.App. 22, 202 P. 943]:

"When the time to sign arrived, the plaintiff directed Mr. Witherspoon to sign her name, which act was done by him in her presence, and in the presence of Mr. Dillard and of Mrs. Foutch. Such act, without regard to any mark, constituted and was in law the signature of the plaintiff."

Quoting with approval from the case of Jansen v. McCahill, 22 Cal. 563, 565, 83 Am.Dec. 84, the court further stated in the last cited that:

"The name of the wife being written by her daughter in her presence and at her request, made it as much her signature as though it had been written by herself."

To the same effect are the cases of Julian v. Schwartz, 16 Cal.App.2d 310, 328, 60 P.2d 887, Tumansky v. Woodruff, 14 Cal.App.2d 279, 283, 57 P.2d 1372, Altermatt v. Rocky Mountain Fire Ins. Co., 85 Mont. 419, 279

P. 243, and Sayre v. Nichols, 7 Cal. 535, 68 Am.Dec. 280. In the case last cited the court uses the following pertinent language:

"'An agent cannot delegate any portion of his power requiring the exercise of *discretion* or *judgment*; otherwise, however, as to powers or duties merely *mechanical* in their nature. Hence, if empowered to bind his principal by an accommodation acceptance, he may direct another to write it, having first determined the propriety of the act himself; and it will bind the principal, though naming the delegate and not the agent, as the one exercising the power.'"

[8] The foregoing language applies to the present case, in which there was no attempt to delegate authority to the amanuensis to exercise discretion with respect to the provisions of the bond, but merely authorized him to sign the agent's name to the document. It is not necessary that such authorization to merely sign the name of an agent to a surety bond, shall be in writing. A multitude of authorities hold that an oral request to perform the mere mechanical act of signing another person's name to an instrument is valid and binding, even though the instrument is required to be in writing. Section 2309 of the Civil Code provides that:

"An oral authorization is sufficient for any purpose, except that an authority *to enter into a contract* required by law to be in writing can only be given by an instrument in writing."

(Italics added.)

The present case does not involve an authorization "to enter into a contract." Judge Shaffer was given no authority to enter into the contract of the surety bond. He was merely directed to sign the name of the duly authorized agent of the contracting surety company.

[9] It is true that the cases, some of which involved the sufficiency of signatures by mark, do state that the instruments were signed, at the request of the parties thereto "in the presence" of the makers thereof. But we are cited to no case, and know of no authority which requires that the signature of the party shall be actually made in his presence. We are of the opinion the signature is valid and binding when the authorization to sign the instrument is conveyed directly to the amanuensis by telephone, as it was in this case. There is no question in this case that Judge Shaffer was personally authorized and requested by J. J. Fluetsch, the duly authorized agent of the surety company, to sign his name to the identical bond which he promptly signed as directed.

[10] Moreover, the surety company served and filed, on August 6, 1945, its duly executed and acknowledged written ratification of the bond, by the terms of which it specifically acknowledged liability, regardless of the alleged invalidity of the signature of its agent. That ratification, under the circumstances of this case, related back to the date upon which the bond was originally entered into, and upon which date it purports to have been executed. It is effective from that time. Union Oil Company v. Pacific Surety Co., 182 Cal. 69, 75, 187 P. 14, 16; 19 C.J.S., Corporations, § 1023, p. 505. In the case last cited it is said in that regard:

"The act of the directors of the Transportation Company in ratifying the contract executed on its behalf made it the contract of that company from its inception."

[11-13] The respondents contend and the trial court determined that the stay bond was not ratified because "it would operate to extend the time of filing said undertaking which, by statute, is limited to five days." Section 946 of the Code of Civil Procedure does not so limit the time. The hearing of the motion to quash the bond occurred on August 6, 1945. It was not determined until August 8th. The ratification was filed August 6th, before the hearing was had or determined. Section 946 of the Code of Civil Procedure, under which the stay bond was filed, does not specify the time within which it shall be filed. The stay bond was merely filed to preserve the status quo with relation to the custody of the attached property pending the appeal from the judgment dismissing the action. The validity of that bond did not effect the appeal. Since the amendment of section 940 of the Code of Civil Procedure in 1921, dispensing with the necessity of filing an undertaking on appeal, all that is now required to perfect the appeal is to file with the clerk the notice thereof. Rule 1 (a), Rules on Appeal; In re Shafter-Wasco Irr. Dist., 55 Cal.App.2d 484, 487, 130 P.2d 755; Mamer v. Superior Court, 15 Cal.2d 569, 103 P.2d 961; 30 Cal.Law Review 436. We conclude that the court erred in holding that the stay bond was not ratified on account of the reason assigned, or otherwise.

The cases cited by the respondents in support of their contention that the ratification of the bond was ineffectual because it was made too late, are not in point. Wittenbrock v. Bellmer, 57 Cal. 12, was a suit for foreclosure of a mortgage based upon an alleged assigned promissory note. The note was held by Germania Building and Loan Association. The president of the association, without authority, attempted to assign the chose in action to plaintiff. The trustees had only authorized the president to "accept payment of the note." At the commencement of the action the plaintiff had no title to the note and no authority to maintain a suit for its collection. Several months after the commencement of the action, the trustees attempted to ratify the former attempted assignment of the president. The court said:

"If a party has no cause of action at the time of the institution of his action, he cannot maintain it * * *.

"It is only when the plaintiff is, at the time of the commencement of his action, entitled to some relief, that he can avail himself of facts which afterwards occur."

The order granting the defendant a new trial was therefore affirmed. That principle has no application to the ratifying of a stay bond during the pendency of the action.

The case of Dingley v. McDonald, 124 Cal. 682, 57 P. 574, upon which the respondents also rely, presented exactly the same question, under similar facts, upon which the preceding case was determined. The Dingley case cited and relied upon the Wittenbrock case. That principle was again upheld. But it has no application to the circumstances of this case.

The case of Title Insurance & Trust Co. v. California Development Co., 168 Cal. 397, 143 P. 723, upon which the respondents rely, merely involved the validity of a notice of appeal. It was held that since the attorney who signed and filed the notice of appeal had no authority from the defendant to appeal from the judgment which was rendered against it, the attempted appeal was ineffectual and void. See Jackson v. Jackson, Cal.App., 163 P.2d 780. The defendant could not validate its right of appeal, which had been waived by failure to comply with the statute within the time prescribed, by subsequently attempting to ratify the act of a disqualified attorney. The right of appeal is statutory. The statute must be complied with to perfect an appeal. No statutory requirement with respect to the filing of the stay bond in the present case was violated. No question of jurisdiction, in that regard, is involved in this case. The Title Insurance & Trust Company case is not in point.

[14] On appeal in this case, for the first time, the respondents contend that the record fails to disclose the authority of Arthur M. Colomb to execute the written ratification of the stay bond of the Glens Falls Indemnity Company, as its attorney in fact. That ratification was duly acknowledged under seal by a Notary Public, who certified that it was the act of "Arthur M. Colomb known to me to be the Attorney of the Glens Falls Indemnity Company." It purports to have been duly authorized by the surety company. The authority of the attorney in fact was not questioned at the trial. It is too late to raise that question for the first time on appeal. There is no merit in that contention.

The judgment dismissing the action is reversed, and the court is directed to grant plaintiff reasonable time within which to amend its complaint as previously stated, if it so desires.

The order quashing the surety stay bond, releasing the attachment and directing the sheriff to surrender to the respondents the money and property attached is reversed.

ADAMS, P. J., and PEEK, J., concur.

KADOTA FIG ASS'N OF PRODUCERS v. CASE-SWAYNE CO. et al.

Civ. 7232.

District Court of Appeal, Third District, California.

April 2, 1946.

Rehearing Denied May 2, 1946.

Hearing Denied May 27, 1946.

1. Agriculture ⇐6
Pleading ⇐225(2)

Where complaint described plaintiff only as "Kadota Fig Association of Producers, a grower cooperative association", and failed to allege compliance with Code sections forbidding maintenance of action by individual, association, partnership or business trust doing business under fictitious name until compliance with certain conditions, or facts showing its exemption therefrom, complaint was demurrable for want of capacity to sue, but dismissal without leave to amend to show compliance with Code sections or exemption was error. Civ.Code §§ 2466, 2468.

2. Appeal and error ⇐468

Where stay bond was timely filed, but authorized agent of surety company neglected to sign it, and on last day for filing agent telephoned judge and requested judge to sign agent's name to the bond, which judge did, and thereafter company ratified the bond regardless of any irregularity, ratification related back to date upon which bond was originally entered into and upon which it purported to have been executed and was effective from that time and did not have the effect of extending the time of filing the undertaking.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Kadota Fig Association of Producers, a growers co-operative association, against Case-Swayne Company, a partnership composed of Paul W. Case, Amos Swayne, and others, and Paul W. Case and Amos Swayne and others individually. From a judgment of dismissal and from an order quashing a surety stay bond given to preserve status quo with relation to money seized under attachment pending appeal, plaintiffs separately appeal.

Reversed with directions.

C. Ray Robinson, Samuel V. Cornell, and Margaret A. Flynn, all of Merced, for appellants.

Johnson, Harmon & Stirrat, of San Francisco, and Adams & Griswold, of Merced, for respondents.

THOMPSON, Justice.

The plaintiff has perfected two appeals in this case. The first appeal is from a judgment dismissing the action, pursuant to an order sustaining a demurrer to the complaint for asserted lack of capacity to sue, without granting leave to amend the pleading. The second appeal is from an order quashing a surety stay bond given to preserve the status quo, with relation to money seized under attachment, pending the appeal. The stay bond was held to be void for the reason that it was not personally signed by the agent of the surety company. The agent's name was signed at his request by an amanuensis. The court also held that an attempted ratification of the bond was also void because it was not filed within time.

[1] The validity of the first appeal is determined adversely to the respondents in this case by a decision of this court this day filed, Kadota Fig Association, etc. v. Case-Swayne Co., 167 P.2d 518, in which it was held that the court erred in dismissing the action without granting plaintiff leave to amend its pleading. Upon the authority of that decision, the judgment in this case dismissing the action without leave to amend is reversed, and the court is directed to grant plaintiff reasonable time within which to amend its complaint, if it so desires.

[2] The second appeal in this case is determined adversely to the respondents upon the issue of the validity of the stay bond by another decision of this court this day filed, Kadota Fig Association, etc. v. Case-Swayne Co., 167 P.2d 523, in which it was determined that a similar surety stay bond signed by an amanuensis at the request of the agent for the surety company is valid and binding and that it was subsequently duly ratified. On the authority of the last mentioned case, the second appeal in this action is reversed.

ADAMS, P. J., and PEEK, J., concur.

73 Cal.App.2d 720

WHITE et al. v. LOS ANGELES RY. CORPORATION.

Civ. 15003.

District Court of Appeal, Second District, Division 3, California.

March 29, 1946.

1. Evidence ⇐123(11)

In action against street car company for death of pedestrian killed by street car, statements by motorman to officer as to how, when and under what conditions accident occurred, made shortly after accident while body of pedestrian was still lying in full view at side of tracks were properly admitted as res gestæ declarations.

2. Evidence ⇐118

Where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication, declaration is admissible as "res gestæ."

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

3. Evidence ⇐118

The practice has been to allow trial court no discretion in determining admissibility of alleged res gestæ statements, but there is necessarily, some element of discretion in the trial court.

4 Evidence ⇐118

A spontaneous declaration made by an employee may be admissible against his employer as an exception to hearsay rule as part of res gestæ apart from question of whether declaration was made in scope of employment.

5. Appeal and error ⇐927(3)

On appeal from a judgment of non-suit, appellate court must view the evidence in the light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant.

6. Street railroads ⇐117(8, 10)

Under evidence that, though motorman applied his brakes 50 feet north of point where streetcar killed pedestrian after dark in pedestrian cross walk at intersection, streetcar traveled 410 feet from that point to point where it finally stopped, whether motorman was negligent because of excessive speed and because he did not keep streetcar under his control and because of failure to keep a proper lookout was a question for the jury.

7. Street railroads ⇐81(1)

Since rights and duties of those in charge of streetcar are reciprocal with other users of public streets, street car operator has duty to exercise ordinary care to avoid collision with another user of public street.

8. Street railroads ⇐81(1, 5)

Street car operator must exercise ordinary care in management and operation of car and in maintaining vigilant lookout.

9. Street railroads ⇐81(1, 5)

Street car operator must use ordinary care, give usual warning of approach and take usual precautions to avoid injury to others.

10. Street railroads ⇐81(1, 3)

Street car operator must operate car in manner and run it at speed customary at particular place.

11. Street railroads ⇐117(10)

In action against street car company for death of pedestrian who was killed after dark while crossing street at intersection, where there was evidence that no warning was given by motorman, whether motorman failed to sound his bell or otherwise warn pedestrians of approach of street car prior to discovery of deceased's peril, and whether such failure was culpable was a question for the jury.

12. Death ⇐58(1)
Evidence ⇐60

In death action, plaintiffs were entitled to invoke aid of presumptions that every person obeys the law, that every person takes ordinary care of his own concerns, and that a person is innocent of crime or wrongdoing. Code Civ.Proc. § 1963, subd. 1, 4, 33.

13. Evidence ⇐89

Where facts, admitted or established by proof, are irreconcilable with presumption, presumption loses its evidentiary value.

14. Evidence ⇐87

A "presumption" is a species of indirect evidence and will prevail in and control deliberations of a jury unless it is

overcome by satisfactory evidence. Code Civ.Proc. § 1957.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumption".

15. Street railroads ⇐117(22, 23)

In action against street car company for death of pedestrian who was killed by street car after dark while crossing street in pedestrian walk at intersection, whether pedestrian should have observed immediate proximity of streetcar or whether, in making an error in judgment as to speed or danger of approaching streetcar pedestrian was guilty of contributory negligence was a question for the jury.

16. Street railroads ⇐98(7, 8)

The test whether pedestrian who was killed by streetcar at intersection was negligent in that he did not observe immediate proximity of streetcar or in that he erred in judgment as to speed or danger of approaching streetcar would be whether his conduct was compatible with conduct of person of ordinary prudence.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Beatrice White and another against the Los Angeles Railway Corporation, for wrongful death of plaintiff's decedent, who was killed by a street car. From a judgment of non-suit, plaintiffs appeal.

Reversed.

Katz, Gallagher & Margolis, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Sherman S. Welpton, Jr., all of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Plaintiffs, widow and mother, respectively of Truman Homer White, deceased, appeal from a judgment of non-suit rendered by the court when they concluded presentation of their case before a jury in an action for damages based upon his wrongful death. Mr. White was instantly killed when struck by a streetcar owned by defendant corporation and operated by one of its employees. Defendant's motion for nonsuit was based upon the following grounds: (1) that there had been no evidence proving or tending to prove any act of negligence upon the part of the defendant; (2) that if any such evidence had been introduced, the negligence had not been shown to be the proximate cause of the injuries sustained by the deceased; (3) that it conclusively appeared from the evidence adduced on behalf of plaintiffs that the deceased was guilty of contributory negligence as a matter of law. A minute order indicates that section 581, subdivision 5, Code of Civil Procedure, furnished the ground upon which the motion was granted, namely, plaintiffs' failure to prove a sufficient case.

The accident occurred on New Year's Day, January 1, 1943, about 6:30 p. m., at the intersection of 98th Street and La Brea Avenue, in the city of Inglewood, California. It was dark at that time and the weather was clear and dry. La Brea Avenue, extending in a northerly-southerly direction, is divided by defendant's private right-of-way, which is elevated slightly above the pavement of La Brea Avenue and is bounded on the east and west sides by a curbing flush with the right-of-way and running along the corresponding edges of the La Brea pavement, except where that highway is intersected by cross streets. 98th Street intersects La Brea Avenue at right angles and is paved where it crosses the streetcar tracks. There is a slight down grade of a mile or two in a southerly direction from the point where "La Brea comes into Market * * * until you hit approximately Lennox." Poles are stationed between the streetcar tracks at regular intervals of about 100 feet along the right-of-way. The neighborhood at this intersection is partially business and partially residential. Nothing at the intersection obstructs the view of the right-of-way by an operator of a streetcar or a pedestrian using the crosswalk at 98th Street. There is no illumination other than a light "on the pole right in the middle of the car tracks * * * just a few feet south of the south line of 98th Street." There is no streetcar stop at 98th Street, but there is one on Hardy Street, one block north, a distance of approximately 550 feet. The record indicates that at the time of the accident the deceased was a soldier stationed at Inglewood, California, 30 years of age, in good health, wearing glasses and in full possession of his faculties. He and two soldier companions for the evening were returning to their barracks when he was struck in the pedestrian crosswalk by defendant's southbound streetcar.

The only testimony pertaining to the manner in which the accident occurred was supplied by Clifton R. Ogle, one of decedent's companions, whose deposition was read at the trial, and the police officer who investigated the accident.

Ogle testified that he, Private Van Horn and deceased had just left the "Blue Moon," a bar in Inglewood; that deceased did not have anything to drink there; "We just stepped in there. It was early and no one was there. We walked in and took a look around and went out again. We weren't there over 15 minutes"; that they then walked up the street two blocks to 98th Street; that just as they turned and stepped over the curb of the sidewalk to cross the street the deceased "got behind us a couple of steps * * * he was talking and all of a sudden he was behind us, that's all I know. All I know is he got killed and he got killed at the intersection." This witness further stated that "when the street car hit him naturally we looked around right quick and White wasn't there. The car carried him approximately * * * fifty or sixty yards down the track before it threw him off the side." Ogle stated further that he did not hear the streetcar, know it was coming or hear any "bell, whistle or any noise whatsoever." This witness was asked, "When was it that you and the other gentleman stepped ahead of Mr. White?", and answered, "we went over the curb to cross the tracks; some way we stepped ahead of him where the street car was. He might have been two steps behind us. * * * we were off the tracks. We had just made the last step over the edge of the track." He further testified that the tracks at the point just referred to were not raised above the level of the ground but "were cemented around."

Harold C. Witty, a police officer of the city of Inglewood for almost 16 years, testified that he arrived at the scene of the accident "about 6:30 p. m." and proceeded to make an investigation; that he saw White's body lying "alongside of the highway approximately 210 feet north of where the streetcar was stopped." Over the objection of defendant this witness was permitted to testify that Magoon, the motorman, pointed out the spot in the intersection where the streetcar hit the deceased, which was "approximately two feet north on the paved portion of the intersection where you walk across"; also that Magoon stated that after he had made the stop at Harvey Street and proceeded southerly approximately 200 feet [a distance of "300 to 350 feet north" of the intersection of 98th Street] he saw three or four soldiers crossing the street; that he "thought all of them *was* clear, and he came on down, and when he happened to see this Mr. White, he hit the emergency brake and all * * * and hit him and carried him 150 feet down, where the body went off of the cow catcher, and he continued on 210 feet * * * from where he left the body"; that Magoon told him "he had rung his bell at the intersection" and applied the brakes "just when he hit the intersection," which the witness estimated to be 50 feet from the point of impact as indicated by Magoon. Witty further testified that the streetcar headlight was on at the time of his arrival; that he did not question Magoon as to whether the headlight was on at the time he came down the right-of-way into the intersection of 98th Street; that he and Officer Burgess, in the presence of Magoon, made the measurements from the point of impact to the spot where the body lay, and then to the point where the streetcar finally came to rest. It was on this state of the record that the non-suit was granted.

[1] Respondent argues that the statements made by motorman Magoon to Officer Witty were hearsay and "not res gestæ or spontaneous declarations, being a mere narration of events in explaining an accident," and were, therefore, inadmissible as to the defendant. While some of the statements of the officer may have fallen within the category of hearsay testimony, we do not feel that the essential details as to how, when and under what condition the accident occurred, as related by Magoon to Witty, should have been withheld from the jury. Under the principles set forth in Showalter v. Western Pacific R. Co., 1940, 16 Cal.2d 460, 461, 106 P.2d 895, which case is deemed to have overruled Shaver v. United Parcel Service, 1928, 90 Cal.App. 764, 266 P. 606; Froeming v. Stockton Electric R. Co., 1915, 171 Cal. 401, 153 P. 712, Ann.Cas.1918B, 408; and Kimic v. San Jose-Los Gatos etc. R. Co., 1909, 156 Cal. 379, 104 P. 986, cited by respondent in support of its position (see, Lane v. Pacific Greyhound Lines, 1945, 26 Cal.2d 575, at page 583, 160 P.2d 21, at page 24), we do not believe the trial court abused its discretion in admitting the statements, Officer Witty having testified that he arrived at the scene "about 6:30," the time the acci-

dent was alleged to have occurred. When Magoon made the statements to the officer he had just been through the tragic experience of having struck and killed a man, the body was lying in full view at the side of the tracks, and we believe it may be fairly said that his statements were spontaneous, and made while he was under great excitement and emotionally upset.

[2, 3] In the Showalter case, supra, the court said at page 467 of 16 Cal.2d, at page 899 of 106 P.2d: "* * * where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication, said declaration is admissible. * * * The practice in this state heretofore has been to allow the trial court no discretion in determining the admissibility of alleged res gestæ statements; however, under the view taken herein there is necessarily some element of discretion in the trial court.

[4] "As stated by the court in Roach v. Great Northern R. Co., 133 Minn. 257, 260, 158 N.W. 232, 234, 'In passing upon the admissibility of testimony claimed to constitute a part of the res gestæ, the trial court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it, and in determining this it considers whether the statements are spontaneous, whether there was an opportunity of fabrication or a likelihood of it, the lapse of time between the act and the declaration relating to it, the attendant excitement, the mental and physical condition of the declarant, and other circumstances, important in determining whether the trustworthiness of the unsworn statements is such that they may safely go to the jury.'" See, also, Lloyd v. Boulevard Express, 1926, 79 Cal.App. 406, 249 P. 837, cited with approval in Coryell v. Clifford F. Reid, Inc., 1931, 117 Cal.App. 534, 536, 4 P.2d 295, and Lane v. Pacific Greyhound Lines, supra, 26 Cal.2d 575, 160 P.2d 21, 24, where the court said: "Hence, a spontaneous declaration made by an employee may be admissible against his employer as an exception to the hearsay rule pursuant to the rule under discussion separate and apart from the question of whether it was made in the scope of employment. There may be situations where they are admissible under both theories or under only one or the other."

[5, 6] Appellants contend that the evidence introduced by them, coupled with the presumption that the deceased exercised due care for his safety, was sufficient to permit the case to go to the jury on the question of defendant's negligence. In disposing of an appeal from a judgment of nonsuit, the appellate court must "view the evidence in the light most favorable to appellant, must disregard all inconsistencies and *draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant.* [Italics ours.]" Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 161 P.2d 673, 675. While there was no evidence as to the speed of the streetcar in miles per hour at the time of the accident or immediately before, it appeared from the testimony that Magoon applied his brakes 50 feet north of the point where his car struck deceased and that the car traveled a distance of 410 feet from that point to the point where it finally came to rest. It may be reasonably inferred, therefore, that the streetcar was going at a high rate of speed at the time it entered the intersection and at the time of the impact. The questions whether that speed was so excessive as to constitute negligence under the particular circumstances here related, or whether the motorman used sufficient care to keep the streetcar under his control immediately prior to the impact, were properly for the jury to decide. Bilton v. Southern Pacific R. Co., 1906, 148 Cal. 443, 447, 83 P. 440. See, also, Phillips v. Pacific Electric R. Co., 1927, 80 Cal.App. 641, 645, 252 P. 628, 629, where the evidence in that case was held sufficient to warrant an inference that the streetcar was running at an excessive rate of speed and where the court said: "It is certainly negligence to run a street car through a residence section of a city at such a rate of speed that it cannot be brought to a standstill, under known conditions, within a distance short of 250 feet, and the jury may have reasonably inferred from the evidence that but for such excessive speed the plaintiff would have safely passed the automobile ahead of him."

[7-11] In Shipley v. San Diego Electric R. Co., 1930, 106 Cal.App. 659, 661, 289 P. 662, 664, the court said: *"The rights and duties of those in charge of a street car are reciprocal with the other users of the public streets.* It is therefore the duty of one operating a street car to exercise ordinary care to avoid a collision with another user of the

public street of a city. [Cases cited.] The operator of an electric car upon a city street is charged with the duty of using ordinary care in the management and operation of his car [citing case], and to use ordinary care in maintaining a vigilant lookout for other users of the street. [Citing case.] It is the duty of an operator of a street car to use ordinary care and *give to others on the street some warning of its approach* [citing case], and to operate street cars 'in the manner and run them at a speed which is customary at the particular place, and they will give the usual warnings and signals, and take the usual precautions to avoid injury to others.' [Citing case.] * * * Ordinary care requires the operator of a street car, as well as the driver of a motor vehicle, to be watchful for others in his path." (Italics ours.) Since Ogle testified that the deceased was only "a couple of steps," perhaps "two steps" behind his companions, it might have been inferred by the jury, if given the opportunity, that the motorman did not maintain the vigilant outlook required of him for other pedestrians using the cross-walk, having been appraised of the fact that pedestrians were "on the tracks." Further, the fact that Ogle testified that he heard no warning or bell, contrary to the motorman's statement that he sounded his bell immediately upon seeing deceased and at the same time applied his brakes, is some evidence that no warning was given by the motorman since Ogle was in a position to have heard a bell if one had been rung. Thompson v. Los Angeles etc. R. Co., 1913, 165 Cal. 748, 752, 134 P. 709; Peri v. Los Angeles Junction R. Co., 1943, 22 Cal.2d 111, 118, 119, 137 P.2d 441. Whether there was a failure on the part of Magoon to sound his bell or otherwise warn pedestrians of the approach of the streetcar prior to the discovery of deceased's peril, and whether such failure was culpable, were likewise questions for the determination of the jury.

[12-16] Respondent argues that "the only reasonable inference that can be drawn from this testimony is that the deceased in crossing the private right of way of the defendant Company stepped directly into the path of the oncoming street car without either looking in the direction from which danger was to be anticipated or heedless of the danger if he did observe the approaching street car. This action of the deceased made him guilty of contributory negligence as a matter of law." In answering this argument the language of the court in Wiswell v. Shinners, 1940, 47 Cal.App.2d 156, 160, 117 P.2d 677, 680, is apropos: "Where, as in the instant case, death has ensued as a result of the accident, thereby sealing the lips of the injured party, the surviving spouse as plaintiff in the action for the alleged wrongful death, was entitled to invoke the aid of certain presumptions indulged in by law. The presumption is that every person obeys the law; that every person takes ordinary care of his own concerns, and that a person is innocent of crime or wrong. Code Civ.Proc., sec. 1963, subds. 1, 4 and 33. There was therefore present in this case the presumption that decedent, while crossing through the intersection, was at all times exercising the requisite degree and amount of care for his own safety *by looking in the direction from which danger could be anticipated.* * * * True, where facts are admitted or established by proof which is irreconcilable with the presumption, the latter loses its evidentiary value. Nevertheless the presumption is a species of indirect evidence (Code Civ. Proc., sec. 1957), and will prevail in and control the deliberations of the jury unless it is overcome by satisfactory evidence." (Italics ours.) On the state of the record in this case we find nothing which is irreconcilable with this presumption. The deceased was in a pedestrian cross-walk, a place where he was lawfully entitled to be and, since his companions had reached a place of safety over the same road, the question of whether he should have observed the immediate proximity of the streetcar, or whether, in making an error in judgment as to the speed or danger of the approaching streetcar, he was guilty of contributory negligence, was also for the consideration of the jury, the test, under these circumstances, being whether deceased's action was compatible with the conduct of a person of ordinary prudence.

From our survey of the testimony and our consideration of the claims of the appellant, we believe the court erred in granting defendant's motion for nonsuit.

Judgment is reversed.

SHINN and WOOD, JJ., concur.

PEOPLE v. BRAC.

Cr. 3922.

District Court of Appeal, Second District, Division 1, California.

March 25, 1946.

Rehearing Denied April 5, 1946.

Hearing Denied April 24, 1946.

1. Infants ⇐20

In prosecution of registered pharmacist for contributing to delinquency of minor by furnishing minor with a barbital derivative without a prescription, evidence was sufficient to warrant jury in concluding pharmacist sold yellow capsules on dates charged in information and that such capsules contained a barbituric acid derivative. Health and Safety Code, § 26252; Welfare and Institutions Code, § 700; Penal Code, § 347½.

2. Infants ⇐20

In prosecution of registered pharmacist for contributing to delinquency of minor by furnishing minor with pentobarbital without a prescription, it was not incumbent on prosecution to demonstrate the absence of a prescription. Penal Code, § 347½.

3. Indictment and Information ⇐196(5)

Where defendant did not demur to information nor move in arrest of judgment, he waived any objections to the information on ground of uncertainty.

4. Criminal law ⇐852

Defendant was not shown to have been substantially injured by court's failure to interrogate jury if members of jury had discussed case with newspapermen, where court instructed jury to refrain from reading newspaper articles and from obtaining or considering any information except in court.

5. Infants ⇐20

In prosecution of registered pharmacist for contributing to delinquency of a minor by allegedly selling him pentobarbital without a prescription on or about the 21st of July and within one year, and on occasions prior to filing of information, trial court did not err in admitting evidence of witness as to alleged sale of pentobarbital on July 15 to the minor as well as on July 21. Penal Code, § 347½.

6. Criminal law ⇐396(2)

Where defendant's counsel first asked state's witness if he had not been promised that prosecution against him would be dismissed if he testified against defendant, and witness testified that there had been such agreement, record in prosecution against witness was properly introduced to show that prosecution had not been dismissed.

7. Criminal law ⇐412(1)

In prosecution of registered pharmacist for contributing to delinquency of minor by allegedly selling him pentobarbital without a prescription, testimony of state's witness who allegedly acted as go-between in the sale of the pentobarbital, that pharmacist told him to testify that pharmacist did not give him the pentobarbital to give to the minor, was properly admitted.

8. Criminal law ⇐1169(1)

In prosecution of registered pharmacist for contributing to delinquency of minor by allegedly selling him pentobarbital without a prescription, admission of testimony of officers that when they went to pharmacist's drug store he denied making sale to minor, did not unduly prejudice pharmacist. Penal Code, § 347½.

9. Criminal law ⇐785(7), 1186(4)

In prosecution of registered pharmacist for contributing to delinquency of minor by allegedly selling him pentobarbital without a prescription, wherein prosecution's expert witnesses testified that capsules in possession of minor and allegedly purchased at pharmacist's drug store, contained a derivative of barbital, failure to give statutory instruction as to expert witnesses was error, but omission of instruction did not result in miscarriage of justice where there were other incriminating facts in evidence, none of which pharmacist denied. Penal Code, § 1127b; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Victor A. Brac was convicted of contributing to the delinquency of a minor, and he appeals.

Affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, appellant was charged with the crime of "contributing to delinquency" (of a minor), a misdemeanor, in violation of section 702 of the Welfare and Institutions Code, in that he "did willfully and unlawfully furnish, deliver and sell to and by acts, encourage the possession of pentobarbital, a derivative of barbital, by * * * and * * *, minors under the age of 21 years, * * * without first receiving or requiring an order or prescription of a physician or other person authorized to issue the same, contrary to section 347½ of the Penal Code of the State of California, and did further make said delivery in an unlabelled bag or container contrary to section 26252 of the Health and Safety Code of the State of California. All of which willful and unlawful acts and course of conduct on the part of the defendant, as aforesaid, did cause and manifestly tend to cause the said minors, * * * to become and to remain persons within the provisions of one or more of the subdivisions of section 700, Welfare and Institutions Code of the State of California."

To the foregoing information defendant entered a plea of not guilty, and after trial before a jury, he was found "guilty of contributing to delinquency, a misdemeanor, as charged in the information." From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

Viewing the evidence in the light most favorable to the prosecution, as we must do following a guilty verdict, it appears that on the afternoon of July 15, 1944, Raymond ——, one of the minors involved herein, a boy 16 years of age, was in the vicinity of appellant's drug store on North Main Street in the City of Los Angeles. He gave some money to his companion, who in turn gave it to a third boy, who went into the drug store and emerged with a paper bag containing twelve pills. Raymond testified that he began taking the pills about 4 or 4:30 in the afternoon; "after taking two or three in about fifteen minutes I didn't know what I was doing. * * * On taking the pills in about twenty minutes or so they take effect on you and you get so that you don't know what you are doing, like a drink of whiskey only it may be worse." At about 7 o'clock that evening Raymond was arrested in a pool hall by Police Officer John Neubert, who testified that although Raymond's breath had a "slight tinge of alcohol," he did not appear to be drunk, but rather in a "stupid condition." While walking to the police station, Officer Neubert found some "little yellow capsules" in the lining of Raymond's jacket.

Raymond remained in jail until July 21. On that date he was taken to the office of the Los Angeles County Sheriff's Narcotic Detail, where his clothes, shoes and person were searched. Deputy Sheriff Johnston then delivered to Raymond a marked dollar bill. Deputy Johnston and three other officers then drove Raymond to the vicinity of appellant's drug store. Officers Johnston and Dowdy watched from across the street, while Officer Ellis followed Raymond. The officers saw Raymond hand the dollar bill or what looked like it to a boy named Tony (the second minor mentioned in the information). Tony went into the drug store and in a few minutes emerged with a small brown paper bag, which he handed to Raymond. The officers thereupon recovered the brown paper bag from Raymond. It was found to contain five yellow capsules. The officers entered the store, recovered the marked dollar bill, and took appellant into custody. They examined the prescription file in the store and found no prescriptions on file for that day. Two of the officers testified that they saw empty bottles labelled "pentobarbital" and "sodium."

The testimony of Fred Wolfe, a chemist in the Sheriff's office, taken at the preliminary examination, was read into the record. Mr. Wolfe's qualifications were admitted. He testified that the capsules contained in the bag obtained from defendant's drug store on July 21, 1944, contained a derivative of barbiturate acid, each capsule containing a grain and a half of the drug. His tests did not show from what compound it was derived or what firm might have prepared it, but, he stated, yellow capsules indicated that they were pentobarbital, which also went under the trade name of Nembatol. Abe Franklin, a pharmacist and President of the State Board of Pharmacy, testified that Nembatol is a trade name for sodium pentobarbital, which is a barbiturate acid; that

such pentobarbital pills come in grain and one-half sizes, the size referring to the amount of drug in the capsule.

Tony, the second minor involved, testified that he received the dollar bill from Raymond; that he gave the bill to defendant and received from him the paper bag containing the five capsules. He further testified that during the trial he had a conversation with defendant, as follows: "A. He said that they want to use me as a witness and I says, 'I don't know,' he said, 'Tell them at no time I gave that to you.' Q. What did you say? A. I said, 'I get what you want.'"

The defendant did not take the stand in his own behalf, and offered no evidence except that of his wife, who testified that she was in the store about a half hour before the officers came; that she saw the boy Tony there; that the officers did not go to the prescription room that day, but did return two days later; that no prescriptions were filled while she was in the store and that she did not see the defendant deliver a package to Tony. Her remaining testimony contradicted that of the officers as to occurrences in the drug store in minor particulars.

[1] Appellant first contends that the verdict is unsupported by the evidence. It is urged that no violation of law was shown for the reason that section 347½ of the Penal Code makes no mention of pentobarbital, but authorizes the refilling of a prescription for phenobarbital, and no testimony was offered as to the having of a prescription or the lack of one by either of the boys. This contention is without merit. Section 347½ of the Penal Code (in effect at the time of the offense here charged) made it unlawful to sell any "veronal, barbital (acid diethylbarbituric) or other barbituric acid derivative of their salts, derivatives, or compounds of the foregoing substance, or any preparation or compound containing any of the foregoing substances, or their salts, derivatives or compounds, except upon the order or prescription of a physician * * *; provided, however, that any prescription for phenobarbital or any preparation, mixture or compound of phenobarbital may be refilled * * *." The evidence hereinbefore narrated was ample to warrant the jury in concluding that the defendant sold the yellow capsules on the dates in question and that such capsules contained a barbituric acid derivative.

[2] It was not incumbent upon the prosecution to demonstrate the absence of a prescription. People v. Le Baron, 92 Cal. App. 550, 568, 268 P. 651, 658, 269 P. 476. In the cited case it was said: "We may add that if the defendant in a case, like the one here, is prosecuted under the State Poison Act, and his possession of any of the narcotics falling under the condemnation of the statute is upon the prescription of a physician given in good faith or for purely medicinal purposes, he may shield himself against punishment by exhibiting the prescription and so proving the fact that such possession was lawful. People v. O'Brien, supra [96 Cal. 171, 31 P. 45]. No such proof was offered in the present case." See also People v. Bill, 140 Cal. App. 389, 393, 35 P.2d 645; People v. Smith, 54 Cal.App.2d 587, 129 P.2d 732.

[3] Appellant also challenges the sufficiency of the information, asserting that the commission of two separate acts is charged in the conjunctive; that one act is improperly pleaded, and that it cannot be determined that the accused was found guilty on the charge which was properly pleaded, citing People v. Garnett, 129 Cal. 364, 61 P. 1114; and People v. Mitchell, 92 Cal. 590, 28 P. 597, 788. It is true that the information does state that the defendant "on or about the 21st day of July, 1944, and within one year last past and on occasions prior to the filing of this information, did * * * sell to and by acts, encourage the possession of pentobarbital" by the two minors involved; but whatever uncertainty there might be in the information as phrased, no prejudice to appellant is shown. "The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. * * * The former requirement that a pleading must set forth the particular circumstances of the offense charged, as now amended declares that it shall be sufficient if it charges 'in any words sufficient to give the accused notice of the offense of which he is accused.' Sec. 952, Pen.Code. The appellant herein was entitled simply to notice of the offense of which he was charged, but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment was founded." People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506, 508. In the instant case appellant did not demur to the information nor did he move in arrest of judgment, and in

such circumstances he must be held to have waived any objections upon the ground of uncertainty. People v. Perfetti, 88 Cal. App. 609, 615, 264 P. 318, 321. In the last-cited case it was said: "No demurrer was interposed by the defendant in this case. Thus all the objections which have been urged upon this appeal are completely answered by this section, under the terms of which the appellant must be held to have waived any of the alleged defects. After sitting still and taking chances on the verdict of the jury, he cannot now come into this court and urge that sections 950, 951 and 952 of the Penal Code, as well as 954 thereof, were not complied with. The authorities that an appellant is precluded from raising such objections upon appeal after having failed to demur are too numerous for citation. * * * People v. Lauman, 187 Cal. 214, 201 P. 459, * * * People v. Welton, 190 Cal. 236, 211 P. 802."

It is next urged that "the court erred in refusing the request of counsel that the jury be interrogated if they had discussed the case with newspapermen." In this connection the record discloses the following:

"Mr. Porter (Defendant's counsel): I am placed in an unfortunate position, I wanted a matter of record here. Papers were actually shown right here in the front to the jurors with prepared statements of what the witnesses would testify to in this case, as to what they were going to testify to, also at the same time the testimony of Raymond * * * and some other testimony which has not been given here and those papers were put out with front headlines and they were put out there so that they would be available to the jury at the time when they came out.

"The Court: Right out where, be more specific about it.

"Mr. Porter: Some time after round about 5 o'clock some of these papers were available after the session here.

"The Court: But those papers were not available at noon here.

"Mr. Porter: There is an edition that comes out at 5 o'clock but this was before that, at any rate, it was out here, some of these were picked up where they were being sold right outside here (Discussion between court and counsel not transcribed.)

* * * * * *

"The Court: Well, have you a request to make that you want me to do anything?

"Mr. Porter: I would like to ask that the jury be interrogated if they have discussed with any of the newspaper men.

"The Court: I am not going to insult any juror by asking him anything like that. I have fully admonished them each time we have adjourned and I am not going to assume they have violated my instructions."

The court had previously admonished the jury as follows: "Ladies and gentlemen of the jury, counsel called my attention to a matter I intended to take up with you anyhow. Apparently there have been several newspaper articles published about this trial. Many of them contain material that cannot and will not be introduced in evidence at this trial. I am instructing you as jurors to endeavor to use the precaution not to read any newspaper accounts of this trial but to get your information and your knowledge of the facts of the case as they are brought out in court. I think that is as far as I can go. The newspapers have the right to publish whatever they please, but I can admonish the jury it is their duty as jurors to refrain from reading the articles and obtain any information in any other way than from the legal evidence here in court."

[4] The foregoing constitutes the entire showing made by appellant on the subject of newspaper influence. In view of the court's specific admonition, as well as its instructions to the jurors that they should consider only the testimony and evidence produced in court, it must be held that no substantial injury has been made to appear. People v. Phillips, 120 Cal.App. 644, 652, 8 P.2d 228.

[5] It is urged that the court erred in admitting and in refusing to strike all evidence of the boy Raymond as to the transaction of July 15 "as to events and transactions not in the presence of the defendant and with which the defendant was never connected, and which did not occur on the date of the alleged offense." The testimony of the boy Raymond as to the transaction on this date was sufficient, if believed, to show that the drugs he obtained on that day were secured from the defendant's drug store. Taken in conjunction with all the other evidence in the case, this evidence warranted a conclusion by the jury that it was the defendant himself who sold the drugs on the earlier date as well as on July 21st. In People v. Brown, 37 Cal.App. 101, 103, 173 P. 621, 622, it

was said: "It is to be noted that the crime of contributing to the delinquency of a juvenile may be of a continuing character; in fact, the offense is usually made of a series of overt acts or of a continuous chain of omissions. The information now before us plainly attempts to charge a crime of that character." So in the instant case, the information charged the commission of acts tending to cause delinquency "on or about the 21st day of July, 1944, and within one year last past *and on occasions prior to the filing of this information.*" While perhaps not a model of certainty, the information did inform the defendant that he was being accused of more than one act of furnishing drugs, "all of which * * * acts * * * did cause and manifestly tend to cause the said minors * * *" to become delinquent. As was said in People v. Oliver, 29 Cal. App. 576, 156 P. 1005, 1007, "* * * evidence of the several acts of the defendant which were shown for the purpose of establishing against him the crime charged in the information is admissible, * * *. Under the so-called juvenile court law, any conduct upon the part of a person toward a minor which either causes or tends to cause such minor to become or remain a dependent or delinquent person may be shown, and such conduct may consist of one act only or a series of acts. While one of such acts may be sufficient to constitute the specific crime of contributing to the dependency of the minor, a number of different acts leading to the same result can have the effect of doing no more." See also People v. Koosistra, 58 Cal.App. 277, 208 P. 316. Also noteworthy in this connection is People v. Baker, 38 Cal.App. 28, 35, 36, 175 P. 88, where in a prosecution for contributing to the delinquency of a minor by selling him liquor, evidence that the minor had previously purchased and drank liquor was held admissible to show that he was a person likely to remain addicted to the use of intoxicants.

[6] It is next asserted that the court erred in admitting into evidence portions of the record of the case of People v. Tony * * *, who was charged with contributing to the delinquency of the minor Raymond. The record discloses that appellant's attorney brought out on cross-examination of the witness Tony that the criminal action against him had been dismissed, whereupon the district attorney introduced evidence to show that a "juvenile petition" against Tony, arising out of the same transaction, was still pending. Defense counsel had asked the witness Tony, "Did you have any conversation with anybody in the District Attorney's office of this County whereby it was agreed between you and them with respect to you testifying against Mr. Brac in this case if they would dismiss that case against you?" to which the witness replied, "Yes, sir." The appellant having brought out the charge that the witness was testifying in hope of reward, the prosecutor was warranted in introducing evidence that the proceedings had not been dismissed. Having thus opened the door, the appellant may not complain that the prosecution's rebuttal unduly prejudiced him. Nor may he complain of a reading of a portion of the district attorney's recommendation in connection with the dismissal. The trial court interrupted the reading of it and directed the jury to disregard it.

[7] Appellant argues that the court erred in permitting testimony as to certain "admissions against interest" assertedly made by the defendant. As to the first of these, the testimony of Tony that the defendant told him, "Tell them at no time I gave that to you," there is no question but that such evidence was properly admitted.

Officer Huber testified to a conversation with the defendant after his arrest, as follows:

"I asked if he knew anything about the yellow capsules that were recovered by Inspector Dowdy from Tony * * * and he said that he had not sold them. I asked him if he had seen the paper sacks that were picked up by Inspector Dowdy and Deputy Sheriff Johnston at his drug store, and he said he had not seen these paper sacks before, or any that looked like them. * * * And I said what do you want to call your wife for, and he said, I want to tell her to get hold of the Brunswick Drug Company and have them send over to me or tell them to get in touch with the person who acted as relief pharmacist. I asked him where his wife was at that time and he said she was at home, and I told him he might use the phone and he dialed some number and talked with somebody on the phone and told them what I have just related."

Officer Johnston testified that while in the drug store, he asked the defendant "if he had made a sale of merchandise that

the Inspector showed him and he said that he had not."

[8] Officer Dowdy testified that upon entering the store, "I asked him if he was a licensed pharmacist in charge of the store and he said he was. I then asked him if he had another registered pharmacist working in the store at the present time and he said that he did not but on rare occasions he had a registered pharmacist come in. * * * (At the sheriff's office.) I showed the defendant that bag containing the five yellow capsules and I asked him if he had sold that material to Tony * * * and the defendant said he did not. I then asked the defendant if he had ever seen this bag before and he said no." The only objection to Officer Dowdy's testimony was the request, "I ask that that be stricken," after the witness had described the entry into the drug store and related the conversation above quoted. It cannot be said that the testimony unduly prejudiced the defendant, as it appeared clearly therefrom that he at all times denied his guilt.

[9] Appellant attacks the instructions given by the court. A reading of them discloses that the jury were fully and fairly instructed as to the law applicable to the case. We are, however, in accord with appellant's contention that since the prosecution resorted to the testimony of expert witnesses to establish the fact that the capsules in question contained a derivative of barbital, it was the duty of the court to give an instruction in accordance with the provisions of section 1127b of the Penal Code, whether or not the defendant requested such an instruction. The statute in question makes it the imperative duty of the court to give such instruction irrespective of the action of the defendant in relation thereto. The simple fact that the defendant remained silent does not amount to a waiver on his part of the necessity of giving such an instruction. We are convinced that it was error to fail to give the statutory instruction as to expert witnesses. The court, however, did give an instruction as to the jurors' being the sole and exclusive judges of the effect of evidence and the credibility of witnesses. There was before the jury evidence that the capsules in question were delivered to the minors by the defendant and that marked money used in their purchase was found in the possession of defendant. There were other incriminating facts in evidence, none of which the defendant denied. After examining the entire cause, including the evidence, we cannot see how a different verdict could have been rendered if the omitted instruction had been given. Section 4½ of Article VI of our state Constitution deprives us of the power to set aside a judgment unless we shall be of the opinion that the error complained of has resulted in a miscarriage of justice. In the instant case we cannot see wherein the court's omission to give the required statutory instruction resulted in any miscarriage of justice. Therefore we are without power to order a reversal of the judgment. People v. Williamson, 134 Cal.App. 775, 780, 781, 782, 26 P.2d 681; People v. Sheridan, 136 Cal.App. 675, 686, 29 P.2d 464; People v. Fellows, 139 Cal. App. 337, 342, 34 P.2d 177; People v. Moore, 70 A.C.A. 213, 220, 160 P.2d 857.

Prejudicial error is also predicated upon the asking of leading questions by the district attorney, the permitting of testimony in narrative form, "permitting prosecution witnesses to answer questions before the counsel for defense had time to object," and alleged misconduct of the district attorney during the trial and in his argument to the jury. To set forth herein the portions of the proceedings upon which these claims are based would unduly prolong this opinion. Suffice it to say that a careful review of the transcript of the testimony and the instructions given convinces this court that these claims of prejudicial error are without merit. The trial court did not abuse its discretion in the conduct of the trial; the jury were clearly admonished to base their verdict solely upon the evidence adduced, and considering the strength of the prosecution's case and the failure of the defendant to explain any of the incriminating circumstances presented against him, it cannot be said that any other verdict might have ensued had the alleged errors not occurred.

The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

73 Cal.App.2d 806

YOSEMITE GROWERS CO-OP ASS'N v. CASE-SWAYNE CO.

Civ. 7230; Sac. 5752.

District Court of Appeal, Third District, California.

April 2, 1946.

1. Attachment ⇐225

A motion to discharge an attachment is in the nature of a plea in abatement. Code Civ.Proc. § 556.

2. Attachment ⇐245

Upon the hearing of motion to discharge an attachment, plaintiff's verified pleading serves as an affidavit. Code Civ. Proc. §§ 556, 557.

3. Attachment ⇐245

Where defendants' notice of motion to dissolve attachment referred to the complaint and asserted that contract attached to complaint granted plaintiff a lien on the property sufficient to protect its interest, it was proper to consider the complaint, together with the attached contract, to determine whether attachment was improperly issued. Code Civ.Proc. §§ 556, 557.

4. Attachment ⇐250

Where complaint is not susceptible of amendment so as to state a valid cause of action, writ of attachment may be dissolved. Code Civ.Proc. § 556.

5. Attachment ⇐250

Where defects in allegations of the complaint can be supplied by amendment, a motion to dissolve an attachment will not serve as a demurrer. Code Civ.Proc. § 556.

6. Attachment ⇐250

Where gravamen of cause of action, as disclosed in the complaint, taken as a whole, was a suit for the direct payment of money due to plaintiff from defendants according to the terms of a written contract, under which defendants acted as the agents for plaintiff, and allegations of fraud and demand for an accounting were only incidental to the chief cause of action, and amount of damages for breach and respective shares of proceeds of sales were readily determinable from terms of the contract, complaint was susceptible of amendment so as to state a valid cause of action warranting the issuance of an attachment, though allegations of original complaint may have been defective. Code Civ.Proc. §§ 537, 538, 556, 557.

7. Contracts ⇐284(2)

A contract providing that, should the parties be unable to agree upon any matter involving computation or allocation of costs thereunder, they should select an accountant to make such determination, did not constitute an agreement to abide by the decision of an accountant as a means of arbitration so as to bar action for direct payment due under the contract, in absence of agreement to abide by the accountant's decision.

8. Attachment ⇐5

An attachment will not lie in an action which is primarily based on fraud but it may properly issue in a suit which is based on a contract, either express or implied, for the direct payment of an ascertained amount of money.

9. Attachment ⇐14

Incidental allegations of fraud with relation to transaction or for an accounting will not necessarily defeat the right of attachment. Code Civ.Proc. § 556.

10. Attachment ⇐14

Where action was brought for direct payment of money due to plaintiff from defendants under a written contract and complaint taken as a whole indicated that defendants handled fruit in question as agents of plaintiff and not as mere joint adventurers, attachment could properly issue, notwithstanding incidental allegations relating to fraud and an accounting. Code Civ.Proc. §§ 537, 538, 556, 557.

11. Attachment ⇐1

The writ of attachment is a special statutory remedy to aid the creditor in satisfying the debt, and the statute must be strictly followed to entitle him to its benefits. Code Civ.Proc. §§ 537, 538, 556, 557.

12. Attachment ⇐232

Where it appeared that plaintiff held a lien which partially secured its debt, and affidavit for attachment failed to aver that lien was originally secured and became valueless without the act of plaintiff writ of attachment was properly dissolved. Code Civ.Proc. §§ 537, 538, 556, 557.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Attachment proceedings by the Yosemite Growers Co-Op Association against Case-Swayne Company, a copartnership comprised of Paul W. Case and Amos Swayne, and against the partners individually. From an order discharging a writ of attachment, plaintiff appeals.

Affirmed.

C. Ray Robinson, Samuel V. Cornell, and Margaret A. Flynn, all of Merced, for appellant.

Johnson, Harmon & Stirrat, of San Francisco, and Adams & Griswold, of Merced, for respondents.

THOMPSON, Justice.

This is an appeal from an order discharging a writ of attachment. The motion was made under section 556 of the Code of Civil Procedure on the ground that the attachment was improperly issued. After written notice of the motion, it was heard and determined upon affidavits filed and with reference to the complaint and the contract attached thereto, marked Exhibit A. The affidavit for attachment was in the usual statutory form pursuant to sections 537 and 538 of the Code of Civil Procedure, except that it did not aver that a lien existed and that it had become valueless through no fault of the plaintiff. It did, however, aver that the suit was brought to recover an indebtedness of $43,399.76, based on an implied contract for the direct payment of money, and that the debt "has not been secured by any mortgage or lien upon real or personal property."

The complaint alleges that said money belonging to plaintiff was procured by the defendants incident to the contract attached thereto, by the terms of which the defendants agreed to pack, can, process and market peaches delivered by plaintiff, and to account to plaintiff for its stipulated share of the fruit and the proceeds of sales, and that said money was wrongfully withheld by the defendants. It is also alleged that 80,200 cases of fruit, out of 82,169 cases of packed peaches, had been sold by the defendants to the United States Government.

Section 10 of the contract provides that "Co-op is at all times to have a lien on all goods in process or finished goods sufficient to protect the interests of the Co-op."

A demurrer to the complaint was sustained on July 25, 1945, with leave to amend the pleading within fifteen days thereafter. The time to amend the complaint had not expired when the order was made to dissolve the attachment.

The notice of motion to dissolve the attachment recites that it was improperly issued because section 10 of the contract provides for a lien in favor of plaintiff upon "all goods", and that the affidavit for attachment failed to aver that the lien became valueless, that paragraph 8 of the contract also provides for the employment of an accountant, as a prerequisite to the maintenance of a suit, in the event of a disagreement between the parties over the proceeds of sales of the packed fruit, and that the complaint fails to state a cause of action, based upon the contract, for the "direct payment of money". Finally it was asserted the attachment was improperly issued because the complaint alleges an equitable cause of action for an accounting for unliquidated damages arising from a joint venture, and for fraud.

Upon submission of the motion, the trial court made an order, on July 25, 1945, discharging the attachment, on the grounds that "the complaint does not state facts justifying an attachment," and "that the grounds for discharging said attachment as set out in defendants' motion are well taken."

From that order the plaintiff has appealed.

[1-3] A motion to discharge an attachment is in the nature of a plea in abatement. 7 C.J.S., Attachment, § 434, p. 615. It is required to be made on notice of motion. Section 556, C.C.P. The motion may be made upon affidavits filed. Sec. 557, C.C.P. Upon the hearing of the motion, plaintiff's verified pleading serves as an affidavit. San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 554, 296 P. 82; 7 C.J.S., Attachment, § 453, p. 622. In the present case defendants' notice of motion refers to the complaint and asserts that the contract attached to the complaint grants plaintiff a lien on the property sufficient to protect its interest "upon all goods in process or all finished goods." It was therefore proper to consider the complaint, together with the attached contract, to determine whether the attachment was improperly issued.

We are of the opinion the gravamen of the cause of action, as disclosed in the complaint, taken as a whole, is a suit for the direct payment of money due to plaintiff from the defendants according to the terms

of the written contract to pack, can, process and market peaches, and that defendants acted as the agents for plaintiff. The allegations of fraud and the demand for an accounting are only incident to the chief cause of action. The amount of damages for breach of the contract, and the respective shares of the proceeds of sales are readily determinable from the terms of the contract. The cause appears to be a suit in which an attachment may properly issue. In the case of Force v. Hart, 205 Cal. 670, 272 P. 583, 584, in which an order refusing to dissolve an attachment was affirmed on appeal, the Supreme Court said:

"It is a well-recognized rule of law in this state that an attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; De Leonis v. Etchepare, 120 Cal. 407, 410, 52 P. 718; Hamburger v. Halpern, 28 Cal. App. 317, 152 P. 61; 3 Cal.Jur., p. 423, and cases cited. The fact that the damages are unliquidated is not determinative."

[4, 5] It is true that when a complaint is not susceptible of amendment so as to state a valid cause of action, the writ of attachment may be dissolved. Hathaway v. Davis, 33 Cal. 161; Wolford v. Neustadter, 21 Cal. App.2d 417, 69 P.2d 909. A motion to dissolve an attachment will not serve as a demurrer where the defects in the allegations of the complaint can be supplied by amendment. Force v. Hart, supra; Kohler v. Agassiz, 99 Cal. 9, 33 P. 741; Redwood Fibre Products Co. v. Miller Mfg. Co., 61 Cal.App.2d 505, 512, 143 P.2d 389; 3 Cal. Jur. 541, sec. 115. In the Wolford case, supra, it is said [21 Cal.App.2d 417, 69 P.2d 911]:

"If on motion for dissolution of attachment upon the ground of the insufficiency of the complaint it appears that the complaint can be made good by amendment, plaintiffs should be allowed to amend."

[6] In the present case, the plaintiff was granted fifteen days in which to amend its complaint after a demurrer had been sustained thereto. That time for amendment had not expired when the attachment was dissolved. It may not be said, under the complaint in this case, that it is not susceptible of amendment so as to state a valid cause of action warranting the issuance of an attachment, even though the allegations of the original complaint may have been defective.

[7] There is no merit in respondents' contention that paragraph 8 of the contract bars the action because it provides for the employment and determination by an accountant of the shares of money or property belonging to the respective parties. That provision is not an agreement to abide by the decision of an accountant as a means of arbitration. It merely states that:

"Should the parties be unable to agree upon any matter *involving the computation or allocation of the costs* under this agreement, then they shall select an accountant to make such determination." (Italics added)

There is no agreement to abide by the accountant's decision. Moreover, it appears from defendants' affidavit for dissolution of the attachment that an accountant was actually employed and that he rendered a statement of accounts. The counter-affidavit avers that the statement was not accepted by plaintiff because the defendants refused to permit plaintiff to have access to their books, files or records to ascertain the correctness of the stated account. That fact is not denied. We must assume the accountant's statement was rejected through no fault of the plaintiff.

[8-10] An attachment will not lie in an action which is primarily based on fraud (Hallidie v. Enginger, 175 Cal. 505, 166 P. 1), but it may properly issue in a suit which is based on a contract, either express or implied, for the direct payment of an ascertained amount of money. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Sec. 537, C.C.P. The incidental allegations of fraud with relation to the transaction, or for an accounting, will not necessarily defeat the right of attachment. Weintraub v. Superior Court, 91 Cal.App. 763, 267 P. 733; McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019; Karn v. Wills, 50 Cal.App.2d 604, 123 P.2d 640; Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 75, 63 P.2d 1124. The allegations of the complaint in this case, taken as a whole, indicate that defendants handled the fruit in question as the agents of plaintiff, and not as mere joint adventurers. Under such circumstances an attachment may properly issue. Oil Well Core Drilling Co. v. Barnhart, 20 Cal.App. 2d 677, 67 P.2d 696.

[11] The important question to be determined on this appeal is whether we are bound by the conclusion of the trial court that the attachment was improperly issued because the affidavit for attachment failed to aver that the lien became valueless through no fault of the plaintiff. We recognize the fact that, in accordance with the allegations of the complaint, the lien may be deemed to have become valueless as security with respect to the large proportion of the property which had been sold by the defendants. It is alleged, as we have previously stated, that the defendants sold, prior to January, 1945, 80,200 cases of peaches out of a total of 82,168 cases. We may assume from that alleged fact that the lien became valueless as security upon all of the canned fruit except about 2,000 cases. The appellant contends that the complaint shows that the lien became substantially valueless. But section 537 of the Code of Civil Procedure authorizes the issuance of an attachment where a lien actually exists only when it appears that it becomes valueless "without any act of the plaintiff." Section 538 of the same code requires that fact to be averred in the affidavit for attachment.

We are satisfied that the plaintiff, in good faith, averred that the indebtedness "has not been secured by any mortgage or lien," on the theory that most of the fruit had been sold and that the lien was therefore inadequate and substantially valueless. But the fact remains that a lien was originally given and that it still remained effective upon a small portion of the goods.

Section 538 of the same code authorizes the issuance of the writ of attachment only when the affidavit therefor shows "the facts specified in section 537."

In the case of Fisk v. French, 114 Cal. 400, 46 P. 161, 162, Judge Vanclief, speaking for the court, said:

"I think the court did not err in discharging the attachment. The amendment of the complaint did not supply or cure the defects in the affidavit for the attachment; but, on the contrary, incontestably proved that it was false in the material statement that the payment of the notes had not been secured by any mortgage, lien, or pledge upon personal property, and that it was fatally deficient, in that it failed to state that the security became valueless. What the statute requires to be stated in the affidavit must be stated, and *truly* stated, *in the affidavit; and, if not stated in the affidavit, the attachment should be dissolved, even though the requisite facts, omitted in the affidavit, are alleged in the complaint. Complaints on contracts for the direct payment of money generally and necessarily state nearly all the facts required to be stated in an affidavit for attachment in actions on such contracts; yet the statement of such facts in the complaint alone does not satisfy the requirement of the statute that they must be expressly and directly stated in the affidavit for an attachment.*"

The writ of attachment is a special statutory remedy to aid the creditor in satisfying the debt, and the statute must be strictly followed to entitle him to its benefits. Gow v. Marshall, 90 Cal. 565, 27 P. 422; Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 293, 83 P. 36, 113 Am.St.Rep. 253.

[12] It has been held that the affidavit for attachment is fatally defective unless it complies with the statutory requirements. Under section 537 of the Code of Civil Procedure the right to an attachment, with respect to the existence of a lien to secure the debt, depends upon two different designated classes. First, it must appear that the demand "is not secured by any mortgage, deed of trust or lien upon real or personal property." Second, if originally so secured, it must appear that "such security has, without any act of the plaintiff, * * * become valueless." In 7 Corpus Juris Secundum, Attachment, § 129, p. 304, it is said:

"The affidavit for an attachment must follow the statutory requirement by negativing the existence of all the forms or means of security enumerated by it. Accordingly, where an affidavit alleges only that the debt is not secured by a mortgage, and fails to negative the existence of the other kinds of security, the affidavit is insufficient."

In the text last cited, after mentioning the two classes previously referred to with respect to liens, it is further said:

"The first class is where the debt has not been secured. Under such circumstances the affidavit must state that the payment of the debt has not been secured by any lien on real or personal property or any pledge of personal property. The other class is where the debt has been secured, and *there the affidavit must state the fact that security has been given, and also that such security has, without any act of plaintiff or the per-*

son to whom the security was given, become valueless." (Italics added)

When it appears that a lien had been given, as it does in this case, we are impelled to hold that a strict construction of the statute rendered the attachment voidable for failure to aver that, through no fault of the plaintiff, the lien became valueless.

In the case of Anaheim National Bank v. Kraemer, 120 Cal.App. 63, 7 P.2d 765, 766, an order discharging an attachment was affirmed. That case presented the issue as to whether an averment in the affidavit for attachment that the payment of the debt "has been secured by a mortgage or lien upon real estate but that the security or lien has become valueless without the act of plaintiff or person to whom security was given," was a sufficient compliance with the statute. The court held that it was insufficient; that the affiant should have also stated that plaintiff "has no additional security." The court said:

"For all that appears in the affidavit under consideration, affiant may have had ample security for the note sued upon, in the shape of a mortgage or lien upon personal property or pledge of personal property in addition to the mortgage or lien upon real estate which he states has become valueless."

In the case of Bellevue State Bank v. Lilya, 35 Idaho 270, 205 P. 893, 894, an order dissolving an attachment was affirmed, on account of the insufficiency of the affidavit therefor. It averred:

"That the notes * * * were secured by chattel mortgages, but that the security for the same became worthless; * * * and that the payment of the same is not secured by any mortgage, lien or pledge upon real or personal property."

The court held that the statute required the plaintiff to further aver that the chattel mortgage became worthless "without any act of the plaintiff, or the person to whom the security was given."

In the present case for aught that appears the plaintiff may have consented to the sales of canned fruit by the defendants, and thus waived its security. The affidavit for attachment and the showing on the motion fail to negative plaintiff's participation in the acts which rendered the lien valueless in part.

For the reason that it appears plaintiff held a lien which partially secured its debt, and because the affidavit for attachment fails to aver that the lien was originally secured and became valueless without the act of plaintiff, the order dissolving the attachment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



73 Cal.App.2d 769

PEOPLE v. VOLLMANN.

Cr. 2351.

District Court of Appeal, First District, Division 2, California.

April 2, 1946.

Hearing Denied April 29, 1946.

1. Criminal law ⇐345

Evidence of accused's conduct prior to commission of crime charged, which has direct tendency to connect accused with the crime and to identify him, is admissible.

2. Bribery ⇐10

In prosecution against farm production council director's assistant for agreeing to accept a bribe from housing contractors with intent to influence assistant's official action, evidence of negotiations antecedent to conversation forming basis of prosecution, which tended to establish relationship between assistant and contractors, was admissible at least as introductory to other transactions to give jury intelligent understanding of the whole evidence. Pen.Code, § 68; Gen.Laws, Act 134 and Act 136.

3. Criminal law ⇐369(2)

In prosecution against farm production counsel director's assistant for agreeing to accept a bribe with intent to influence his official action with regard to housing contractors, evidence of conversations between assistant and contractor regarding payment and offer of sums of money by third parties to assistant were properly admitted under rule that where proffered evidence directly throws light upon issue being tried, evidence is admissible although it proves another offense as well. Pen.Code, § 68; Gen.Laws, Act 134 and Act 136.

4. Criminal law ⇐1169(2, 3)

A judgment will not be reversed because of erroneous admission of evidence where disputed fact is shown to have been proved by evidence of accused, or by accused's cross-examination of a witness for the prosecution.

5. Criminal law ⇐692, 899

In prosecution against farm production counsel director's assistant for agreeing to accept a bribe from housing contractors with intent to influence assistant's official action, alleged error in admission of evidence of amount of contractors' profit was waived by accused who referred to such profit on voir dire examination of a prospective juror and in cross-examining one of contractors. Pen.Code, § 68; Gen.Laws, Act 134 and Act 136.

6. Bribery ⇐10

In bribery prosecution it is permissible to show various steps taken by accused in committing the crime, including preliminary negotiations with other parties and his acts subsequent to offense charged which tend to confirm such charge. Pen.Code, § 68.

7. Bribery ⇐10

In prosecution against farm production council director's assistant for agreeing to accept a bribe from housing contractors with intent to influence assistant's official action, admission of evidence of assistant's acts and conduct after he left state's employ, which tended to prove that assistant was carrying out his part of bargain was not error. Pen.Code, § 68; Gen.Laws, Act 134 and Act 136.

8. Bribery ⇐11

In prosecution against farm production council director's assistant for agreeing to accept a bribe from housing contractors with intent to influence assistant's official action, evidence was not insufficient to show that accused had agreed that his official conduct should be thereafter influenced, on theory that accused's words that he should have something for contractors' "having had this contract" overcame all inferences that bribe was sought for purpose of influencing future conduct. Pen.Code, § 68; Gen.Laws, Act 134 and Act 136.

9. Bribery ⇐1(1)

The offer or solicitation of a bribe need not be stated in express language as such, it being sufficient that words used carry import of bribe and were evidently intended to bear that meaning. Pen.Code, § 68.

10. Bribery ⇐10

In bribery prosecution, it is permissible to show various steps taken by accused in committing the crime, including preliminary negotiations. Pen.Code, § 68.

11. Bribery ⇐11

In prosecution against farm production council director's assistant for agreeing to accept a bribe from housing contractors with intent to influence assistant's official action, evidence warranted jury's conclusion that assistant had entered into an agreement as to his future conduct. Pen. Code, § 68; Gen.Laws, Act 134 and Act 136.

12. Bribery ⇐1(1)

A meeting of the minds is not required to establish agreement to take a bribe. Pen.Code, § 68.

13. Criminal law ⇐683(1)

In prosecution for agreeing to accept a bribe from contractors with intent to influence accused's official action, wherein prosecution had proved conversion of $5,000 check into cashier's check and its use to procure ten $500 bills and accused admitted that three of the $500 bills had become to his hands from contractors but explained that such bills were for a different transaction, admitting testimony of contractor in rebuttal that contractor handed accused ten $500 bills was not an abuse of discretion. Pen. Code, § 68.

14. Witnesses ⇐379(2)

In prosecution for agreeing to accept a bribe from housing contractors with intent to influence accused's official action, wherein contractor testified in rebuttal that he handed accused ten $500 bills, denying cross-examination of contractor whether he had not told district attorney that contractor had never given accused a bribe was error. Pen.Code, § 68.

15. Witnesses ⇐397

When witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness, and prior statements are incompetent for any other purpose.

16. Bribery ⇐11

In prosecution for agreeing to accept a bribe, the prosecution need not prove payment, and payment is corroborative evidence only. Pen.Code, § 68.

17. Criminal law ⇐1170½(5)

In prosecution for agreeing to accept a bribe from housing contractors with intent to influence accused's official action, error in sustaining objection to cross-examination of contractor who had testified in rebuttal that he handed accused ten $500 bills, whether contractor had not told district attorney that contractor had never given accused a bribe was not prejudicial where evidence apart from contractor's testimony was sufficient to establish agreement to accept a bribe, and fact of payment could not be affected by contractor's admission or denial. Pen.Code, § 68.

18. Bribery ⇐10

In prosecution for agreeing to accept bribe from contractors with intent to influence accused's official action, admission of evidence that on designated date contractors' bank issued a cashier's check to contractor who on same day cashed such check at another bank receiving bills of large denominations was not error on ground that such transactions were not in accused's presence and money received was not traced into his possession, where sufficient facts were established from which inference could be reasonably drawn that money involved found its way into accused's possession. Pen.Code, § 68.

19. Bribery ⇐1(1)

To establish agreement to accept bribe with intent to influence official conduct, it is only necessary to establish the agreement on part of accused officer, and state of mind of parties from whom bribe was solicited is immaterial. Pen.Code, § 68.

20. Criminal law ⇐730(1)

In prosecution for agreeing to accept a bribe from contractors with intent to influence accused's official conduct, alleged error in argument of assistant district attorney in commenting on fact that accused's counsel carefully avoided asking contractor the one question which state could not ask, whether contractor through his partner had agreement and offered money to accused, and court's refusal to strike such remarks was cured by instruction that jury could not speculate as to views of judge as to any fact or inference because of anything said or done during trial or because of any ruling made. Pen.Code, § 68.

21. Criminal law ⇐1186(4)

In bribery prosecution based on circumstantial evidence, failure to instruct that to justify conviction facts must not only be consistent with theory of guilt, but must be inconsistent with any other rational conclusion did not warrant reversal where jury was told that if two reasonable inferences, one of guilt and one of innocence, might be drawn from circumstances accused could not be convicted. Pen.Code, § 68; Const. art. 6, § 4½.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Adolph L. Vollmann was convicted of agreeing to accept a bribe with intent to influence his official action, and from the judgment of conviction and from an order denying a new trial, he appeals.

Affirmed.

Harold C. Faulkner, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., and Ralph E. Hoyt, Dist. Atty., Alameda County, and Folger Emerson and Cecil Mosbacher, Asst. Dist. Attys., all of Oakland, for respondent.

GOODELL, Justice.

This appeal was taken from a judgment of conviction of a violation of section 68 of the Penal Code, entered upon the verdict of a jury, and from an order denying a new trial.

Section 68 provides that "Every executive or ministerial officer, employee or appointee of the State * * * who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, * * *" is guilty of a felony.

The indictment charged that on or about September 14, 1943, appellant, while assistant to the director of the farm production council, asked and agreed to receive from Nels E. Nelsen and Grant L. Ewing a bribe of $5,000 in connection with contracts which Nelsen and Ewing then had with the state. This accusation was the

outgrowth of a legislative investigation which culminated also in an indictment charging Nelsen under section 67½ with agreeing to give a bribe to appellant, to which accusation Nelsen pleaded guilty before this case went to trial. Ewing was granted immunity and became the principal witness for the state in this case.

A conversation on or about September 14, 1943 formed the basis for this prosecution, but there were several earlier discussions on the subject of money which the jury might well have connected with the later negotiations.

The theory of the state was and is that all the dealings between the parties, from first to last, were properly laid before the jury. The defense, on the other hand, strenuously claims that by admitting all this evidence the appellant was seriously prejudiced and the rule against proof of other offenses violated. Because of these opposing contentions a rather detailed recital of the facts is necessary.

In 1943 legislation was enacted, Stats. 1943, p. 307; Stats.1943, 2d Ex.Sess, p. 3397, designed to assure maximum crop production. It created the farm production council and provided for the recruiting, placement, transportation and housing of farm labor. Laborers in large numbers were brought into the state from Mexico, and one of the immediate problems was their housing. The appellant was employed on May 12, 1943 as an administrative assistant and on July 1 was appointed assistant to the director of the council and continued as such until October 31, 1943. He was given charge of locating suitable housing and negotiating for its procurement and assembling.

Ewing and appellant first met early in May, 1943, when Ewing called at the council's office in Berkeley to discuss the so-called Ewing-Way portable camp, made up of prefabricated units of the "Igloo" type, which Ewing had designed. Ewing told appellant that he believed the Hayward Mill & Lumber Co., at Hayward, could turn out the product in the required quantities. That company was owned by Nelsen, and he and Ewing first met about this time. They formed a partnership providing for a 60 per cent interest in Nelsen and 40 per cent in Ewing. After a visit to the Hayward plant and to Ewing's home, where a sample structure was inspected, appellant requested Nelsen and Ewing to submit a bid for the housing units. Ewing's preliminary plans and drawings were taken to the council where, on June 22, Ewing completed the estimates and made out the bid. Appellant was present at these proceedings and directed his secretary, a state employee, to type the bid in finished form from information furnished by Nelsen and Ewing. This bid, submitted to the council by appellant on June 23, was for $16,929.95 for each 200-man unit of redwood or pine siding. At that time appellant reported the results of his investigation of the Ewing-Way product, and the minutes show that he requested the council to award the contract for the first ten units to Nelsen and Ewing. He stated that there was a good chance they would make speedy deliveries, but that if they were not awarded the contract deliveries might be delayed indefinitely. The council made the award with the proviso that appellant should draw up the specifications in collaboration with the department of finance and a Mr. Bowers of the attorney-general's office.

Appellant communicated with two other firms of contractors, one operating in the San Francisco bay area and the other in southern California, with respect to the submission of bids by them, but without fixing any date for their reception. No bids were received from either firm by June 23, when the award to Nelsen and Ewing was made. A bid from one of these firms, which came in on July 1, was declared by appellant to be a little too high, and a revised bid was submitted on July 3. The other (San Francisco) firm submitted a bid on June 30 but appellant notified that bidder a day or so later that the contract had been already awarded. The other firm was not notified of the rejection of its bid until early in August.

Soon after June 23 appellant informed Nelsen and Ewing that additional bids were required, and on June 28 Ewing delivered five additional bids: one of $19,500 per unit signed by James P. Morton, (a carpenter working for Nelsen) who had nothing to do with its preparation; one of $23,607.05 per unit, submitted by Nelsen and Ewing, based on plans prepared by the University of California College of Agriculture; and three submitted by Hayward Mill & Lumber Co. based on plans prepared by the University of California for a four-man cabin, two-man bunk house, and six-man bunk house respectively. These five bids were presented

to Fred W. Links of the department of finance when appellant, accompanied by an attorney of the council, called on him to present the requisition for ten labor camp units. Links testified that appellant told him that they had gone out and obtained these bids from various concerns, and that the main purpose in securing them was to see how quickly they could get the housing. He was informed that the council by resolution had approved the purchase of the Nelsen and Ewing product. He thereupon obtained from the director of finance authorization to approve the requisition.

A purchase order for the first ten units at a total cost of $169,299.50 was issued by the bureau of purchases on July 2, based of course on the award which had been made on June 23.

On June 30, appellant accompanied Nelsen and Ewing to the office of the War Production Board in San Francisco where Ewing worked out priorities. Later that day appellant and Nelsen appeared at the office of an insurance broker in San Francisco where arrangements were made for a $25,000 contractor's bond. Appellant called for this bond the following day.

About July 1 appellant informed Ewing that the council planned to award a contract for a second group of ten units and inquired whether his firm cared to bid on it, and in the course of a conversation about this time, according to Ewing, appellant told him that the two other firms already referred to were going to bid; that some one from the southern California firm had offered appellant $25,000 for the contract, but "that he had turned him down, and, as far as he was concerned, we [Nelsen and Ewing] could have the contract."

Ewing also testified that in late July or early August appellant told him that during a trip south, from which he had just returned, one of the people connected with a firm of contractors which had a contract with the state to furnish food to these farm labor camps, had given him $1,700 or $1,750 (which had relieved a financial embarrassment of which he had theretofore complained) and that he had asked this person how he thought individuals like himself (appellant) lived. Ewing testified further that on several later occasions when appellant asked him if he had spoken to Nelsen, and Ewing had inquired "About what?" appellant had explained by making reference to the catering firm and its "gesture" toward him.

Nelsen and Ewing were awarded the second contract. The minutes of the council's meetings on July 6 and 7 disclose that the director discussed the advisability of contracting for ten more additional Ewing-Way camps and that he was authorized to enter into a contract to purchase them. Appellant wrote to the state purchasing agent enclosing bids for the second group of ten units, advised him that the council had decided to purchase them from Nelsen and Ewing, and a second purchase order, identical with the first was issued by the bureau of purchases on July 13.

Nelsen and Ewing commenced work at the Hayward plant about a week after the first purchase order was received, and the first deliveries were made in late July and early August. During the construction work appellant visited the Hayward plant frequently, at times as often as every other day, checking on materials and making suggestions for the expediting of the work.

On August 1 Nelsen and Ewing submitted their first invoice for $16,929.95 for one unit, worded to conform with the purchase order. Actually numerous items specified in the purchase order had not been furnished, and Ewing testified that these omissions had been authorized by appellant. The council's accountant, who processed the invoices for payment, testified that he informed appellant that appellant would have to verify that everything had been furnished. Appellant wrote on the invoice "approved for payment" and signed his name. As each subsequent invoice was received, appellant was asked to approve it before it was sent to Sacramento for payment. He so approved all invoices between August 1 and September 24. He knew at the time he approved them that the units represented were not complete and that in the future a final adjustment would have to be made.

Shortly after the first invoice was submitted appellant advised Ewing that he would write a letter to the department of finance to expedite its payment. On August 10 the council's accountant wrote to the bureau of purchases requesting speedy payment of the Nelsen and Ewing invoice,

and he testified that appellant repeatedly asked him to speed up their payments.

At appellant's instance, said accountant on August 25 prepared a letter for the signature of the director, advising the state purchasing agent that it had been found necessary to eliminate certain dormitories and to substitute therefor certain mess halls with 100 tables; authorization was requested for this change plus a charge for delivery of all 20 camps "free on board our trucks" for $6,520, which figure represented the difference between the cost of the mess halls plus the 100 tables, and the cost of the dormitories. The original purchase orders had provided that the units were sold "F. O. B.–Delivered." The accountant testified, however, that appellant told him that the entire purpose of the change was to reimburse Nelsen and Ewing for the cost of loading the units. The request embodied in this letter was approved, and a change order was issued by the bureau of purchases on September 2.

On September 13 appellant visited the Hayward plant and advised Ewing that he had been instructed by the council to cancel the Nelsen and Ewing contracts. Ewing replied that they had expended considerable time, money, and material; that the contracts were almost completed as far as material was concerned, and asked him to join him in an inspection of the yard to see for himself. Ewing testified that during this tour appellant asked him whether he had talked to Nelsen. Ewing said, "What about?" "Well," he said, "you know", to which Ewing replied, "No, I don't. What do you mean?" Whereupor appellant said, "Well, it's time you boys got smart. I feel that I should have something for your having had this contract." Ewing responded that he would have to consult his partner before giving an answer. Appellant then suggested, according to Ewing, that one way to handle it would be to turn over to him the barn that Nelsen and Ewing were proposing to build at Bay Meadows race track. Several days later at Hayward appellant inquired if Ewing had spoken to Nelsen and was told that he had, and that they had agreed to take care of him. During this conversation appellant told Ewing that he had made a favorable recommendation respecting the threatened cancellation, and showed him an inter-office memorandum to that effect which he had prepared for the director on September 14. The contracts were not cancelled.

In the latter part of October Nelsen and Ewing commenced the preparation of a final statement. Ewing testified that he consulted appellant about the final invoices at that time, and was told to prepare them and that appellant would submit them. The original statement which Nelsen and Ewing submitted was not accepted. Appellant told Ewing it was not correct and that the council's attorney had himself prepared a statement as the basis for arriving at a settlement. Appellant told Ewing to work the original over, using the attorney's statement as a basis. This revised statement included an item of "Extras to contracts" totaling $11,855.68. Nelsen and Ewing then submitted a statement dated October 20 which also was not acceptable, and appellant advised them to break the loading charge down into a dollar value per unit and add it to the item of extras, and returned it with the suggestion that the next statement should so specify the loading charge. A final approved statement had not yet been submitted when appellant terminated his employment with the state on October 31 Appellant visited Ewing in Hayward on November 6 and advised him to speed up the preparation of the final statement.

On November 8 Ewing called at the council's office in Berkeley. He was then unaware that appellant had terminated his employment. He was advised in appellant's presence that another statement would have to be prepared which would be acceptable to Sacramento. Such other statement was prepared that day at the council's office, during which time the appellant was present. It was almost a five-hour session. At the same time the council's attorney, with the assistance of appellant, dictated a letter to the purchasing agent explaining and clarifying the substitutions, omissions and changes that had been made in the construction of the units, explaining that it had been discovered that complete units for 200 men were not necessary in some camps, whereas in other instances additional equipment was needed to round out a camp to conform to its requirements. Appellant signed this letter as "Assistant to the Director" eight days after the termination of his state employment.

Some time in August in a transaction having nothing at all to do with these state contracts appellant had interested the Cal-

ifornia Jockey Club in the possible use of Ewing's prefabricated product for some new race track stables. On October 9 the club authorized appellant to arrange for the erection of such prefabricated stables at Bay Meadows at a cost not to exceed $5000. Five days later appellant in writing authorized Nelsen and Ewing to proceed with the construction of the stables. On November 20 Nelsen and Ewing met appellant at Bay Meadows race track and advised him that they had decided to turn over to him the stables under construction, although it then appeared that the cost would be $7,691.64, considerably in excess of the $5,000 originally stipulated. They accompanied him to the office where appellant had a stenographer type out an order for Nelsen and Ewing's signature, directing the Jockey Club to pay him the amount due for the stables. On November 22 appellant presented an invoice for these stables to the accountant at Bay Meadows and received the Club's check for $7,691.64 payable to appellant. The following day Ewing called on appellant at Bay Meadows and informed him that Nelsen and Ewing's auditor had objected that the race track transaction had not been put through the Nelsen and Ewing books. Appellant had not yet cashed the check, and he accompanied Ewing to Hayward with the check and the order authorizing payment to him in his possession. The auditor examined the order and took them sharply to task with the comment that they knew better than to put through a deal like that; that as appellant was an inspector for the state, the transaction had the appearance of a bribe. New invoices were then made out to the Jockey Club, and appellant took them to Bay Meadows, returned the original check and received in exchange a check payable to Nelsen and Ewing for $7,691.64, to whom he delivered it.

On November 24 according to the state's evidence Nelsen and Ewing again met appellant at Bay Meadows and Nelsen joined the appellant in his automobile and gave him ten $500 bills. The record shows that the day before the $5,000 was paid a $5,000 check had been drawn to "cash" by Nelsen and Ewing, on their own bank in Hayward. With this they procured a cashier's check from their bank for the same amount. This cashier's check was taken by Nelsen to a San Francisco bank, and in exchange for it he procured the ten $500 bills which Nelsen testified he gave to appellant at the race track. The books of Nelsen and Ewing show that $3,000 of this was charged to the personal account of Nelsen and $2,000 to Ewing (which was in accordance with their respective interests, i. e. 60 and 40 per cent). The following day was Thanksgiving, and on the day after that, the bank records show that appellant visited his safe deposit box. Some months later the authorities opened the box under a search warrant, and found therein three $500 bills. Appellant admitted that he had received said $1,500 from Nelsen and Ewing but claimed it had been turned over to him by them in connection with a Puente race track transaction. Ewing testified that in early December, 1943, he asked appellant how he was getting along with the $500 bills and that appellant replied, all right and if he had any trouble he could deposit the money in some Texas bank.

The first point made by appellant is that "it was prejudicial error to admit evidence of defendant's actions [prior to September 14] relating to preliminary negotiations, award of the contract, procurement of additional bids, procurement of a purchase order, the bond application, approval of invoices, payment of invoices, orders for changes in construction, payment of loading charges and issuance of change orders." Appellant's counsel object that this evidence implanted in the minds of the jurors inferences of wrongful intent and conduct apart from a possible bribe; namely, that the appellant dealt in bad faith with the two other contracting firms which submitted bids; that he rendered improper assistance to Nelsen and Ewing during the preliminary negotiations; that he was not in good faith in presenting the Nelsen and Ewing bid to the council; that he conspired to deceive the state finance department by representing that the contract was awarded by competitive bidding; that he in bad faith concealed and evaded the council's instructions to prepare plans and specifications; that he rendered improper assistance to Nelsen and Ewing in securing their bond; that he corruptly increased the profits to Nelsen and Ewing by directing that the state take delivery at the Hayward plant, transferring the burden of loading to the state, and introducing changes in the construction plans; that he in bad faith approved invoices for payment of funds not properly due, and sought to expedite payment of Nelsen and Ewing's invoices. Counsel point out that he was

"charged with asking for a bribe on September 14 upon an agreement to influence his official action in specified particulars in the future", and they pose the question whether he is to stand trial for every action taken by him prior thereto. "Is there", they ask, "to be put in issue and the defendant compelled to defend possible mistakes or errors in judgment and the reasonableness of his actions prior to the time he is charged with asking for the bribe upon an agreement to do something in the future?" The appellant relies mainly upon People v. Glass, 158 Cal. 650, 112 P. 281, which case he claims forcefully and compellingly answers this question in the negative.

The appellant was on trial for agreeing to accept a bribe. It would seem that all evidence of the relations between the alleged offeror and offeree from which the inference could be drawn that the appellant suggested or solicited it, or went out of his way to favor the party from whom he hoped or expected ultimately to receive it, would be relevant, and the prosecution should be permitted to bring it out. It is true that the prosecution could have opened its case by proving the "it's time you boys got smart" conversation in the lumber yard on September 14 and what followed it, as already narrated, but surely the jury in that event would not have had the same grasp or understanding of the case as they got by the evidence (in more or less chronological order) of the preliminary matters leading up to that conversation. With respect to what evidence is admissible, beyond the very minimum needed to prove the exact offense on trial, Chief Justice Beatty had this to say in People v. Cook, 148 Cal. 334, 340, 83 P. 43, 46: "The prosecution in a criminal case is not obliged to rest upon evidence which merely establishes the guilt of the defendant prima facie—upon evidence, that is to say, which is merely sufficient in law to sustain a verdict of guilty. The guilt of the defendant must be proved beyond a reasonable doubt in order to secure such a verdict, and the district attorney not only may, but ought to, introduce all proper evidence at his command tending to establish the guilt of the defendant, in order to overcome any doubts or scruples of the jurors."

[1, 2] The dealings and negotiations antecedent to the September 14 conversation had to do with the actual performance of the Nelsen and Ewing contracts, which performance was under the immediate supervision of appellant. From that evidence the jury might have drawn the inference that appellant was improperly favoring Nelsen and Ewing and thereby seeking to ingratiate himself with them with the intention of laying the foundation or paving the way for a later solicitation. On the other hand they might have inferred that what he did was dictated purely by a wholesome desire to be accommodating. If the circumstances were susceptible of an inference of wrong-doing connected with appellant's official dealings with Nelsen and Ewing, the prosecution was certainly entitled to get such evidence before the jury for the reasons so well stated in People v. Cook, supra, without being restricted to barely proving the conversation of September 14 and what followed it, which would do no more than get by a motion for a directed verdict. "The conduct of a defendant prior to the commission of the crime charged against him, which has a direct tendency to connect him with it and to identify him as a guilty participant therein, is both relevant and material." 8 Cal.Jur. 37, sec. 154. In People v. Sturman, 56 Cal.App.2d 173, 182, 132 P.2d 504, 509, the court said: "Evidence of the behavior of the accused is competent if it tends to prove intent * * * preparation, or any other acts inconsistent with innocence." See, also, People v. Arnold, 199 Cal. 471, 492, 250 P. 168. Such evidence tended to establish the relationship between the appellant and Nelsen and Ewing (see People v. Kelly, 69 Cal.App. 558, 566, 231 P. 767) and was admissible "at least as introductory and preliminary to other transactions, to give the jury an intelligent understanding of the whole of the evidence, and as bearing on the relations of the parties. Facts whose existence is a necessary preliminary to the relevancy of evidence are properly received, and facts which tend to explain or unfold a situation are admissible as establishing the relevancy of evidence. * * * The evidence, in the circumstances here disclosed, was introductory and preliminary, and was necessary to an intelligent consideration of what followed." Bedell v. United States, 8 Cir., 78 F.2d 358, 364.

[3] The conversations between appellant and Ewing, wherein appellant is said to have told him of the $1,700 or $1,750 payment and of the $25,000 offer, are likewise attacked by appellant. It may be con-

ceded that the testimony respecting the payment was proof of another offense, but even so, it was admissible under the settled rule that "Where the proffered evidence directly throws light upon the facts of the issue being tried, it is admissible, although it proves another offense as well". People v. Ellis, 188 Cal. 682, 689, 206 P. 753, 756, quoting People v. Smith, 9 Cal.App. 644, 647, 99 P. 1111. "'The law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime'." Id., 188 Cal. 690, 206 P. 756, quoting People v. Sanders, 114 Cal. 216, 230, 46 P. 153. This court had occasion to pass upon a similar contention in the recent case of People v. Duncan, Cal.App., 164 P.2d 313, where we cited People v. Kynette, 15 Cal.2d 731, 746, 104 P.2d 794; 20 Am.Jur. 293 et seq. and 22 C.J.S., Criminal Law, § 683, p. 1089 et seq. See, also, 8 Cal.Jur. p. 60, sec. 168; People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7; People v. Palassou, 14 Cal.App. 123, 127, 111 P. 109; People v. Cook, supra, 148 Cal. 340, 83 P. 43.

That appellant's statement that he had actually received $1,700 or $1,750 from another contractor engaged on the same general project "throws light upon the facts of the issue being tried" is not open to question, for, if believed, it could mean but one thing, namely, that appellant was implanting in Ewing's mind rather broadly the suggestion that an offer from Nelsen and Ewing would be acceptable to him. It could be interpreted as outright solicitation, or, as said in Bedell v. United States, supra, it "reflected * * * his susceptibility to corruption."

Unlike the evidence just discussed, that in People v. Glass, supra, which was held to be erroneously admitted was *in no way related to or connected with the case on trial,* as it had to do with the efforts (not amounting to a criminal offense) of the corporation of which Glass was an officer, to keep a competing company from obtaining a franchise in Oakland. The offense for which Glass was on trial was alleged bribery committed four years later in an attempt to keep the same competitor out of San Francisco. This distinction is pointed out in People v. Ellis, supra, 188 Cal. at page 691, 206 P. 753. We are satisfied that neither the Glass case nor any other authority cited by appellant, indicates that the evidence just discussed was erroneously admitted, but are convinced, on the other hand, that the prosecution was entitled to have all of it—as telling the whole story—laid before the jury.

[4] Appellant contends that the court erred in admitting evidence of the amount of Nelsen and Ewing's profit. The respondent proved that their profit on the two contracts was "a little over $152,000." "It is difficult to comprehend" says appellant's counsel, "any matter which would be * * * so prejudicial to defendant's right to a fair trial." The respondent answers that it was the appellant who opened up the subject. On the voir dire examination a prospective juror was asked: "* * * if it develops in the course of this trial that * * * Nelsen and Ewing have made a profit from the State of California in the sum of $152,000 during the course of twenty weeks' work, that fact in itself will not prejudice your mind against the defendant Vollmann, will it?" Again, in cross-examining Nelsen, appellant brought out that the profit was at least $150,000. It already appeared that Nelsen's share in the venture was 60 per cent and Ewing's 40 per cent. Nelsen was asked by the defense: "It is also your hope, as you sit there as a witness in this case, that, as a result of the assistance,—whatever it may be,—that you have given to the State of California, the State of California will not sue you for the $90,000 profit you made?" "* * * The judgment will not be reversed because of the erroneous admission of evidence where the disputed fact is shown to have been proved by the evidence of the defendant, or by the defendant's cross-examination of a witness for the prosecution * * *." 4 Cal.Jur. 1943 Revision, p. 999, sec. 599; People v. Renteria, 60 Cal.App.2d 463, 472, 141 P.2d 37, and cases cited; People v. Juehling, 10 Cal.App.2d 527, 534, 52 P.2d 520. Moreover, appellant's counsel in their argument referred several times to the $152,000 profit, and closed with these words: "* * * as I leave you, may I just put these figures on the board, because sometimes figures are so confusing—but let me leave you with these figures, if you please, and take them into the jury room: $152,000; that represents the profit that those men made."

[5] We are satisfied that there was a clear waiver of whatever error there might have been in admitting evidence of profit. It is for that reason unnecessary to discuss

the appellant's authorities to the effect that it was error to admit the evidence, or to pass upon the question of its admissibility.

Appellant also claims that the admission of evidence of his acts and conduct after he left the state's employ on October 31, 1943, was prejudicial error. Such acts and conduct have been already fully stated. If from such evidence the inference could be drawn that appellant aided Nelsen and Ewing in getting something to which they were not entitled, the prosecution was entitled to have it in evidence as a circumstance tending to prove that appellant, although no longer in authority, was carrying out his part of the bargain of September 14. Counsel for appellant say that appellant's "actions after he terminated his employment could not form the basis of any prosecution under Section 68 of the penal code where it must not only be shown that the defendant is an officer or employee of the State but that he asks for a bribe in connection with a matter then pending before him or which might be brought before him in his official capacity." That is, of course, true. But that does not mean that a person who, while occupying office, had agreed to take a bribe could not be shown to have taken steps after leaving office in performance of the corrupt agreement, or to help out the persons to whom he still looked for payment.

[6] "It is permissible to show the various steps taken by accused in committing the crime, including preliminary negotiations with the other parties *and his acts subsequent to the offense charged,* which tend to confirm that charge." 11 C.J.S., Bribery, § 14, p. 871. (Emphasis added.) The authorities cited by respondent holding that evidence of subsequent acts and conduct is admissible are in point and show this to be the prevailing rule. People v. Furlong, 140 App.Div. 179, 125 N.Y.S. 164, 168; Stovall v. State, 104 Tex.Cr.R. 210, 283 S.W. 850, 852; State v. Gardiner, 88 Minn. 130, 92 N.W. 529, 535; People v. O'Neill, 109 N.Y. 251, 16 N.E. 68, 71; Commonwealth v. Barker, 311 Mass. 82, 40 N.E.2d 265. On the other hand, the authorities cited by appellant on this point, while holding that certain evidence had been erroneously received in bribery cases for one reason or another, do not support the claim he now makes. None of them holds inadmissible evidence of the acts and conduct of a defendant after he has left the position or office which he occupied at the time of the corrupt agreement.

[7] Our views and conclusions on this point are the same as those already expressed with respect to acts and conduct prior to September 14, namely, that there was no error in admitting this evidence.

The appellant contends that "the verdict is contrary to the evidence, and the evidence is insufficient to sustain the verdict."

In language which paraphrased the indictment the court instructed the jury that it must find "that the defendant intended or agreed that his official conduct should be thereafter unlawfully influenced upon at least one of the following matters:

"1. In approving, recommending, obtaining or procuring * * * changes, alterations or revisions in the contracts and purchase orders * * *; or

"2. In recommending * * * that said contracts and purchase orders be not cancelled; or

"3. In approving for payment, invoices or claims submitted * * * under said contracts and purchase orders or such changes, alterations and revisions thereto."

[8-11] Appellant contends that the record is entirely lacking in evidence which would justify the jury in concluding that he had agreed that his official conduct should be *thereafter* influenced in any of these particulars. On the contrary, he argues that Ewing's testimony as to the words used, namely, "* * * I feel that I should have something for your having had this contract", was *direct* evidence conveying the idea of a gratuity or reward for *past acts or services,* and that it overcame all *inferences* based on circumstantial evidence that a bribe was sought for the purpose of influencing his conduct in the *future.* The respondent answers that the appellant cannot single out a part of one conversation—that of September 14—or one set of words, but that everything appellant said and did on, before and after that date was before the jury, and presumably was weighed and considered in reaching the verdict. People v. Elliott, 103 Cal.App. 329, 331, 284 P. 733. We agree with this view. "The offer or solicitation of a bribe need not be stated in express language as such; it is sufficient that the words used carried the import of a bribe and were evidently intended to bear that

meaning. * * *" 11 C.J.S., Bribery, § 2, p. 843. Further, "It is permissible to show the various steps taken by accused in committing the crime, including preliminary negotiations * * *." 11 C.J.S., supra, Bribery, § 14, p. 871. It must be remembered that the conversation of September 14 was not the first time the subject had been broached. A full month before that, when appellant had returned from the south, he had, according to Ewing, told Ewing in so many words, that a person connected with the catering contractors had given him $1700 or $1750. This itself might well have been viewed by the jury as a solicitation by the process of suggestion. Moreover Ewing testified that on several later occasions when appellant had inquired if he had spoken to Nelsen, and Ewing professed ignorance of what was meant, appellant answered with a cryptic reference to the $1,700 or $1,750 "gesture". Then, too, there was the conversation testified to by Ewing where appellant told him in so many words that he had declined a $25,000 offer with the remark that "as far as he was concerned, we [Nelsen and Ewing] could have the contract." This, too, might have been taken by the jury as a broader hint or suggestion, for it indicated that appellant's refusal was coupled with a favoritism toward Nelsen and Ewing. The people's case did not depend on any single or isolated conversation, and these two earlier conversations, and the others where appellant inquired if Ewing had spoken to Nelsen, were just as much direct evidence as was the conversation of September 14.

Moreover, there was more to the September 14 conversation than the reference to the past award of the contract. Appellant, according to Ewing, then told him in substance that his mission to the Hayward plant that day was to let them know "that he had been instructed by the California Farm Production Council to cancel out our contract." This was part and parcel of the same conversation and he chose that particular time and occasion to associate and couple the two subjects together. Appellant was the man in authority who had direct and almost complete supervision of the Nelsen and Ewing contracts and their performance. Nelsen and Ewing were, so to speak, in his hands, and the jury might well have drawn the inference that regardless of the phrasing of the suggestion, a bribe was then and there solicited not for past performance but for appellant's direct and immediate influence in defeating the threatened and impending cancellation.

Moreover, it must be remembered in considering the question whether future influence was in the minds of the parties that in the conversation several days after September 14 when Ewing told appellant that they had agreed "to take care of him", appellant told Ewing of the favorable recommendation he had made respecting the cancellation, supporting his statement by documentary proof. From this the jury could have inferred that although in the September 14 conversation appellant spoke of getting "something for your *having had* this contract" his real meaning and intent was *getting something for putting a halt to the cancellation.*

In addition to what has been said there was sufficient evidence for the jury to conclude that appellant in fact approved, recommended, obtained and procured changes, alterations, or revisions in the contracts and purchase orders; that he recommended that the contracts and purchase orders be not cancelled; that he approved for payment invoices or claims submitted by Nelsen and Ewing. Those facts (if found) of themselves were indicative that the agreement in question had been made. Coupled with the conversations above related, or independently of them, they were sufficient to warrant the jury in concluding appellant had entered into an agreement as to his *future* conduct.

[12] It is the appellant's position that though the prosecution's evidence, if believed, may establish that Nelsen and Ewing agreed to pay him a bribe, there is no evidence that the agreement on their part was based on an understanding that appellant's action on matters then pending or thereafter brought before him in his official capacity would be unlawfully influenced thereby, as charged in the indictment. He points out that his recommendation against cancellation of the contract and purchase orders was made prior to notification from Nelsen and Ewing that his request of September 14 was agreeable to them; nor is there any evidence, he asserts, that from the time of that conversation Nelsen and Ewing ever requested him to act in a particular manner or to aid them in any way that could possibly be construed as unlawful, corrupt or even improper. In this connection it must be remembered that no "meeting of the minds" is required to estab-

lish an agreement to take a bribe. People v. Powell, 50 Cal.App. 436, 442, 195 P. 456; People v. Kerns, 9 Cal.App.2d 72, 75, 48 P.2d 750; People v. Brigham, Cal.App., 163 P.2d 891. "It is not necessary that there be an understanding, in the sense of an agreement, with the person unlawfully approached, but merely an understanding on the part of the bribe seeker himself that his official action shall be influenced." People v. Kerns, supra, 9 Cal.App.2d page 75, 48 P.2d 751.

[13] Appellant, while frankly recognizing that ordinarily it is within the trial court's discretion to allow testimony in rebuttal which might have been given earlier, claims that the court in allowing Nelsen to testify, as a rebuttal witness, that he actually handed appellant ten $500 bills, abused its discretion. Counsel argue that Nelsen was placed on the stand by the prosecution "to end the case in its entirety upon a high note of victory for its cause" and that, under the circumstances, such procedure was decidedly unfair. As part of the prosecution's case proof had been made of the conversion of the $5000 check into a cashier's check and *its* use to procure at a San Francisco bank the ten $500 bills; and testimony had been given by Ewing of his later conversation with appellant respecting his getting rid of the $500 bills. From all this evidence the jury could have concluded that the $5,000 had actually changed hands, without Nelsen's testimony as to the details of its manual delivery. Appellant admitted that three of the $500 bills had come to his hands from Nelsen and Ewing but explained that $1,500 was for the Puente transaction. It was then, and then only, that the prosecution put Nelsen on the stand in rebuttal to prove that he had personally handed the ten $500 bills to appellant.

In view of the state of the record prior to the rebuttal testimony—including all the evidence respecting the $7,691.64 check issued to appellant in the Bay Meadows transaction and later cancelled—we are satisfied that there was no abuse of discretion. It is not necessary to cite authorities holding that the court had such discretion, for, as above indicated, the appellant concedes the general rule in that regard.

It is next claimed by appellant that the court erred in limiting the cross-examination of Nelsen. As we have just seen, he testified in rebuttal that he handed appellant ten $500 bills at Bay Meadows race track. On cross-examination he was asked, "Isn't it a fact, Mr. Nelsen, that you have told Mr. Hoyt that you never gave Mr. Vollmann a bribe?", to which an objection was interposed without any statement of the ground therefor, and was sustained without comment by the court. The question was repeated several times in varying forms, (for instance, "never gave five cents to Mr. Vollmann as a bribe"; "never given any money") and none of the district attorney's objections (each of which was sustained) specified any grounds beyond "incompetent, irrelevant and immaterial." Counsel for appellant did not indicate (and, as will presently appear, did not have to) whether the questions were asked with a view to later calling witnesses to contradict Nelsen if he answered in the negative. In the course of argument on the admissibility of this evidence counsel for appellant said to the court, "* * * in the examination of Mr. Vollmann, questions were asked him as to whether or not he made certain contradictory statements to the district attorney. I have asked this witness if he had made contradictory statements to the same district attorney, in the same month; and I * * * ask your Honor to review again the ruling that I may not show that, in the month of June, 1944, this witness,—who says, now, that he gave money at that time to Mr. Vollmann,—told the district attorney he had not.

"Mr. Emerson: Judge, that wasn't the foundation that was laid for those questions at the time I objected to it. If they are offered as impeachment and the proper foundation is laid,—I have no objection to them."

[14] That the questions were not legally objectionable in the form in which they were cast (without following the impeachment formula indicated by sec. 2052, Code Civ. Proc.) is clear from the discussion of this subject found in People v. Jones, 160 Cal. 358, at page 365, 117 P. 176, in People v. Ho Kim You, 24 Cal.App, 451 at 458, 459, 141 P. 950 and in 10 So.Cal. Law Rev. 145. In People v. Jones, supra, 160 Cal. 365, 117 P. 179, it was held to be "an unwarranted curtailment of legitimate cross-examination to exclude such questions, * * * upon the ground that they are necessarily impeaching questions, and the proper foundation for them has not been laid", citing People v. Hart, 153 Cal. 261,

94 P. 1042. In People v. Campos, 10 Cal. App.2d 310, 317, 52 P.2d 251, 254, the court said, "It is always proper, for the purpose of discrediting a witness by his own admissions, to interrogate him, on cross-examination, as to prior inconsistent statements without calling attention to time, place, circumstances and persons present. 27 Cal.Jur. p. 159, § 133; People v. Jones, 160 Cal. 358, 117 P. 176; People v. Ho Kim You, 24 Cal.App. 451, 141 P. 950; People v. Williams, 43 Cal.App. 60, 184 P. 498."

While we are satisfied that it was error to sustain these objections, the question remains whether such error was prejudicial.

[15] If the witness had been permitted to answer, and had admitted that he had *told* the district attorney that he had never given appellant a cent, it would not have been affirmative or competent evidence of the *fact* that he had not given appellant a bribe of $5000 or any other sum. If he had denied such statement and some other witness had provided that he had heard it made the result would be the same. "It has been held in numerous cases" said the court in Lopez v. Wisler, 58 Cal.App.2d 455, 462, 136 P.2d 816, 819 (citing them) "that when a witness is impeached by proof of prior inconsistent statements the effect is merely to discredit him as a witness, and that the former statements made by him are incompetent for any other purpose."

While such an admission by Nelsen or proof by some other (impeaching) witness would have discredited Nelsen's entire testimony, it must not be forgotten that he had been already discredited and impeached by his admission that he had entered a plea of guilty to his indictment for a violation of 67½, agreeing to give a bribe to appellant, —a felony. (sec. 2051, Code of Civ. Proc.)

[16] Before Nelsen had been put on the stand the following evidence had gone before the jury from the testimony of other witnesses and from documentary evidence as well, all touching upon the question of *payment:* that, at the race track appellant had caused to be drawn up a writing, which Nelsen and Ewing had signed, directing the Jockey Club to pay appellant the $7,691.64; that a check for that amount had been drawn by the Jockey Club to appellant's order and given to him; that Nelsen and Ewing's accountant had taken them to task for handling the transaction in this way, making it appear that appellant, a state inspector, was being bribed; that the check had been recalled, and a new one issued to the order of Nelsen and Ewing and the transaction put through their books in the regular way; that then the $5,000 check had been drawn to "cash", (charged to Nelsen and Ewing in their respective shares) converted into a cashier's check and that check given for the ten $500 bills; that appellant had visited his safe deposit box two days later (the intervening day being a holiday); that appellant had been asked how he was getting on with the large denomination bills and made the reply that if he had any trouble he could deposit them in a Texas bank, and that three $500 bills had been found in his safe deposit box. All this evidence, we repeat, went in independently of Nelsen's testimony or his credibility and it was of course sufficient by itself to warrant the inference that $5,000 in money had passed. It was not, however, necessary for the prosecution to prove payment. An agreement was all that had to be proved, and the only bearing payment had on that issue was that from actual payment an antecedent *agreement* to pay would be a logical inference. It was corroborative evidence only.

There was an abundance of evidence in the record, apart from Nelsen's testimony, to establish the understanding and agreement which, after all, was the issue in this case.

[17] In People v. Williams, 43 Cal.App. 60, 184 P. 498, 500, the trial court had curtailed the cross-examination, as in the case at bar, and while on appeal it was held to be error it was not prejudicial error. We are disposed to say as was there said: "A survey of the whole record of the case, however, which discloses ample testimony to warrant the conviction of the defendant, compels the conclusion that the error complained of has not resulted in a miscarriage of justice. The case seems to be one for the application of section 4½ of article 6 of the Constitution of the state."

[18] The prosecution was permitted to introduce evidence that on November 24, 1943, Nelsen and Ewing's own bank issued a cashier's check to Nelsen in the amount of $5,000, and that on the same day Nelsen cashed that check at a San Francisco bank, receiving bills of large denominations. Appellant objects that neither of these transactions was in his presence and the money received was not traced into his possession.

He relies on People v. Bissert, 71 App.Div. 118, 75 N.Y.S. 630, 637. The appellant therein had been convicted of accepting a bribe of $550. The court in holding it was error to permit evidence that several days prior to the transaction the other party withdrew $450 from the bank said: "It is not claimed that the defendant induced her to draw this money from the bank, or that any of it was traced into his possession. * * * Had the money drawn from the bank been traced into the defendant's possession, or *had there been established some fact from which that inference could be properly drawn,* then it might be considered by the jury; * * *." (Emphasis added.)

Here sufficient facts were established from which the inference could be reasonably drawn that the money in question found its way into the appellant's possession. Ewing testified that after Nelsen's visit to the bank in San Francisco they proceeded to Bay Meadows, where they met appellant; Nelsen testified that he then and there gave appellant ten $500 bills; a search of appellant's safe deposit box disclosed three $500 bills. The facts here are in many respects similar to those in People v. Graves, 137 Cal.App. 1, 29 P.2d 807, 812, 30 P.2d 508, where Graves was convicted of accepting a bribe of $80,000 on the understanding that as a member of the board of supervisors he would vote in favor of the acceptance by the board of a compromise of a claim for certain construction work. Evidence was admitted that on a date subsequent to the approval of the compromise a man later identified as Graves purchased with currency a cashier's check for $40,000, at a San Francisco bank and a cashier's check for $17,000 at another bank in San Francisco. It was also established that on the day these two checks were purchased, a firm interested in the compromise withdrew from its account in still another bank in San Francisco $80,000 in currency. Testimony in relation to the withdrawal of this sum was objected to on the ground that it was irrelevant and not in any way connected with appellant. In rejection this argument, the court said: "This fact would be very important when joined with the fact that immediately following the payment on the compromise, appellant went to the city wherein the contractors maintained their headquarters and there became possessed of a large sum of money in currency, and acting under an assumed name disposed of it as hereinbefore shown. Notwithstanding the argument of counsel that contractors were used to handling large sums of money, the present commercial practice of transferring credit by check from bank to bank in the discharge of obligations seems to mark the withdrawal of such a large sum of currency as an unusual circumstance. We think the evidence was properly admitted as a circumstance in the unfolding of the case."

[19, 20] In the course of his closing argument the assistant district attorney commented upon the fact that "Mr. Faulkner, in all of those questions, very carefully avoided asking Mr. Nelsen the one question * * * which the state could not ask; * * * 'Did you, through Mr. Ewing, have an agreement and understanding and offer money or a barn to the defendant?' " The court denied appellant's request that these remarks be stricken from the record and that the jury be admonished to disregard them, with the comment that "if the question had been asked by the defense, I would have allowed Mr. Nelsen to answer it." As previously noted, the evidence presented to the jury was clearly sufficient to establish that the appellant requested a bribe on the understanding and agreement that his official conduct would be influenced thereby. People v. Brigham, Cal.App., 163 P.2d 891, and other cases already cited, establish that to support the conviction it is only necessary to establish the agreement and understanding on the part of the accused officer, and that the state of mind of the parties from whom the bribe was solicited is immaterial. Any inference that the jury might have drawn from the argument that Nelsen and Ewing for their part entered into an agreement would but add additional force to the point already well established that there was an agreement on the part of the appellant.

Any error which might have resulted from the remarks of the assistant district attorney and the comment of the court was cured by the following instructions: "The jury has no right to speculate as to the views of the judge as to any fact or any inference he may have because of anything he may have said or done during the trial, or because of any ruling he has made in permitting or excluding any evidence offered by either side. * * * You are hereby further instructed that the opening statement of the district attorney and statements and arguments of counsel, * * * are not in themselves evidence in this case;

and that any statements, made by counsel either during the trial or argument which are not supported by the evidence or which are inconsistent with my instructions as to the law are to be disregarded by you * * *." In People v. Matthew, 68 Cal.App. 95, 109, 228 P. 417, 423, the court said: "upon the final submission of the case the court instructed the jurors to the effect that they were the exclusive judges of the evidence and of the credibility of the witnesses, that it was their function to determine all questions of fact, that the court had nothing to do with the facts, and that if it had said anything during the trial which might seem to indicate that it had an opinion upon any of the facts, such expressions should be entirely disregarded by them. This was sufficient to remove all apprehension that the remarks of the court, would have any prejudicial effect upon the minds of the jurors." See, also, People v. Siderius, 29 Cal. App.2d 361, 371, 84 P.2d 545.

[21] In an instruction on circumstantial evidence, the court said: "If two reasonable inferences, one of guilt and one of innocence, may be drawn from such chain of circumstances, or if any necessary link in such chain is not proven to the exclusion of a reasonable doubt, then the defendant cannot be convicted, but all that is required to convict is this: If the testimony in the case is sufficient to convince the jury beyond a reasonable doubt and to a moral certainty that the [defendant] did commit the crime charged, then it is the duty of the jury to convict the defendant of such crime, although the fact may be surrounded in a degree by some possible or fanciful doubt, surmise or conjecture not arising from a consideration of the evidence. If a reasonable explanation or construction compatible with the innocence of a defendant may be drawn from the evidence or if two reasonable inferences, one of guilt or one of innocence, can be found from the same facts or circumstances then the jury must acquit."

Claiming that this instruction was improper, appellant relies upon the recent case of People v. Bender, Cal., 163 P.2d 8, 16. The evidence to support the conviction of first degree murder in that case was entirely circumstantial. The court instructed the jury as follows: "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." The similarity between that instruction and the one given in the instant case is apparent. The Supreme Court agreed with the appellant there that in every case where circumstantial evidence is received, it should be declared to the jury in unequivocal language "that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." Page 15 of 163 P.2d, quoting 8 Cal.Jur. 371, sec. 405. The court indicated its approval of the statement in People v. Hatchett, 63 Cal.App.2d 144, 155, 146 P.2d 469, 474, that this requirement is not met by an instruction to the jury that the guilt of the defendant must be established beyond a reasonable doubt, or that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt. Nevertheless, the court concluded that the failure to instruct the jury in the language above quoted was not necessarily ground for reversal, in view of the constitutional provision that "No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained has resulted in a miscarriage of justice." (Art. VI, sec. 4½.) The court then proceeded to consider the instruction given: "This instruction is eminently proper as far as it goes. To it should have been added a direct statement of the precise principle under discussion. * * * Since the quoted instruction was given, the failure to give the further instruction is not, upon the facts of this record, ground for reversal." The court's language is equally applicable to the instant case. See, also, People v. Graves, 137 Cal.App. 1, 21, 29 P. 2d 807, 30 P.2d 508.

The judgment and order appealed from are and each of them is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

73 Cal.App.2d Supp. 1000

DRAKE v. DAVIS et al.

Civ. A. 6192.

Appellate Department, Superior Court, Los Angeles County, California.

March 29, 1946.

1. Courts ⇐190

The Superior Court has inherent power, upon proper occasion, to dismiss an appeal from municipal court because of failure of appellant to proceed diligently with its prosecution, though not expressly authorized by rules governing appeals from municipal courts.

2. Appeal and error ⇐801(1)

Public policy favors hearing appeals on their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith.

3. Appeal and error ⇐787

It is policy of the law to require an appellant to exercise diligence in perfecting and prosecuting his appeal.

4. Courts ⇐190

Where appellants were in default, without excuse, in preparation of the record on appeal from municipal court, and the filing in municipal court of a request for clerk of that court to prepare a transcript containing copies of a complaint, of the judgment, and some other papers did not come until after respondent's notice of motion to dismiss appeals on ground that appellants had failed to prosecute their appeals with diligence, the filing of request in municipal court was too late to preclude granting of respondent's motion.

5. Courts ⇐190

The right of respondent complaining of appellants' failure to take first step requisite to preparation of record on appeal from municipal court with required diligence to dismissal of the appeals must be determined by facts as they exist at time notice of motion to dismiss is given, and such right is not destroyed by mere subsequent filing of necessary documents.

Appeals from Municipal Court of City of Los Angeles; Charles Newell Carns, Judge.

Action for unlawful detainer by Etta R. Echols Drake against E. B. Davis and another. From a judgment for plaintiff, the defendants appeal. On motion to terminate the proceedings looking to the preparation of a record on appeal and to dismiss the appeals.

Motion to terminate the proceedings looking to preparation of a record on appeal denied, but appeals dismissed.

Walter L. Gordon, Jr., of Los Angeles, for appellants.

David W. Williams, of Los Angeles, for respondent.

BISHOP, Judge.

Respondent has moved "to terminate proceedings in the above entitled cause and to dismiss the same" on the ground that the appellant-defendants have not taken the first step requisite to the preparation of a record on appeal, and hence have failed to prosecute their appeals with diligence. We have concluded that the defendants are in default, without excuse, in the preparation of the record on appeal, and that in consequence an order should be made, not terminating proceedings, but dismissing the appeals.

When the new rules, governing appeals in civil cases from municipal courts, came into being, in September of 1945, several old practices went into oblivion. So nearly identical was the procedure in the municipal courts with that in the superior courts, and so closely are the new rules for the municipal courts modeled after the new rules which are applicable to appeals from the superior courts, that the following quotation from Averill v. Lincoln, 1944, 24 Cal. 2d 761, 763, 764, 151 P.2d 119, 120, is apposite, reference within the brackets being to the rules that affect appeals from municipal courts: "The new rules constitute a fundamental departure from the old procedure in the following respects: (1) Fixed periods are specified for the performance of the various steps in preparing the record, and when the allotted time has elapsed the appellant is in default. [Rules 4–7.] (2) The trial court has authority to extend time for limited periods, and has no power to extend if the time has already expired. [Rule 45(b).] (3) The appellate court alone has power to grant additional extensions of time and to relieve from default. [Rules 45(c) and 53(b).] As a re-

sult of these changes, the motion to terminate proceedings for a record has disappeared from our procedure." Emphasis is given to the conclusion that the only court that can now give relief from default in the preparation of the record on appeal is the appellate, not the trial, court, in Peebler v. Olds, 1945, 26 Cal.2d 656, 659, 160 P.2d 545. See also Jarkieh v. Badagliacco, 1945, 68 Cal.App.2d 426, 156 P.2d 969.

[1] What is to be done in the event of a default from which the reviewing court grants no relief? In cases appealed from the superior court, "If the specified time and allowable extensions have elapsed, the appeal will be dismissed under rule 10(a) unless the appellate court grants relief." Averill v. Lincoln, supra, 24 Cal.2d 761, 764, 151 P.2d 119, 120. But the rules governing appeals from municipal courts contain no counterpart of Rule 10(a). However, the absence from the rules of a provision expressly authorizing superior courts to dismiss appeals where the appellants are hopelessly in default, does not mean that dismissals may not be ordered, for it is generally recognized that a court has an inherent right to dismiss a case pending before it when that is the proper disposition of the matter.

Prior to the addition of section 583 of the Code of Civil Procedure in 1905, section 581 of that code furnished the only express provisions for the dismissals of cases because of any delay in bringing them to trial, and the provisions then made were limited to dismissals in the event summons had not been issued within a year, or, if issued, not served and returned within three years, of the commencement of the action. As was to be expected, someone arose to argue that the explicit statement of these grounds for a dismissal negatived the use of others. But in People ex rel. Stone v. Jefferds, 1899, 126 Cal. 296, 298–301, 58 P. 704, after a review of several early cases, it was determined that the power to dismiss an action for lack of prosecution was inherent in the court and not limited by the provisions of section 581. This case has been frequently cited with approval. It and only a partial list of the others which might well have been included appear in Gray v. Times-Mirror Co., 1909, 11 Cal.App. 155, 160, 104 P. 481, 482, following the introductory statement: "But that nisi prius courts possess inherent power to dismiss pending actions upon the ground that they have not been diligently prosecuted is a proposition repeatedly confirmed and well settled in this state." See also Craghill v. Ford, 1932, 127 Cal.App. 661, 666, 16 P.2d 343.

That superior courts have an inherent power to dismiss, for lack of diligent prosecution, actions pending before them on appeals from justices' courts on questions of law and fact, has been recognized in the following cases: Pistolesi v. Superior Court, 1915, 26 Cal.App. 403, 405, 147 P. 104; Long v. Superior Court, 1916, 31 Cal. App. 34, 35, 159 P. 734; Kaster v. Superior Court, 1917, 34 Cal.App. 88, 90, 166 P. 852; Hochheimer, etc., Co. v. Superior Court, 1924, 65 Cal.App. 206, 208, 223 P. 564; Pacific Dry Goods Co. v. Superior Court, 1935, 9 Cal.App.2d 707, 710, 711, 51 P.2d 180.

No doubt the silence of the cases with reference to the inherent power of the supreme court to dismiss appeals which have not been kept in step with the passing days, is due to the existence of express provisions in its rules providing for dismissals in such cases. Rule V has been on the books at least since 1892 (130 Cal. xxxviii), and we find its predecessor in 4 Cal. xvi. Even so, in Moultrie v. Tarpie, 1905, 147 Cal. 376, 378, 81 P. 1112, 1113, we find the court discussing facts showing that appellant had practically abandoned all proceedings looking to a prosecution of his appeal by his failure to take any steps towards preparation of the record, and stating: "there can be no doubt of the inherent right of this court to dismiss an appeal under such circumstances."

[2, 3] Having concluded, therefore, that we have the power, upon proper occasion, to dismiss an appeal because of the failure of the appellant to proceed diligently with its prosecution, we note that, usually, two public policies come into conflict in determining in any case whether or not the occasion is a proper one for a dismissal. The first of the policies is set forth in Jarkieh v. Badagliacco, supra, 68 Cal.App.2d 426, 431, 156 P.2d 969, 971, in these words: "There is, of course, a strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right of appeal because of technical non-compliance where he is attempting to perfect his appeal in good faith." The other public policy, which creates a problem when it comes into conflict with the first, grows out of the fact, phrased by Gladstone, that justice de-

layed is justice denied. As declared in O'Connell Gold Mines, Ltd., v. Baker, 1943, 60 Cal.App.2d 777, 779, 141 P.2d 785, 786: "It is the policy of the law to require an appellant to exercise diligence in perfecting and prosecuting his appeal. Prompt disposition of appeals is in the interest of justice."

[4, 5] The problem in the present appeal is not a difficult one. It appears that judgment was rendered in plaintiff's favor on December 7, 1945, in an action for unlawful detainer based upon the ground that the defendants were committing a nuisance. A motion to set aside the judgment was denied, and the defendants, on December 18 (possibly two days later) filed a notice of appeal from the judgment and from the subsequent order, and posted a $250 bond to stay execution. No action looking to the preparation of a record on appeal was taken until after the respondent served and filed her notice of motion in this court, March 11, 1946. The action then taken by the appellant was to file, in the trial court, a request for the clerk of that court to prepare a transcript containing copies of the complaint, of the judgment, and of some other papers. As appellant was over seventy days late in filing this request, and filed it without being relieved of his default, and he does not even yet make any pretense that he can suggest a reason which will excuse his default, the belated presence of the request, filed after the notice to dismiss was filed, will not bar the dismissal. It may be questioned whether, under the present rules, the filing of a request after default without leave of this court, even if accomplished before the giving of the notice of a motion to dismiss, should serve to obstruct the granting of the motion, where no claim is made that an excuse exists for the tardy appearance of the request and that its late filing should be approved. But, in any event, where, as here, the filing comes after the notice of motion, it is too late to be of avail. "The right of the complaining party to a dismissal must be determined by the facts as they exist at the time the notice of motion is given, and it is not destroyed by the mere subsequent filing of the necessary document. [Citing cases.]" Murphy v. Krumm, 1943, 21 Cal.2d 846, 849, 136 P.2d 8, 10.

The motion to terminate the proceedings looking to the preparation of a record on appeal is denied, but the appeals are dismissed.

SHAW, P. J., and KINCAID, J., concur.

27 Cal.2d 813

TRUCK INSURANCE EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19492.

Supreme Court of California.

March 28, 1946.

1. Workmen's compensation ⇐610

In considering whether an injury arose "out of" and was "proximately caused by the employment", questions of workmen's compensation are not controlled by common law rules as to proximate cause in tort cases, and reasonable doubt as to whether an injury is compensable are to be resolved in favor of the employee. Labor Code, § 3600(b, c).

2. Workmen's compensation ⇐645

A causal connection between employment and an injury by accident on a public road occurs where the employee by reason of and in connection with his employment, is peculiarly subject to the danger to which the general public is also exposed. Labor Code, § 3600(b, c).

3. Workmen's compensation ⇐709

Where contract of employment contemplates that the employee shall live on the employer's premises, an injury sustained while the employee is making a reasonable use of such premises, although not during working hours, occurs within the course of employment and is compensable. Labor Code, § 3600(b, c).

4. Workmen's compensation ⇐709

Where employer furnished home as part of the wages for employment, if employee was injured after reaching the home furnished by employer, a finding could under certain conditions properly be made that the employee was within the course of his employment at the time of the injury, and injury would be compensable. Labor Code, § 3600(b, c).

5. Workmen's compensation ⇐719

Where employer furnished ranch home as part of wages for employment, if employee was injured upon the necessary means of access to the place of employment, whether or not such means of access was controlled by the employer, during the reasonable interval of time allowed for his departure from the place where he rendered service, the employee could have been within the course of his employment or within a district where the duties of his employment required employee to travel, and injury would be compensable. Labor Code, § 3600(b, c).

6. Workmen's compensation ⇐617

The determination of whether an injury to an employee is incurred during the course of the employment cannot be automatically solved in every case by an exact formula. Labor Code, § 3600(b, c).

7. Workmen's compensation ⇐719

Where employee received wages of $165 monthly and a house, but employee could have taken $165 without the use of the house, the medium of exchange was incidental and the employer could not require the employee to forego a part of his compensation in order to relieve the employer from the risk of injury to the employee in going to and from the place where employee rendered his services. Labor Code, § 3600(b, c).

8. Workmen's compensation ⇐726

Where employee was killed when truck collided with his automobile as employee was driving to his home after work, and home was furnished by employer as partial consideration for employment, injury was compensable as arising out of and within course of employment, where employee was proceeding by a route and by the means of transportation contemplated by the contract of employment at a time contemplated by the contract having rendered service at place contemplated, and engaging in proceeding directly to collect portion of his compensation by occupying the home. Labor Code, § 3600(b, c).

In Bank.

Proceeding under the Workmen's Compensation Act by Mrs. Estell Dollarhide and by James Henry Dollarhide and others, minors, by their guardian ad litem and trustee, Mrs. Estell Dollarhide, for the death of their husband and father James D. Dollarhide, claimant, opposed by Elmore W. Peterson, employer and the Truck Insurance Exchange, and interinsurance exchange, insurance carrier. To annul an award by the Industrial Accident Commission, the insurance carrier petitions for a writ of review.

Award affirmed.

Prior opinion, 160 P.2d 128.

Syril S. Tipton, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

SCHAUER, Justice.

Petitioner, the insurance carrier for Elmore W. Peterson, seeks review and annulment of a death benefit award in favor of the dependent widow and minor children of James D. Dollarhide, employee of Peterson. Dollarhide was killed when a truck collided with his automobile as he drove along the public highway from a ranch of Peterson, where Dollarhide worked, toward another ranch owned by Peterson, where the Dollarhides lived. Petitioner contends that the fatal injury was not sustained in the course of and did not arise out of the employment. We have concluded that the award must be affirmed.

Dollarhide was employed as a ranch hand. His hours of work were from 7:30 a. m. to 6 p. m. He worked at the ranch of Peterson known as the "home place." With his wife and three minor children he lived in a house furnished by Peterson, under the contract of employment, as part of the employee's compensation. Such house was on the ranch of Peterson known as the "Traver Ranch" and was about two and one-half miles from the "home place." In addition to the two ranches above mentioned, Peterson owned two other ranches which were situated, respectively, about four and eight miles from the "home place."

After his day's work on November 23, 1943, the employee drove in his own car toward the "Traver Ranch" by a route which, according to Peterson, was "the most direct way." At an intersection a truck collided with his car and he was fatally injured. The intersection Peterson testified "was a dangerous crossing and many people got killed there."

Dollarhide entered Peterson's employ two weeks before his death. As to the terms of the contract of employment Peterson testified:

"Q. Was there any discussion [when Dollarhide was hired] what you would pay him? A. I was paying $165 a month then and house. * * *

"Q. Was he to work on all the ranches. * * *? A. Nothing was said about that; that was just the idea. * * *

"Q. Up to the time of the accident had he worked any on the ranch [on] which he was leaving [living]? A. None at all.

"Q. When you employed him did you contemplate that he would be working on that ranch? A. Yes, that is the way I hire everybody. * * *

"Q. The only way you can get a man to work for you is to pay them and give them a house too? A. Yes. * * *

"Q. You don't require him to live in this house? A. No, but I usually have a house for them to live in.

"Q. You figured that was part of the wages? A. I figured that was but they don't have to.

"Q. You prefer they live in the house which you furnish? A. Yes. * * *

"Q. Was he to watch out to see that petty-thieves did not get away? A. No, there was nothing that anyone could get away with, but I think it is safer to have the house occupied."

Mrs. Dollarhide testified that her uncle suggested to her and her husband that the latter inquire of Peterson as to employment and "he [the uncle] mentioned the house; * * * he said, 'go and see them; see what kind of houses they are.'" She further testified that Dollarhide, after he had called on Peterson, told her, "I got my job, I am going to go to work tomorrow. * * * Peterson showed me the little house. * * * I've got the little house, so we can move this evening."

[1] An injury, to be compensable, must arise out of the employment, must be "proximately caused by the employment," and the employee at the time of injury must be "performing service growing out of and incidental to his employment and * * * acting within the course of his employment." (Lab.Code. § 3600, subds. (b), (c).) In considering whether an injury arose "out of" and was "proximately caused by the employment" it has been repeatedly recognized and emphasized that questions of workmen's compensation are not controlled by common law rules as to "proximate cause" in tort cases and that reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee. (See, e. g., Pacific Emp. Ins. Co. v. Industrial Acc. Comm. (1945), 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313, and the cases there collected.)

[2] A causal connection between employment and an injury by accident on a public road can properly be found where the employee by reason of and in connection with his employment is peculiarly subject

to the danger to which the general public is also exposed. (Freire v. Matson Navigation Co. (1941) 19 Cal.2d 8, 12, 118 P.2d 809.) The employee here was peculiarly exposed to the risk of the dangerous intersection by reason of its location with respect to the ranches between which he was required to travel if he accepted, as he did, the total compensation attached to his employment.

[3] Where the contract of employment contemplates that the employee shall live on the employer's premises an injury sustained while the employee is making a reasonable use of such premises, although not during working hours, can properly be found to be within the course of employment. (Associated Oil Co. v. Industrial Acc. Comm. (1923), 191 Cal. 557, 559, 217 P. 744; Larson v. Industrial Acc. Comm. (1924), 193 Cal. 406, 410, 224 P. 744; State Comp. Ins. Fund v. Industrial Acc. Comm. (1924), 194 Cal. 28, 32, 227 P. 168; Union Oil Co. v. Industrial Acc. Comm. (1931), 211 Cal. 398, 403, 295 P. 513; Employers' etc., Corp. v. Industrial Acc. Comm. (1940), 37 Cal.App.2d 567, 569, 99 P.2d 1089.) The evidence clearly shows that Dollarhide's contract of employment contemplated that he live on the "Traver Ranch."

Petitioner, however, relies on the theory suggested in the Associated Oil Company (1923) and Larson (March, 1924) cases, supra, that the above stated proposition (the so-called "bunkhouse rule") applies only where the employee is compelled to live on the premises, is not free to come and go as he pleases, and his time is not his own. But in State Comp. Ins. Fund v. Industrial Acc. Comm. (June, 1924), supra, it was held (at pages 32, 33, 34, and 36 of 194 Cal. at pages 169, 170, and 171 of 227 P.), "[The employe], it is true, had choice, when she applied for employment, of making a contract by which she would be paid $50 a month and furnish her own room, or a contract by which she would receive $40 a month and accept a room in the hotel. * * * When she had made her choice and signed the contract of employment * * * she was bound during that month, at least, to accept a room in the hotel in lieu of $10 additional wages. * * * [She] was to be furnished all of her meals at the hotel as a part of her compensation for her labor. It was a part of the * * * contract creating her status as an employee that she should live at the hotel and receive her meals there. * * * She was in the course of her employment when she was collecting this remuneration just as much as when she was performing the labor that earned the remuneration. * * * [quoting from Hackley, etc., Co. v. Industrial Acc. Comm., 165 Wis. 586, 162 N.W. 921, L.R.A.1918A, 277] 'If we turn to the textbooks and decided cases on this subject, we find that they sustain the view that an employee going in the usual manner [the trip in this case was by train] for his pay to a place designated by the employer is performing a service within his employment.' * * * [The employe] was in course of her employment and performing services growing out of and incidental to such employment when she was leaving her place of employment (her residence, also, by reason of her contract of employment, and furnished to her as part compensation for her labor under such contract) by the exit designated by her employer, to enjoy her 'day off'—an intermission in her labor contemplated by said contract of employment," and fell on the public sidewalk because of an unsafe condition created by fellow employees. It is the theory of the quoted and subsequent cases that the living quarters "are part of the employee's compensation which is being earned [or collected] at all times while the employee is on the premises, and that, therefore, the earning and collection of such compensation is as much a part of the employment as is the performance of service, and is reasonably incidental thereto." (Employers', etc., Corp. v. Industrial Acc. Comm. (1940), supra, 37 Cal.App.2d 567, 569, 99 P.2d 1089, 1090.)

[4, 5] So here Dollarhide could have agreed to work for wages of $165 a month only. But Peterson testified, "the only way you can get anyone is to furnish a house." And the offer of employment which Peterson preferred that Dollarhide accept, and which Dollarhide did accept was for compensation of "$165 a month, and a house." Though Dollarhide could have moved from the ranch at will he had not done so, his agreement to occupy the ranch remained a term of the employment contract, and regardless of whether he was performing a service to his employer by residing in the house he was entitled to collect his compensation for services rendered on the other ranch and such compensation included the occupancy of the house

on the "Traver Ranch." (Cf. California Cas. Indem. Exch. v. Industrial Acc. Comm. (1942), 21 Cal.2d 461, 464, 132 P.2d 815.)

From the authorities which have been discussed it appears that if Dollarhide had reached the "Traver Ranch" it could have been found that he was within the course of his employment. If he had been upon the necessary means of access to the "home place," whether or not such means of access was controlled by the employer, during the reasonable interval of time allowed for his departure from the place where he rendered service, he could have been within the course of his employment. (Freire v. Matson Navigation Co. (1941), supra, 19 Cal.2d 8, 12, 13, 118 P.2d 809.) If he had been traveling directly from one place of rendering service to another (Department of Pub. Works v. Industrial Acc. Comm. (1932), 128 Cal.App. 128, 16 P.2d 777; Gagnebin v. Industrial Acc. Comm. (1934), 140 Cal.App. 80, 84, 34 P.2d 1052; Dauphine v. Industrial Acc. Comm. (1943), 57 Cal.App.2d 949, 953, 135 P.2d 644) or within a district where the duties of his employment required him to travel (Makins v. Industrial Acc. Comm. (1926), 198 Cal. 698, 703, 247 P. 202, 49 A.L.R. 411), he could have been within the course of his employment.

[6, 7] Although Dollarhide's factual situation does not bring him squarely within any one of the above cited California holdings it contains many controlling elements common to the cited cases. "No exact formula can be laid down which will automatically solve every case," this court said recently in holding compensable the death of employes which occurred when and because they stopped on their way to collect compensation to make reasonable, personal use, contemplated by the employment, of washing facilities of the employer's reservoir. (Pacific Indem. Co. v. Industrial Acc. Comm. (1945), 26 Cal.2d 509, 516, 159 P.2d 625, 629.) An employee cannot be required to forego a part of his compensation in order to relieve the employer from risk. "The duty to pay and the right to receive the compensation were integral parts of the contract of employment," and "The medium of exchange in which wages happen to be paid is a mere accidental circumstance and should not be permitted to cloud the issue." (State Comp. Ins. Fund v. Industrial Acc. Comm. (1924), supra, 194 Cal. 28, 34, 35, 227 P. 168, 170; Pacific Indem. Co. v. Industrial Acc. Comm. (1945), supra, 26 Cal.2d at page 432, 159 P.2d 625.)

[8] Proceeding by a route and by the means of transportation contemplated by the contract of employment, at a time contemplated by the contract, having rendered service at the "home place" and engaging in proceeding directly to collect a portion of his compensation by occupying the ranch house as the contract provided, the employee met a risk contemplated by the employment and known to the employer and was killed. It cannot be said, as a matter of law, that the commission was without jurisdiction to find that the injury arose out of and was in the course of his employment.

For the reasons above stated the award is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



27 Cal.2d 784

HUBER v. HUBER.

L. A. 19262.

Supreme Court of California, in Bank.

March 27, 1946.

As Modified on Denial of Rehearing April 25, 1946.

1. Evidence ⇐461(4)
Husband and wife ⇐266

Evidence is admissible to show that real property is intended to be held as community property and is in fact of that character, although title has been acquired under a deed accepted by husband and wife and executed in a form which ordinarily creates in the grantee a common law estate such as a joint tenancy, and an oral agreement to convert property into community property may be established.

2. Evidence ⇐461(4)

Parol evidence is admissible to establish the absence of an intention to make a gift of either separate or community property, although conveyance is made by the husband to the wife alone or as joint tenant with him, or is from a third person

to the wife or to both as joint tenants at the husband's direction in cases where there is no showing of fraud, mistake or undue influence.

3. Husband and wife ⇐266

Where husband purchased realty after marriage with his separate funds and had grantor convey to himself and wife as joint tenants, evidence that husband did not intend to give wife any present interest at that time and that husband told wife at that time that she would get half if they were married at his death, was admissible to show that husband did not intend to make a present gift to his wife.

4. Husband and wife ⇐266

Where husband purchased realty after marriage with his separate funds and had grantor convey to himself and wife as joint tenants, evidence that husband did not intend to give wife any present interest, and told wife at that time that she would get half if they were married at his death, was sufficient to sustain a finding that defendant did not intend to make a present gift to wife.

5. Evidence ⇐269(3)

Declarations of spouses are admissible to show whether a gift was intended where conveyance is made to wife alone or as a joint tenant with husband.

6. Trusts ⇐103(3)

Because of the confidential relationship between husband and wife, an oral agreement between the spouses in connection with the conveyance of real property between them or by a third person to one of them can be enforced by making the grantee a constructive trustee for the other spouse if the grantee violates such oral agreement.

7. Husband and wife ⇐264

In wife's action for divorce, where husband sought to establish that property conveyed to himself and wife as joint tenants was his separate property, evidence established that the property was paid for from the separate funds of the husband and was therefore his separate property. Civ.Code, § 163.

8. Husband and wife ⇐255

Real property purchased with the separate funds of the husband is his separate property. Civ.Code § 163.

9. Husband and wife ⇐257

Rents, issues and profits of real property purchased with the separate funds of the husband and increase in value thereof are his separate property. Civ.Code, § 163.

10. Husband and wife ⇐264

In wife's action for divorce where husband sought to establish that property conveyed to himself and wife as joint tenants was his separate property, evidence did not establish that purchase price of property and rents and profits therefrom were community property because funds therefor were placed in husband's account in a bank in which also were placed his earnings and that because the latter were community property, there was a commingling of funds, where husband transferred sufficient money for purchase of property from his own savings account and immediately checked it out to pay the purchase price.

11. Husband and wife ⇐257

In action for divorce, where husband sought to establish that property conveyed to himself and wife as joint tenants was his separate property, that a portion of income from some of the separate real property was used to purchase other real property would still make the latter separate property of the husband.

12. Husband and wife ⇐264

In wife's action for divorce where husband sought to establish that property conveyed to himself and wife as joint tenants was his separate property, evidence sustained conclusion that earnings allocable to community property consisted of $1,800 per year for the years between 1938 and 1941.

13. Husband and wife ⇐262(1)

There is a presumption that the expenses of the family are paid from community earnings.

14. Divorce ⇐286

In wife's action for divorce, where husband sought to establish that property conveyed to himself and wife as joint tenants was his separate property, there was no issue on appeal as to any community property other than the real property involved, where plaintiff appealed only from that part of interlocutory judgment adjudging that plaintiff had no interest in real property described in amended complaint and that the same was separate property

of defendant, and evidence was amply sufficient to support portion of judgment appealed from.

15. Divorce ⇐253

In wife's action for divorce where the husband sought to establish that property conveyed to himself and wife as joint tenants was his separate property, and the pleadings put in issue the status of the property and rights of parties therein, both separate and community, court could determine that the plaintiff had no joint tenancy separate property interest in the real property and that it belonged to the husband as his separate property.

16. Divorce ⇐249(1), 254

While the court in a divorce action should not assign the separate property of one of the spouses to the other, where the pleadings put in issue the status of the property and the rights of the parties therein, the court, in a divorce action, may determine whether the property is separate or community and quiet title in the rightful owner.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Marie Ida Huber against William X. Huber, wherein defendant filed a cross-complaint. From that part of judgment awarding plaintiff a divorce which adjudged certain property to be separate property of defendant, plaintiff appeals.

Affirmed.

Prior opinion, 161 P.2d 54.

Hahn, Graf & Ross and A. A. Goldstone, all of Los Angeles, for appellant.

George Penney and Earl D. Killion, both of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff, wife, obtained an interlocutory decree of divorce from defendant on the ground of extreme cruelty. The marriage had lasted five years. The court found that certain parcels of real property were acquired during the marriage and title taken in the names of plaintiff and defendant as joint tenants, but that inasmuch as it was purchased with the separate funds of defendant it was his separate property, and further, that in taking the property in joint tenancy defendant did so "as a mere matter of convenience to himself and in order that title would as he believed, pass to plaintiff one-half only of said properties upon his death if he had not otherwise directed in his life-time. * * * The Court further specifically finds that the defendant did not intend to vest any present interest in said properties in the plaintiff and that she was fully conversant with that fact." The court also found that plaintiff had no interest in that real property.

Plaintiff challenges the admission of evidence to the effect that there was no intention to create a joint tenancy, and plaintiff acquired no such rights, and also the sufficiency of the evidence on that issue and the lack of interest of plaintiff in the rents, issues and profits from said property.

Turning first to the question of admissibility of evidence and assuming that the real property was acquired with the separate funds of defendant, we have a situation where a husband purchases real property after marriage with his separate funds and has the grantor convey the property to him and his wife as joint tenants. The evidence to refute the joint tenancy consisted of the following:

"Q. Now, you have stated that when you acquired these properties and had them placed in joint tenancy, you did it because you were under the impression that if you were married at the time of your death she could get half of them? A. That is correct.

"Q. Well, what did you think would be the situation if you were not married? A. Well, they would be my property.

"Q. Well, they stood in the two names. How were you going to get out of the two names? A. That, I don't know. I did not think of it at the time, because when I made the arrangement on the first place Mrs. Huber was in the car when I came out and made the payment, and I told her: 'Well, I have fixed it so you will get half if we are married at the time of my death.'

"Q. Are you sure you said: 'If we are married' or 'When I die you will get half?' A. No, I remember because we parked the car five feet from the entrance."

And "Q. Did you intend, at the time you bought the third piece of property, to give to Mrs. Huber a half interest or any interest whatsoever in the property at that time? A. Not at that time.

"Q. Did you know, at the time you took the third piece of property in your joint

names, that there was a legal presumption she became the owner of an undivided one-half interest in and to the property? A. No."

And "Q. Was it your intention on any of these properties that she should have become vested in any interest during your lifetime? A. No, sir, she was not."

The property was purchased with defendant's separate funds. Plaintiff deposited the rents she collected in the defendant's separate bank account upon which she had no authority to draw. The leases on the property were executed by defendant alone. Plaintiff never claimed any interest in the property and no accounting was made to her of the rents and profits thereof. While it may be true that a delivery to one of two grantees is considered a delivery to both, no physical delivery of the deeds was ever made to plaintiff and she never had possession of any of the property here involved.

[1] It is clear that evidence is admissible to show that real property was intended to be held as community property and is in fact of that character although title has been acquired under a deed accepted by husband and wife and executed in a form that ordinarily creates in the grantee a common law estate such as joint tenancy, and that an oral agreement to convert property into community property may be established. Sears v. Rule, Cal., 163 P. 2d 443; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; In re Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1; Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; In re Estate of Cronvall, 220 Cal. 503, 31 P.2d 372; Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Hibernia Sav. & Loan Soc. v. DeRyana, 210 Cal. 532, 292 P. 632; Salveter v. Salveter, 206 Cal. 657, 275 P. 801; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Title Insurance etc. Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Jaegel v. Johnson, 148 Cal. 695, 84 P. 175; In re Estate of Wilson, 64 Cal.App.2d 123, 148 P.2d 390; Horsman v. Maden, 48 Cal.App. 2d 635, 120 P.2d 92; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777.

[2] By close analogy it is likewise true that parol evidence is admissible to establish the absence of an intention to make a gift of either separate or community property, although the instrument of conveyance is made by the husband to the wife alone or as joint tenants with him or is from a third person to the wife or to both as joint tenants at the husband's direction in cases where there is no showing of fraud, mistake or undue influence. See Fanning v. Green, 156 Cal. 279, 104 P. 308; Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 138 P.2d 693; Horsman v. Maden, supra; Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 38 P.2d 790; Whitaker v. Whitaker, 137 Cal. App. 396, 30 P.2d 538; Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804; Stephenson v. Brand, 122 Cal.App. 543, 10 P.2d 476; In re Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534; In re Estate of Nelson, 104 Cal.App. 613, 286 P. 439; Dale v. Dale, 87 Cal.App. 359, 262 P. 339; Tilden v. Tilden, 81 Cal.App. 535, 254 P. 310.

[3, 4] Plaintiff argues, however, that the undisclosed and secret intention of the husband not to make a gift to his wife cannot be established by parol evidence, citing Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507, and Watson v. Peyton, 10 Cal. 2d 156, 73 P.2d 906, but as indicated by the foregoing quotation from the record, defendant advised plaintiff of his intention as to the first parcel of real property and it may be inferred that the placing of the other parcels in joint tenancy was done under like circumstances.

Plaintiff also relies upon Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; In re Kessler, 217 Cal. 32, 17 P.2d 117; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190; Yoakam v. Kingery, 126 Cal. 30, 58 P. 324; Schipper v. Penkalski, 46 Cal. App.2d 28, 115 P.2d 231; In re Estate of Henderson, 128 Cal.App. 397, 17 P.2d 786; Thomas v. Hoffman, 122 Cal.App. 213, 9 P.2d 538; In re Estate of Sill, 121 Cal.App. 202, 9 P.2d 243; In re Estate of Wahlefeld, 105 Cal.App. 770, 288 P. 870. The correct holding of the Kessler case was stated in Tomaier v. Tomaier, supra, 23 Cal.2d 759, 146 P.2d 905, in accordance with the views herein expressed. The Schipper, Yoakam, Perkins, Kenney, Sill and Wahlefeld cases merely hold that husband and wife may by written or executed oral agreement change the character of their property. They do not hold that a showing of true intent may not be made by parol. Tomaier v. Tomaier, supra, must be considered as settling the law on the subject. Moreover it may be inferred from the above mentioned evidence that an executed oral agreement was made to the ef-

fect that she was not to receive a present gift by virtue of the conveyance of the property to her and defendant as joint tenants. In re Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055, relied upon by plaintiff did not involve transactions beween husband and wife.

[5] Plaintiff cites Bias v. Reed, 169 Cal. 33, 145 P. 516; In re Estate of Granniss, 142 Cal. 1, 75 P. 324; and In re Estate of McCarthy, 127 Cal.App. 80, 15 P. 8d 223, to the effect that transmutation of the property may not be established by declarations of the parties. The Granniss case was concerned only with the interpretation of a will. It appears that the court considered such declarations admissible in the Bias case, but concluded they were insufficient to establish the fact. It is obvious that the court was weighing the evidence which it should not have done. Declarations of the spouses are admissible to show whether a gift was intended. See Whitlow v. Durst, 20 Cal.2d 523, 127 P. 2d 530.

We conclude therefore that the evidence was admissible and sufficient to sustain the finding that defendant did not intend to make a present gift to plaintiff. Plaintiff calls attention to evidence that defendant referred to the property as "ours" and other like expressions, but nothing more than a conflict was created which the trial court resolved against her.

[6] In this state it is settled that because of the confidential relationship between husband and wife, an oral agreement between the spouses in connection with a conveyance of real property between them or by a third person to one of them can be enforced by making the grantee a constructive trustee for the other spouse if the grantee violates such an oral agreement. Quinn v. Reilly, 198 Cal. 465, 245 P. 1091; Bradley Co. v. Bradley, 165 Cal. 237, 240, 131 P. 750; Lauricella v. Lauricella, 161 Cal. 61, 65, 118 P. 430; Brison v. Brison, 75 Cal. 525, 528, 17 P. 689, 7 Am. St.Rep. 189; Sexson v. Sexson, 52 Cal. App. 644, 199 P. 61; see Altramano v. Swan, 20 Cal.2d 622, 128 P.2d 353; Rest., Trusts, § 44; 1 Scott, Trusts, § 44.2; 35 A.L.R. 281, 311; 45 A.L.R. 851, 854; 13 Cal.Jur. 869; 54 Am.Jur. 178. An oral agreement between husband and wife to whom property is deeded as joint tenants, that while both spouses are alive one of them should have no beneficial interest in the property should likewise be enforced by impressing a trust upon the share of a spouse who attempts to violate such an agreement. See Kramer v. Watnick, 63 Cal.App.2d 308, 310, 146 P.2d 947. By impressing such a trust upon the share of the wife in a case like this, she would be prevented from obtaining a property interest that she should not have during the lifetime of her husband; if the husband dies without requesting her to convey the property, the wife would not be a constructive trustee but by virtue of the right of survivorship and in full harmony with the oral agreement she would obtain the beneficial and legal title contemplated by the parties.

[7-9] Plaintiff asserts that community and joint funds were used to purchase the above mentioned property and hence it was joint tenancy or community property. It will be recalled that implicit in the court's finding is a conclusion to the contrary. Plaintiff and defendant were married in 1937 (they lived together about five years). It is conceded that defendant had as his separate property, assets of about $30,000 when he married plaintiff, consisting in part of savings of about $14,000. Defendant maintained a commercial account in his name in the Security First National Bank. Defendant testified as to the first parcel, he made the down payment of $338.40 from his account in the Security First National Bank, and the balance of $4,431.34 from his savings account in a different bank. The second parcel was purchased with funds transferred from the savings account to the Security First National Bank account. The rest of the property was handled in a similar manner. Generally, defendant testified:

"Q. And did the purchase price of all of these properties come from your separate funds? A. They did.

"Q. No contributions of any kind were made by Mrs. Huber? A. None from anybody."

Contrary to plaintiff's testimony defendant stated that plaintiff did not perform work in improving and repairing the property. The foregoing is clearly sufficient to support a finding that the property was paid for from his separate funds. Real property purchased with the separate funds of the husband is his separate property. See Tomaier v. Tomaier, supra; 3 Cal.Jur. 10-Yr.Supp., Community Property, § 38. Likewise the rents, issues and profits therefrom and increase in value thereof are separate property. Civ.Code, § 163; 3

Cal.Jur. 10-Yr.Supp., Community Property, § 44. It, therefore, follows that the equitable title to the property, the increase in value and rents and profits thereof were defendant's separate property, unless there are some factors which alter the situation.

[10, 11] Plaintiff contends that the purchase price of the property and rents, issues and profits are community property because the funds for the purchase and rents, etc. were placed in defendant's account with the Security First National Bank in which also were placed his earnings; that the latter were community property and there was a commingling of funds. Plainly the trial court properly concluded by implication that the purchase price was from separate funds, either because there was no commingling or the funds were traced. Defendant in each case transferred sufficient money for the purchase of the property from his savings account to the Security First National Bank account, and immediately checked it out to pay the purchase price. It is suggested that there is some $18,000 unaccounted for by defendant, but in the face of the testimony of the defendant as to the source of the funds used for the purchase price, such cannot disturb the court's finding. What may have happened to the income from the real property and the amount withdrawn by defendant from his business is not significant, as it lacked community status—it remained his separate property. If a portion of the income from some of the separate real property was used to purchase other real property, the latter would be separate property. In this connection, with reference to the deposit of defendant's earnings and the rents, etc. from the real property in the same account, plaintiff urges that defendant drew $300 per month from his business (custom broker, which was admittedly his separate property) and that such constituted his earnings.

[12-14] In regard to earnings, the rule is that where the husband is operating a business which is his separate property, income from such business is allocated to community or separate property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment. In re Estate of Gold, 170 Cal. 621, 151 P. 12; Witaschek v. Witaschek, 56 Cal.App.2d 277, 132 P.2d 600; 3 Cal. Jur. 10-Yr.Supp., Community Property, § 46. Plaintiff testified that defendant brought home $300 per month as salary from his business. Defendant, on the other hand, testified that:

"Q. Mr. Huber, do you have the exact amount that you brought home in the way of salary checks from the time of your marriage until you closed your business in February, 1942? A. Well, I took a hundred and fifty ($150.00) dollars out of my money every two weeks," indicating that it was not necessarily salary.

The business required considerable capital ($15,000 to $20,000) to operate as money was advanced for customers. Defendant's accountant testified that from his computation of the figures there was no community capital invested in the business and that the business would warrant a salary of $150 per month to defendant. Under these circumstances the court was justified in reaching the conclusion that the earnings allocable to community property consisted of $1,800 per year for the years 1938, 1939, 1940 and 1941. After February, 1942, there was no income from the business. He turned it over to another person. Defendant testified that to run the household it cost $80 to $90 a month. It is presumed that the expenses of the family are paid from community earnings. See Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 492, 111 P. 360; In re Estate of Cudworth, 133 Cal. 462, 65 P. 1041; In re Estate of Tompkins, 123 Cal.App. 670, 11 P.2d 886; Van Camp v. Van Camp, 53 Cal.App. 17, 199 P. 885. The exact amount of money allocable to community property placed in the bank account with the rents, etc. from the real property being ascertained, it was not so commingled that all of the fund became community property. It could be traced. It does not appear, however, what was done with the balance of the earnings, that is, the $60 to $70 per month left after the household expenses were paid. Hence it cannot be said that there was no community property. However, there is no issue on this appeal as to any community property other than the real property involved in this action as plaintiff appealed only from that part of the interlocutory judgment "wherein it was adjudged that the plaintiff has no interest in the real properties described in the amended complaint and that the same are separate property of the defendant." Since the evidence is amply sufficient to support the portion of the judgment appealed from, the same must be affirmed.

[15-16] Finally, plaintiff contends that the court could not properly in this divorce action determine that plaintiff had no joint tenancy separate property interest in the real property and that it belonged to defendant alone as his separate property. She urges that a court in a divorce action is limited to the disposition of the community property and cannot pass upon a dispute as to the separate property, citing Allen v. Allen, 159 Cal. 197, 113 P. 160; Reid v. Reid, 112 Cal. 274, 44 P. 564; Roy v. Roy, 29 Cal.App.2d 596, 85 P.2d 223; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988; and Glass v. Glass, 4 Cal.App. 604, 88 P. 734. While the court in a divorce action should not "assign the separate property of one of the spouses to the other", Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325, 326, yet when the issue has been made the court may determine whether the property is separate or community and quiet title in the rightful owner. Salveter v. Salveter, 206 Cal. 657, 275 P. 801; Allen v. Allen, 159 Cal. 197, 113 P. 160; Spahn v. Spahn, 70 Cal.App.2d 791, 162 P.2d 53. Here the pleadings put in issue the status of the property and the rights of the parties therein both separate and community.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



27 Cal.2d 829

PEOPLE v. COLLUP et al.

Cr. 4678.

Supreme Court of California, in Bank.

March 28, 1946.

1. Witnesses ⇐379(1), 388(2, 10)

A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony, but, as a foundation, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements and, if so, be allowed to explain them, although such foundation is unnecessary if it is impossible to comply with such requirement due to no fault of the party urging the impeachment. Code Civ.Proc. § 2052.

2. Criminal law ⇐338(1)

The goal of all judicial proceedings is to bring before the trier of facts all pertinent evidence.

3. Criminal law ⇐539(1)

The rule allowing the use of former testimony is a salutary expedient in the administration of justice. Pen.Code, § 686.

4. Witnesses ⇐388(2)

The lack of foundation cannot be said to impair the value of impeaching testimony to the point where it should be rejected when it is impossible to lay the foundation insofar as requirement for foundation is based on endeavor to get all of pertinent evidence before the court and to further test the credibility of the impeachment. Code Civ.Proc. § 2052.

5. Witnesses ⇐388(2, 6)

There is a distinction between impeaching dying declarations and testimony at a former trial because of the opportunity to cross-examine in the latter case, but the issue is largely one of the value of the evidence, and that factor should not be decisive as to necessity for foundation.

6. Witnesses ⇐380(3), 388(2, 6)

Where prosecution was enabled to read transcript of testimony given at preliminary hearing on basis of a showing that the witness was out of the state, impeaching evidence consisting of statements made by witness after she had testified at the preliminary hearing was admissible without the foundation normally required by rule providing that contradictory statements must be related to witness and opportuniy afforded him to explain them. Pen.Code, § 686; Code Civ.Proc. § 1870, subd. 8; § 2052.

SPENCE, SHENK, and EDMONDS, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Thomas H. Collup and Lillianne Flaten were convicted of assault with intent to commit rape, assault by means of force likely to produce bodily injury, and conspiracy to commit rape, and they appeal.

Reversed.

Prior opinion 161 P.2d 576.

William C. Ring and Ward Sullivan, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

CARTER, Justice.

Defendants, Miss Flaten and Mr. Collup, were convicted on a three count charge, of assault with intent to commit rape, assault by means of force likely to produce bodily injury, and conspiracy to commit rape. The alleged victim was a Miss Rosenman. She was insane at the time of the alleged commission of the offenses on March 17, 1944.

Miss Rosenman shared an apartment with Miss Flaten and a Miss Curtiss. A Miss Nelson had previously occupied the apartment with Curtiss and Rosenman and was a friend of theirs. When taken to the hospital the evening of March 17, 1944, Rosenman had a small cut on the back portion of the top of her head, bruises across her throat, on the back of her neck and on her shoulder blades, red marks indicating application of pressure on her lower abdomen and on the inner and outer portions of her right thigh. The examining physician stated that her hymen was ruptured but he could not say whether or not it was of recent occurrence. He found no trauma or blood in the region of the vagina.

Flaten, Curtiss and Nelson had all observed that Rosenman was acting irrational for several days prior to March 17, 1944. Flaten was distraught and worn out from caring for Rosenman and finally the latter's parents residing in an eastern city were contacted. They requested that the care continue until Rosenman's mother had time to come to California. It was decided by the three, Curtiss, Nelson and Flaten, that Rosenman should be placed in a sanitorium and arrangements were made to place her in such an institution on the morning of March 17, 1944, it being understood that the plan could not be accomplished unless Rosenman went voluntarily. The representative of the sanitorium testified that she called at the apartment on the morning of the 17th between 9 and 10 a.m. where she was advised by Flaten that it had been decided not to send Rosenman to the sanitorium, that "we are going to care for her." Flaten testified that the representative did not call until about 12 o'clock noon. Be that as it may, defendant Collup called Flaten on the telephone in the morning apparently intending to make a social engagement with her. He had met her about two months before. Flaten told him about the irrational conduct of Rosenman and the plan of sending her to an institution. Collup, according to his statement, went to the apartment arriving between 10 and 11 a.m. Defendants discussed the condition of Rosenman, Flaten mentioning that Rosenman dwelt on sex in her conversation, sexual affairs with men, and sexual frustration, and reference was made by Flaten to a magazine article discussing shock as a treatment for mental ailments. Collup removed his coat and entered Rosenman's bedroom. She was sitting on the footboard of the bed swaying back and forth and pulling her hair over her face. She was fully dressed. Collup removed her from the footboard and sat on her bed where he held her on his lap brushing the hair from her face and attempting to sooth her. Defendants left Rosenman in her room and retired to the kitchen where several drinks of alcoholic content were consumed. According to their testimony Rosenman entered the kitchen attired in nothing but a T shirt and under pants. There was a spot of blood on the front of the shirt. Her nose was bleeding slightly. It was wiped by one of the defendants. She had her eyes closed and had nothing to say. She was swaying back and forth. Collup grasped her by the shoulders and shook her and slapped her face attempting, as defendants claim, to "snap" her out of the condition. He took her back to bed in her room. Defendants consumed three "shots" of whiskey and 1½ quarts of rum during the day, and at various times removed Rosenman from her seat on the foot of the bed and put her to bed. During the afternoon defendants retired to Flaten's bedroom where Collup stripped and they indulged in an act of sexual intercourse. According to Collup, he thereafter found Rosenman on the footboard of the bed. He was attired in his shorts. Rosenman was nude. He laid her down on the bed. The events of the day were somewhat hazy in the minds of both defendants. Curtiss testified that she telephoned about 10 a.m. and Flaten told her the sanitorium representative had not yet arrived. She called again at 1 o'clock but although the receiver was lifted, no one answered. Flaten telephoned Curtiss at 5:30 p.m. According to Curtiss, Flaten told her not to come home for she was experimenting with Rosenman

and had a doctor there. At Curtiss' request Collup was called to the telephone and said he was a doctor and Curtiss could come home. Flaten admitted the conversation with Curtiss except that she merely asked Curtiss not to come home. Her reason for the request she stated, was because of the drinking by her and Collup, and she thought it wise to advise him to say he was a doctor. Collup stated he merely told Curtiss she could come home.

Curtiss arrived at the apartment at about 6 p.m. and had a conversation with Flaten in the dinette. She testified that there was blood on towels on a pile of clothes in the kitchen. She stated that Flaten told her Rosenman would be normal after the treatment she had received, that she had brought a man to the apartment (Collup) who had been beating her all day, that Rosenman needed a man—sexual intercourse, and that she had had such with Collup and that she enjoyed it and wanted more. Collup walked out of Rosenman's room covered with blood, being clad in a robe, but his legs were bare to above the knees. She said Collup told her he had beaten Rosenman and that Flaten had to get him drunk to do it. After that, he returned to Rosenman's room and closed the door. She and Nelson summoned the police, and after they arrived, Collup was running around the apartment nude. She saw Rosenman in her bedroom. She had bruises and blood between her legs. When Collup came out of Rosenman's room the second time he was nude and attempted to choke Flaten who was endeavoring to get him to leave.

Nelson testified that she had discussed Rosenman's mental condition with Flaten and suggested a rest home with which Flaten agreed. She saw Rosenman on the evening before the alleged offenses and she had no bruises or cuts on her body. She came to the apartment on the 17th shortly after Curtiss arrived pursuant to the latter's telephone call. There were two blood stained slips on a pile of clothes in the kitchen. Flaten was not in the apartment at the time. After talking to Curtiss, she opened the door to Rosenman's room and saw Rosenman on the bed naked in a "praying position" and eyes shut. Collup, also nude, was standing at the foot of the bed. She immediately shut the door. She also saw in the bedroom a bloody sheet, the absence of any covers on the bed and blood running down Rosenman's face. The living room was in an "uproar" and the blinds drawn. She told Collup to get dressed and get out and he replied that he was Rosenman's husband and he did not have to leave. He cursed, remarking that there was nothing but bastards and sons-of-bitches around. Flaten in her endeavor to make Collup leave was choked by him. She saw Rosenman, still nude, kneeling on the floor. She had bruises between her legs and blood on her "private parts." When she first arrived at the apartment Flaten was outside with her mother. Flaten told her not to go in and stated: "I [Flaten] called a friend of mine [Collup] this morning, and they told me that when a person is insane and they go to these hospitals, these rest homes, these private rest homes, they put them in a bed and they mark a big X and then they just leave them and they don't get any care. * * * So she said 'I called a friend of mine, and he sent some friend over that knows all about these things, he has been in one of these institutions and he knows.' I said, 'Did the nurse come?' She said, 'No, the nurse didn't come,' she said, 'The doctor was not going to be there today' and she said, 'Marge, I think all Natalie needs is a good lay, so' she said, 'I brought a man over and he has been beating her all day,' she said, 'You should see the apartment, it's full of blood, he has been hitting her and everything all day in there,' and I said, 'I am going in the house Lillianne,' and she stayed out in front and I went in the house."

The prosecution produced evidence of extrajudicial admissions by Flaten in which, among other things, she said that she had had a long talk with Collup at the apartment on March 17, 1944, about Rosenman's mental condition and that they agreed that an act of sexual intercourse would help her, and that she took Collup to Rosenman's room and left him there for about 45 minutes to permit him to consummate the act.

Without further recitation of the evidence we believe that a case was presented which would have justified the jury in finding the defendants not guilty of the charges against them. Heavy reliance for a conviction necessarily rests upon the extrajudicial statements of Flaten and the testimony of Nelson as to statements by said defendant and her observations at the apartment on the evening of March 17, 1944. Under these circumstances error with regard to the admission of evidence to impeach the testimony of Nelson is of vital importance even though many of the circumstances were brought out from other witnesses.

At the trial the prosecution was permitted to read, over defendants' objection, that there was insufficient showing of unavailability and diligence in procuring her attendance, from a transcript of the testimony given by Nelson at the preliminary examination of defendants, upon the statement by the prosecution that "this deputy has received a letter from Marjorie Nelson, at which time she advised me that she has since the date of the preliminary remarried and her name is Coscorelli. She is in Caliente, Nevada, in the Lincoln County Hospital as a registered nurse and regularly employed there. I have had several communications from her, the last of them being under the date—postmarked August 7th, Caliente, Nevada. And on each of her communications she has indicated that she was permanently employed there. She was served with a subpoena before leaving California, and she wrote and asked me to be excused. I told her we would expect her here, but we have no way of enforcing the subpoena. On that showing the People will ask leave to read the testimony of Miss Nelson. * * *

"The Court: Will you stipulate the facts as related by Mr. Wildey [deputy district attorney] that if Mr. Wildey were sworn he would testify to the same facts?

"Mr. Bernay: I will stipulate to that."

On defendants' case, defendant Flaten, over the objection of the prosecution, testified concerning a conversation between her, and her mother and Nelson occurring *after* Nelson had testified at the preliminary hearing. In connection therewith the following occurred:

"Q. What was said about the testimony in this case, Miss Flaten, so far as you and Miss Nelson had testified to in court? * * * A. The statement that Miss Nelson made to me in the presence of my mother and myself concerning me was the fact that she was sorry for anything she had said or done in order to hurt me, and she had no intention of hurting me, that she made no charge against me, and that when they took her story previously they hadn't got it straight. * * *

"Q. Now, what, if anything, did Miss Nelson in that conversation say to you regarding the truth or falsity of any case that she may have testified to in court at the preliminary hearing? * * *

"Q. Right then and there about her own testimony? A. That is right, that they hadn't gotten this story straight, and that she had said so many things that were prompted by Miss Curtiss that were untrue, she was very sorry, that she was making no charges against me."

Mrs. Thomas, Flaten's mother, testified in regard to the same conversation. The following occurred:

"Q. At the time something was said by Miss Nelson with reference to her testimony at the preliminary hearing in this case, were you there at that time? A. I was.

"Q. Please tell the Court and jury to the best of your recollection as to what Miss Nelson said about her testimony at the preliminary hearing? * * * A. She said that 'I am very very sorry about some statements I made at the preliminary hearing. I sure thought I could detract some of them, but Miss Curtiss and I talked it over before the preliminary hearing, and she had put the words in my mouth, the different things to say.' * * *

"Q. Was that why you didn't ask her what some of the things were that she testified to? A. I really don't know why, we didn't discuss the things at all, only things in general; she said that there were some things that she had told on the stand that were untrue."

After the defense rested, the motion of the prosecution to strike all of the foregoing testimony of Flaten and Thomas impeaching Nelson was granted and the jury instructed to disregard it, on the ground that it was impeachment by contradictory statements and no foundation or predicate had been laid by asking the witness to be impeached whether or not she had made such a statement, giving the time, place and persons present.

[1] It is undoubtedly the general rule that: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent, with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them." Code Civ.Proc. § 2052. However, we do not believe that the foundation requirement is necessary where it is impossible to comply with it due to no fault of the party urging the impeachment.

[2, 3] In the instant case the prosecution was enabled to read the transcript of Nelson's testimony given at the preliminary hearing on the basis of a showing (the suffi-

ciency of which we do not decide) that the witness was out of the state. Pen.Code, § 686; Code Civ.Proc. § 1870(8). The witness was not therefore available to either the prosecution or defendants. The impeaching evidence consisted of statements made by the witness *after* she had testified at the preliminary hearing and hence could not have been used at the preliminary hearing. The defendants are helpless in meeting the testimony by a method which may refute it entirely or cast serious doubts upon its veracity, namely, subsequent contradictory statements or admissions by the witness that the testimony was false. Justice and fairness compel one of two results, that the testimony at the former trial be excluded or that the impeaching evidence be admitted. The reading of the former testimony is expressly permitted by the code (Pen. Code, § 686; Code Civ.Proc. § 1870(8), and the goal of all judicial proceedings is to bring before the trier of fact all pertinent evidence. Hence the rule allowing the use of former testimony is a salutary expedient in the administration of justice. But it is equally clear that by reason of the same principle the impeaching evidence should be admitted for what it is worth. It is also evidence which throws additional light upon the case.

[4] The reason for the requirement that a foundation be laid is in furtherance of that policy. To prevent the surprise of the party offering the witness, that is, to give him data from which his witness may refute or explain the impeachment, and to present the complete picture of the credibility of the witness by preserving the opportunity to explain or refute, and the danger of false testimony by the impeacher are valid reasons for the rule. With reference to surprise, the prosecution should bear that burden when they take advantage of the unavailability of the witness as a basis for introducing the testimony at a former hearing. Insofar as the reasons for the rule consist of the endeavor to get all of the pertinent evidence before the court and to further test the credibility of the impeachment, the lack of the foundation cannot be said to impair the value of the impeaching testimony to the point where it should be rejected when it is impossible to lay the foundation.

[5] Closely analogous to the question here presented, is the rule declaring admissible, contradictory statements to impeach dying declarations. The only difference of consequence is that the offeror of the impeaching evidence had no opportunity to cross-examine the declarant. There is, however, the right of cross-examining the witness to the declaration, and like in the case at bar, the declarant-witness is unavailable, making the laying of a foundation impossible. The same principles should be applicable in both cases. Dying declarations may be impeached by contradictory statements of the deceased without laying a foundation. People v. Amaya, 134 Cal. 531, 66 P. 794; People v. Lawrence, 21 Cal. 368; People v. Attema, 75 Cal.App. 642, 243 P. 461; Carver v. United States, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602; 16 A.L.R. 419; III Wigmore on Evidence, 3d Ed., § 1033. It has been held that there is a distinction between impeaching dying declarations and testimony at a former trial because of the opporunity to cross-examine in the latter case (Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 345, 39 L.Ed. 409), but as we have seen the issue is largely one of the value of the evidence, and that factor should not be decisive. The Mattox case was by a divided court, and Justice Shiras, dissenting, in discussing the question, stated: "Undoubtedly the credit of witnesses testifying under oath should not be assailed by evidence of their statements made elsewhere, without affording them, if practicable, in justice to them and to the party calling them, with an opportunity to deny, explain, or admit; but it must not be overlooked that the primary object of the trial is not to vindicate the truth or consistency of witnesses, but to determine the guilt or innocence of the accused. If the evidence tending to show that the testimony of an essential witness cannot be relied on because he has made contradictory statements elsewhere, and at other times, is valid and admissible, as the authorities all concede, why should the right to put in such evidence be destroyed by the incidental fact that the witness, by reason of death, cannot be produced to deny or to admit that he made such statements? Does not the necessity call for a relaxation of the rule in such a case?" In Carver v. United States, supra, the court permitted the impeachment in the case of dying declarations and cited the Mattox case, but stated, at page 698 of 164 U.S., at page 230 of 17 S.Ct., 41 L.Ed. 602: "We are not inclined to extend it to the case of a dying declaration * * *." The opportunity to cross-examine is not of too great significance when we have a case where the contradictory statements were

made after the former testimony or were not known to the impeacher at the time. In such case he never had an opportunity for cross-examination to test the witnesses' reliability on that ground.

[6] The modern tendency is to relax rigid rules of evidence—to escape from a slavish adherence to them with the accompanying hardship, injustice and prevention of a full disclosure of all pertinent circumstances to the trier of fact. Dean Hale, of the School of Law of the University of Southern California, aptly states: "However, it doubtless is possible to follow this rule, calling for foundation, too slavishly. Cases arise in which the laying of the foundation is impossible or impracticable—for example, where a deposition is taken and the conflicting statements are made thereafter, or where the declarant of admissible hearsay has told conflicting stories." (10 So.Cal.L.Rev. 136.) We conclude therefore that no predicate was necessary for the impeaching evidence in the instant case.

The cases of People v. Witty, 138 Cal. 576, 72 P. 177; People v. Compton, 132 Cal. 484, 64 P. 849; People v. Greenwell, 20 Cal.App. 2d 266, 66 P.2d 674; People v. Seitz, 100 Cal.App. 113, 279 P. 1070; People v. Garnett, 9 Cal.App. 194, 98 P. 247; People v. Pembroke, 6 Cal.App. 588, 92 P. 668, seem to hold contrary to the views herein expressed. The Compton and Witty cases were decided in department and no hearing in bank was requested. The judgment of conviction of defendant in the Compton case was reversed on the ground that the jury was not properly selected. The court then volunteered the holding that the defendant could not impeach by contradictory statements the testimony of a prosecution witness read from the transcript thereof at the preliminary hearing. There is no discussion, the court merely remarking, at page 486 of 132 Cal., at page 850 of 64 P.: "We know of no rule of law justifying the impeachment of the witness under these circumstances." The Witty, Greenwell, Garnett and Pembroke cases merely cite the Compton case or other cases without discussion. None of the cases cite or discuss People v. Lawrence, supra. Insofar as those cases hold that the testimony of a witness given at a former trial, and read at the instant trial, because of the nonavailability of the witness cannot be impeached by contradictory statements made subsequent to the former trial, or by statements made prior thereto but where the impeacher clearly shows that he had no knowledge of such contradictory statements, they are, and each of them is, overruled.

The judgments and order denying a new trial are reversed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

SPENCE, Justice (dissenting).

I dissent.

It would serve no useful purpose to review further the sordid details of the testimony relating to appellants' drunken debauch and the brutal treatment inflicted upon the deranged victim. Disregarding entirely the testimony of Miss Nelson, there was abundant evidence which pointed unerringly to the guilt of appellants on all counts. I am therefore of the opinion that the error, if any, in striking the evidence tending to impeach the testimony of Miss Nelson was not prejudicial and that it cannot be said to have resulted in a miscarriage of justice. Const. art. VI, § 4½.

SHENK and EDMONDS, JJ., concurred.



27 Cal.2d 819

WESTERN COAL & MINING CO. v. JONES.

L. A. 19537.

Supreme Court of California, in Bank.

March 28, 1946.

1. Limitation of actions ⇐141

Under statutory rule regarding tolling of statute of limitations by subsequent writing, either an acknowledgment or a promise is sufficient. Code Civ.Proc. § 360.

2. Limitation of actions ⇐148(4)

A "promise" which will toll statute of limitations is an engagement to pay the debt. Code Civ.Proc. § 360.

See Words and Phrases, Permanent Edition, for all other definitions of "Promise".

3. Limitation of actions ⇐148(4)

An "acknowledgment", which will toll statute of limitations, is an admission or

recognition of existence of debt and an acknowledgment standing alone is sufficient even though it is insufficient from which to imply in fact a promise to pay. Code Civ.Proc. § 360.

See Words and Phrases, Permanent Edition, for all other definitions of "Acknowledgment".

4. Limitation of actions ⇐148(2), 149(1)

The law will imply a promise to pay a debt from a bare acknowledgment but acknowledgment will not be sufficient to toll statute of limitations if there are circumstances showing an unwillingness to pay or refuting an intent to contract to pay. Code Civ.Proc. § 360.

5. Limitation of actions ⇐148(3)

Agreement that old stock which was held as security for defendant's obligation was to be replaced by new stock which was to stand as security and that new stock should be subject to lien of notes, constituted a sufficient "acknowledgment" to toll statute of limitations. Code Civ. Proc. §§ 337, 360; Civ.Code, §§ 2877, 2911.

6. Limitation of actions ⇐151(1, 3)

In determining whether agreement for substitution of security was a sufficient acknowledgment tolling statute of limitations, it was not significant that agreement was prepared by creditor and was executed after statute of limitations had run. Code Civ.Proc. § 360

7. Limitation of actions ⇐199(3)

The interpretation of a written instrument and its sufficiency as an acknowledgment tolling statute of limitations is a question of law where there is no conflict in the evidence or issue of credibility of oral testimony. Code Civ.Proc. § 360.

8. Appeal and error ⇐842(1)

Supreme Court was not bound by a determination of trial court on issue of sufficiency of instrument as an acknowledgment tolling statute of limitations where there was no conflict in the evidence. Code Civ.Proc. § 360.

9. Judgment ⇐822(3)

A judgment against plaintiff in one state on ground that statute of limitation has run on obligation is not res judicata in an action in a sister state on the same obligation in so far as statute of limitation is concerned.

10. Limitation of actions ⇐165

The running of statutory period of limitation does not extinguish cause of action but merely bars the remedy.

11. Limitation of actions ⇐2(1)

The law of the forum rather than where obligation arose governs statutes of limitation and their applicability, except where cause of action has arisen in another state or in a foreign country and by the laws thereof an action thereon cannot there be maintained by reason of lapse of time. Code Civ.Proc. § 361.

12. Limitation of actions ⇐2(1)

Even if statutory exception to application of law of forum was applicable in action on notes payable in Missouri, action commenced within the 10 year period fixed by Missouri statute would not be barred. Code Civ.Proc. § 361; Mo.R.S.A. § 1013.

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action on three notes by Western Coal & Mining Company against George H. Jones. Judgment for defendant and plaintiff appeals.

Reversed.

For prior opinion of district court of appeal, see, 161 P.2d 418.

Whitelaw & Whitelaw, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

CARTER, Justice.

Three promissory notes totaling $238,000 were executed by defendant and three comakers, two payable to Festus J. Wade & Co. and one to Festus J. Wade, Jr. Two of the notes matured on January 2, 1934, and the third on January 3, 1934. The notes were transferred to plaintiff. Plaintiff's action on the notes was commenced on October 20, 1941.

Defendant defended on the ground, among others, that the action was barred by the statute of limitation. Code Civ. Proc. § 337. His defense that it was so barred is based upon the contention that the acknowledgment urged by plaintiff as taking the case out of the statute of limitation was insufficient to suspend the running of the statute, and had become res judicata

as to plaintiff by reason of a judgment in Arizona against plaintiff and in favor of one Hilvert, one of the comakers with defendant on the note. Plaintiff relied upon an alleged acknowledgment or new and continuing promise as taking the case out of the operation of the statute of limitation. The court found the action to have been barred by the statute of limitation and the acknowledgment insufficient to suspend the running of the statute.

In connection with the acknowledgment it appears that stock in the S. A. Gerrard Company, a corporation, owned by the makers of the notes, was held by plaintiff as security for the payment of the notes. There having been a reorganization of the corporation which contemplated the issuance and exchange of old stock for new, plaintiff on December 10, 1938, wrote to defendant enclosing a form of "agreement" for defendant's "signature covering the exchange of stock in The S. A. Gerrard Company pursuant to the Plan of Reorganization, and in consideration of our censent to this Plan.

"We ask you to agree to endorse in blank the certificates for the new Common Stock to be issued in exchange for the 10,000 shares of old Common Stock issued in the name of Geo. H. Jones and Carolyn M. Jones and endorsed by Geo. H. Jones and Carolyn M. Jones in blank; and to return the new stock to us in place and stead of the old stock now held by us as collateral security for the notes signed by Geo. H. Jones and others." Defendant returned to plaintiff the "agreement" executed by him, which stated that in consideration of plaintiff consenting to the reorganization of the corporation, defendant agrees that upon delivery by plaintiff to the corporation of defendant's old stock in the corporation "which Western Coal and Mining Company [plaintiff] holds as security for the obligations of" defendant to plaintiff, for exchange for the new stock, "to endorse, in blank, ready for transfer, the certificates for said new Common Stock issued in exchange for said deposited stock; such endorsement to be in, substantially, the same manner, and for the same purpose that said deposited Common Stock has been endorsed by the [defendant] undersigned." The concluding paragraph followed, reading: "Said new Common Stock, when so endorsed and when received by [plaintiff], will be deemed substituted by [plaintiff], as holder of the certain notes signed by the undersigned [defendant] and other parties and without releasing or in anywise impairing the liability of the undersigned [defendant] under said notes; and said new Common Stock so deposited under said notes shall be as fully *subject to the lien* of said notes as if specifically referred to and described in said notes." [Emphasis added.]

[1-4] The statutory rule in respect to the tolling of the statute by a subsequent writing provides: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." Code Civ.Proc. § 360. It is to be noted that the acknowledgment and promise are stated in the alternative, thus indicating that either one or the other will be sufficient to toll the statute. A promise is plainly what the word imports, namely an engagement to pay the debt. Naturally it may be either express or implied in fact. The ordinary meaning of acknowledgment is an admission or recognition of the existence of the debt. Hence it would appear that an acknowledgment standing alone would be sufficient even though it is insufficient from which to imply in fact a promise to pay. It is generally assumed, however, that the acknowledgment must be unqualified and unconditional, that is, while the law will imply a promise to pay from a bare acknowledgment, it will not be sufficient if there are circumstances showing an unwillingness to pay or refuting an intent to contract to pay, thus injecting the implied in fact promise feature into the case where such circumstances are present. The rule is stated in Biddel v. Brizzolara, 56 Cal. 374, 380:

"The law, then, as now fully established both in England and in this country, clearly is: 1. That a debt barred by the Statute of Limitations may be revived by a new promise. 2. That such new promise may either be an express promise or an implied one. 3. That the latter is created by a clear and unqualified acknowledgment of the debt. 4. That if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or contract to pay, no implied promise is created. * * *

"We think that § 360 of the Code of Civil Procedure does not establish a different rule in this State. The purpose of

that section is to establish a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of *evidence* by which the promise or acknowledgment shall be proved." This court said in Southern Pacific Co. v. Prosser, 122 Cal. 413, 415, 52 P. 836, 837, 55 P. 145: "The distinct and unqualified admission of an existing debt, contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same. From such an acknowledgment the law implies a promise to pay." See Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78; Curtis v. Holee, 184 Cal. 726, 195 P. 395, 18 A.L.R. 1024; Foster v. Bowles, 138 Cal. 346, 71 P. 494, 649; Concannon v. Smith, 134 Cal. 14, 66 P. 40; Sterling v. Title Ins. & Trust Co., 53 Cal.App.2d 736, 739, 740, 128 P.2d 31; Van Cauteren v. Forger, 45 Cal.App. 2d 388, 392, 114 P.2d 6; Heiser v. McAlpine, 20 Cal.App.2d 467, 471, 67 P.2d 141; Maurer v. Bernardo, 118 Cal.App. 290, 5 P.2d 36; Foristiere v. Alonge, 98 Cal.App. 563, 277 P. 367; Armstrong v. Maupas, 97 Cal.App. 710, 712, 276 P. 148; First Nat. Bk. of Park Rapids v. Pray, 86 Cal.App. 484, 489, 260 P. 933; Shirley v. Shirley, 83 Cal.App. 386, 390, 256 P. 823; Hayes v. O'Marr, 81 Cal.App. 210, 212, 253 P. 749; Wilson v. Walters, 66 Cal.App.2d 1, 151 P.2d 685; Outwaters v. Brownlee, 22 Cal.App. 535, 538, 135 P. 300; Rest. Contracts, § 86(2) (a).

[5, 6] In applying the foregoing principles to the instant case, there is no doubt that the acknowledgment was sufficient. There is nothing conditional or qualifying in defendant's admission of liability. That there is an admission of an existing liability follows from the recital that the old stock which was held as *security* for defendant's *obligation* was to be replaced by new stock which was to stand as security the same as the old, that is, serve the *same purpose* as the old. It was agreed the new stock was *deemed substituted* for the old by plaintiff as holder of the *notes*. The substitution shall not impair the liability of defendant under said *notes*. The stock shall be subject to the *lien* of said *notes*. All these factors show a clear admission of present liability. Certainly there is an unqualified admission of the lien and the existence of the stock as security for the payment of the debt. "The acknowledgment of the mortgage is an acknowledgment of the debt secured by the mortgage." Curtis v. Holee, supra, 184 Cal. 730, 195 P. 397, 18 A.L.R. 1024; see, also, Foster v. Bowles, supra. There is a plain analogy between that rule and the circumstances here involved where the debtor acknowledges the lien and the security of the stock for the payment of the debt. Indeed not only is the lien expressly kept alive but different security is substituted in place of the old. If the debt was barred the lien on the pledged stock would fail. Civ.Code, §§ 2911, 2877. It is not likely that the debtor would recognize the lien and give substituted security without tacitly admitting the existence of the liability. It is not significant that nothing was said about an acknowledgment of the debt in the letter from plaintiff to defendant of December 13, 1938, inclosing the agreement here relied upon, or that because the agreement was prepared by plaintiff and was executed after the statute had run, it must be strictly construed against it, or that the main purpose of the agreement was to authorize a substitution of the stock held as security. The wording of the agreement is plain and unequivocal. Even though the purpose of the agreement was to sanction the substitution of the security, still we must take the language as it stands, and the fact remains that implicit in that purpose is the present existence of the debt, otherwise why consent to the exchange? The permission to exchange the stock and to have new stock held as security by the creditor for the payment of the debt together with the wording of the agreement definitely establishes an admission of a subsisting obligation.

Defendant relies upon cases in which it is stated that the writing must be one by which the debtor admits a subsisting debt which he is willing to pay. Stress is laid upon the last clause of that phrase, but as we have seen from the rule stated in the authorities heretofore cited that clause means that there may be no such conditions or qualifications imposed by the acknowledgment which indicate an *unwillingness* to pay, rather than that there must be an express statement of willingness to pay in addition to the admission of a subsisting obligation. The seeming indication to the contrary in Clunin v. First Fed. Trust Co.,

189 Cal. 248, 207 P. 1009, was commented upon as follows in First Nat. Bk. of Park Rapids v. Pray, supra, 86 Cal.App. 489, 260 P. 936:

"It is sufficient if it shows the writer treats the indebtedness as subsisting, and one which the debtor is liable and willing to pay. From this acknowledgment the law implies a promise to pay. Concannon v. Smith, 134 Cal. 14, 66 P. 40; Foster v. Bowles, 138 Cal. 346, 71 P. 494, 649; Clunin v. First Fed. Trust Co., 189 Cal. 248, 207 P. 1009; Searles v. Gonzalez, 191 Cal. 430, 216 P. 1003, 28 A.L.R. 78. The California cases on this subject are reviewed at some length in the case of Clunin v. First Fed. Trust Co., supra, and this conclusion reached by Shaw, C. J.: 'It is clear from all these decisions that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either in itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay.' Such acknowledgment may be made to an agent of the creditor or to some person authorized to receive it. Searles v. Gonzalez, supra.

"In the Clunin case the court quotes from Southern Pacific Co. v. Prosser, 122 Cal. 415, 52 P. 837, 55 P. 146, as follows: 'The distinct and unqualified admission of an existing debt, contained in a writing, signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same.'

"There appears at first blush a difference between the Prosser case and the Clunin case inasmuch as it appears from the conclusion of the court in the latter case that the acknowledgment must contain an admission of a debt which the debtor is liable and willing to pay. However, in the Clunin case all that the court was called upon to decide, and all that was decided, was that the writings offered contained no reference to any debt, or any language which could be said to be uncertain in its meaning and subject to explanation by the aid of extrinsic circumstances so as to be made to refer to a debt."

Defendant discusses numerous cases passing upon the sufficiency of the acknowledgment or promise involved. Each case must be based upon its particular facts and instruments relied upon. Those cases concern a conditional or qualified promise or acknowledgment, or involve an acknowledgment made to a stranger or an express conditional promise which would not justify the implication of an absolute promise, or which lacked the factors existing in the case at bar. We do not have such in the case at bar. For illustration, in the case of Powell v. Petch, 166 Cal. 329, 136 P. 55, doubt was cast on the admission of the debt because it was also said that it was supposed to be paid by an offset. The court did speak of admission of "indebtedness" as being insufficient. Assuming that is true, we have in the case at bar an admission of both liability and obligation. Defendant cites Kemper v. Industrial Acc. Comm., 177 Cal. 618, 171 P. 426, for the proposition that for an acknowledgment to take the case out of the statute of limitation the creditor must prove that he relied upon it. That case does not involve an acknowledgment. It was concerned with an estoppel to plead the statute. The theory of acknowledgments and new promises with respect to the statute of limitation is contract not estoppel. Special reliance is placed upon In re Estate of Azevedo, 17 Cal.App.2d 710, 62 P.2d 1058, but the court there did not pass upon the sufficiency of the acknowledgment as such. It merely held it unavailing as it did not run to the creditor.

[7,8] Defendant claims that the issue of the sufficiency of the acknowledgment was one of fact, pointing to the circumstances surrounding its execution, that is, its preparation by plaintiff and the letter of transmittal; and that the finding of the trial court is conclusive, citing Sherwood v. Lowell, 34 Cal.App. 365, 167 P. 554; Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 48 A.L.R. 1308. In the case at bar there was no conflict in the evidence and the circumstances do not alter the interpretation of the agreement. The interpretation of a written instrument and its sufficiency as an acknowledgment is a question of law where there is no conflict in the evidence or issue of credibility of oral testimony. Sterling v. Title Ins. & Trust Co., 53 Cal.App.2d 736, 128 P.2d 31; Concannon v. Smith, supra, 134 Cal.

20, 66 P. 40. The general rule now in effect with relation to the interpretation of written instruments was stated in Re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 830: "An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence, * * * where there is no conflict in the evidence, * * * or a determination has been made upon incompetent evidence."

The judgment and decision on appeal in Western Coal & Mining Co. v. Hilvert, 60 Ariz. 537, 61 Ariz. 131, 142 P.2d 411, is urged as a controlling precedent and res judicata in the present action. There an action was commenced in Arizona by plaintiff here on the same notes here involved, against one of the defendant's comakers. It was claimed that the case was taken out of the statute of limitation by the same agreement here considered and the judgment of the trial court against that claim was affirmed. Insofar as precedent is concerned, we do not agree with the conclusion there reached. It fails to give full effect to what is deemed to be the law in California as above expressed, that is, that a promise will be implied by law from an unconditional acknowledgment unless the purport of the document is that the admission of the debt is qualified.

[9-11] It may be that, as against the claim of lack of mutuality of estoppel and lack of identity of the parties (the defendants are different), a judgment unfavorable to the plaintiff-holder of a note based on a defense which is the same and common to all the defendant-makers in an action by the plaintiff-holder against one of the defendant-makers, is res judicata as to the plaintiff-holder in a subsequent action against one of the other makers. See Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892. Be that as it may, a judgment against a plaintiff in one state on the ground that the statute of limitation has run on the obligation is not res judicata in an action in a sister state on the same obligation insofar as the statute of limitation is concerned. The rule has been thus stated: "A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case the judgment is on the merits to the extent that it will bar the plaintiff from maintaining a further action in that State, but it is not on the merits so far as actions in other States are concerned. Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. He is not, however, precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State." Rest., Judgments, § 49, comment a. See Bank of United States v. Donnally, 8 Pet. 361, 369, 33 U.S. 361, 369, 8 L.Ed. 974; Brent v. Bank of Washington, 10 Pet. 596, 617, 35 U.S. 596, 617, 9 L.Ed. 547; Brand v. Brand, 116 Ky. 785, 76 S.W. 868, 63 L.R.A. 206; Warner v. Buffalo Drydock Co., 2 Cir., 67 F.2d 540, certiorari denied Buffalo Dry Dock Co. v. Salkeld, 291 U.S. 678, 54 S.Ct. 529, 78 L.Ed. 1066; In re Rutherfurd's Estate, 182 Misc. 1019, 46 N.Y.S.2d 871, 873; Freeman on Judgments, 5th Ed., vol. III, § 1397; 31 Am.Jur. Judgments, § 545. One theory of the authorities appears to be that a judgment determining that an action is barred by the statute of limitation is not one on the merits and therefore is not res judicata. The general rule is that the running of the statutory period does not extinguish the cause of action, but merely bars the remedy. That is the law in California. Mitchell v. Automobile, etc., Underwriters, 19 Cal.2d 1, 118 P.2d 815, 137 A.L.R. 923; 16 Cal.Jur. 599. The law of the forum rather than where the obligation arose governs statutes of limitation and their applicability. (Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264; 16 Cal.Jur. 411), except "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued." Code Civ.Proc. § 361. Therefore, Arizona was applying its own law in Western Coal & Mining Co. v. Hilvert, supra, not California law because the Arizona court was the forum. In the instant case the California court is the forum and we apply our law which, as we have seen, reaches a different result. There is

no merit in the contention that plaintiff is thus enabled improperly to "shop around" to find the state with the most favorable law. He must sue defendant where he is able to serve process upon him and that is a matter under defendant's control.

[12] Assuming but not deciding that the exception to the application of the law of the forum contained in section 361 of the Code of Civil Procedure is applicable, the result would be the same. The notes in the instant case were payable in Missouri. Hence the cause of action thereon arose in Missouri where the contract was to be performed within the meaning of section 361. McKee v. Dodd, 152 Cal. 637, 93 P. 854, 14 L.R.A.N.S. 780, 125 Am.St. Rep. 82. Under the Missouri statute of limitation (Mo.R.S.A. § 1013, a 10-year period) the action would not be barred.

Other points are urged by respondent as supporting the judgment but should be considered on retrial.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 859

CONSOLIDATED VULTEE AIRCRAFT CORPORATION v. UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA LOCAL 904.

L. A. 19456.

Supreme Court of California, in Bank.

April 2, 1946.

1. Arbitration and award ⇐72

An order confirming arbitration award must be read with nunc pro tunc order correcting the order. Code Civ.Proc. §§ 1287, 1288, 1290, 1291.

2. Arbitration and award ⇐72

The Superior Court's correction by a nunc pro tunc order of order confirming arbitration award was a determination that the court had jurisdiction to make the correction. Code Civ.Proc. §§ 1287, 1288, 1290, 1291.

3. Arbitration and award ⇐72, 73

A nunc pro tunc order correcting order confirming arbitration award was the court's disposition of proceedings to vacate award and was subject to right of parties to appeal. Code Civ.Proc. §§ 1287, 1288, 1290, 1291.

4. Arbitration and award ⇐73

A court will not continue with review of an arbitration award in proceedings for confirmation or vacation of the award, if the award does not affect the present relations of the parties.

5. Appeal and error ⇐781(1)

An appellate court will not continue with the review of a decision by the trial court if the decision cannot be enforced.

6. Master and servant ⇐3(2)

Appeals from order vacating arbitration award adding amendment to labor union's collective bargaining agreement with employer were moot and would be dismissed, notwithstanding that employer's opposition to award was responsible for union's loss of dues, and that a determination that award was valid would improve union's collective bargaining position, where new agreement had superseded the agreement to which the amendment related, and rights under the new agreement did not depend on validity of amendment, and employer was under no enforceable duty to agree to amendment. Code Civ.Proc. §§ 1287, 1288, 1290–1292.

7. Appeal and error ⇐781(1)

An appeal is prevented from becoming moot only if the rights of the parties are directly affected by determination of appeal, and the interest of the parties must be an immediate consequence of the judgment.

8. Master and servant ⇐3(2)

The fact that a determination that arbitration award adding amendment to labor union's collective bargaining agreement with employer might improve union's bargaining position in respect to negotiation of future agreements did not give union such an interest in decision of validity of award as to require a decision on the merits after new agreement superseded the agreement to which the amendment related. Code Civ.Proc. §§ 1287, 1288, 1290–1292.

Appeals from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Arbitration proceeding between the United Automobile Aircraft and Agricultural Implement Workers of America Local 904, and the Consolidated Vultee Aircraft Corporation. The Consolidated Vultee Aircraft Corporation filed a motion in the Superior Court to vacate the award of the permanent arbitrators adding an amendment to a collective bargaining agreement. From a nunc pro tunc order, both parties appeal.

Appeals dismissed.

Prior opinion, 160 P.2d 113.

Gibson, Dunn & Crutcher and Ira C. Powers, all of Los Angeles, for Consolidated Vultee Aircraft Corporation.

Katz, Gallagher & Margolis, Milton S. Tyre, and Ben Margolis, all of Los Angeles, for United Automobile Aircraft and Agricultural Implement Workers of America Local 904.

TRAYNOR, Justice.

On June 1, 1942, United Automobile Aircraft and Agricultural Implement Workers of America Local 904, hereinafter referred to as the union, and Consolidated Vultee Aircraft Corporation, hereinafter referred to as the company, entered into a collective bargaining agreement, which was to remain in effect "until June 1, 1943 or, until ninety (90) days after the present war in which this country is engaged is terminated, whichever is longer, and shall thereafter automatically renew itself in its entirety from year to year for a period of one (1) year." On February 19, 1945, the parties entered into a new collective bargaining agreement superseding the former one. They also entered into a separate agreement providing that the agreement of February 19, 1945, shall not prejudice the claims of either party on the present appeal and shall not affect the parties' contentions "concerning the advisability of including therein appropriate provisions on maintenance of membership and check-off."

The present litigation arose under the first agreement, which provided that "if mutual consent for amending Agreement is not given, the desirability of amendment may be referred to the grievance procedure." Grievances were to be submitted to the plant grievance committee of the union and the company's labor relations committee. If the company and union representatives could not agree, they could invoke the arbitration procedure provided for in the agreement. The union initiated grievance proceedings to obtain an amendment adding provisions for maintenance of membership and check-off of union dues and initiation fees. Having failed in the grievance procedure to secure the company's consent to such an amendment, the union invoked the arbitration procedure to have the following amendment added to the contract: "In order to secure the increased production which will result from greater harmony between workers and employers and in the interest of increased cooperation between union and management, which cannot exist without a stable and responsible union, the parties hereto agree as follows: All employees who, 15 days after the date of this amendment to the contract are members of the union in good standing in accordance with the constitution and bylaws of the union and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing. The Company for said employees shall deduct from the first pay of each month the union dues for the preceding month of one dollar ($1.00) and promptly remit the same to the secretary-treasurer of the Local Union. The initiation fee of the Union of three dollars ($3.00) shall be deducted by the Company and remitted to the secretary-treasurer of the Local Union in the same manner as dues collection. The Union shall promptly furnish to the Company a notarized list of members in good standing 15 days after the date of the amendment to the contract. If any employee named on that list asserts that he withdrew from membership in the Union prior to that date and any dispute arises the assertion or dispute shall be adjudicated in accordance with the arbitration procedure of this agreement and the decision of the arbiter shall be final and binding upon the Union, the Employer and the employees."

[1-3] The permanent arbitrator elected by the parties under the contract made an award determining that the parties should add the proposed amendment to their contract. The company filed a motion in the superior court under sections 1288, 1290 of the Code of Civil Procedure to vacate the award on the ground that the arbitrator impaired the exclusive right retained by the

company to hire and discharge its employees and exceeded his jurisdiction in violation of the provision in the agreement that the arbitrator "shall not have jurisdiction to arbitrate provisions of a new agreement or to arbitrate away, in whole or in part, any provisions of this Agreement." The union filed a cross-motion for confirmation of the award under sections 1287 and 1291 of the Code of Civil Procedure. The court made an order confirming the award, but a month later corrected its order nunc pro tunc, stating "that the foregoing amendment does not and shall not be construed to impose any obligation upon the employer to discharge any employe for failure to maintain in good standing his membership in the union according to the Constitution and By-laws of the Union and does not impair the exclusive right to hire and discharge employees given by Article I, Section 6, of the contract to which the amendment relates." The order of the court must be read with this correction. By correcting its order, the court determined that it had jurisdiction to make the correction. The corrected order became the court's disposition of the case and was subject to the right of the parties to appeal. The decision of the court as corrected, nominally a confirmation of the award, was actually a cancellation thereof, for the award made maintenance of membership in the union "a condition of employment" for all employees who were or became union members after the expiration of the 15 days' escape period specified in the award. The order must be read as also denying confirmation to the check-off provision, for it appears from the arbitration proceedings that the check-off of initiation fees and union dues was applied for and allowed only as an incident to the maintenance of membership provision in order to prevent forfeiture of employment by nonpayment of union fees and dues. Both parties appeal.

[4-6] It is contended that the appeals have become moot because the new agreement has superseded the agreement that was to be amended under the award. An amendment that would become inoperative with the termination of a contract obviously cannot take effect after such termination. Since the amendment to which the award relates has become obsolete, a confirmation of the award would be meaningless. A court will not continue with the review of an arbitration award in proceedings for its confirmation or vacation, if the award does not affect the present relations of the parties, just as it will not continue with the review of a decision by a court if the decision cannot be enforced. As the United States Supreme Court declared in Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293: "the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." See California Pacific, etc., Co. v. California Mining & D. Syndicate, 17 Cal.App.2d 353, 355, 61 P.2d 1181; General Petroleum Corp. of California v. Beilby, 213 Cal. 601, 2 P.2d 797; Armstrong v. Sacramento Valley Realty Co., 179 Cal. 648, 651, 178 P. 516; In re Estate of McSwain, 176 Cal. 287, 288, 168 P. 117; Hindman v. Owl Drug Co., 4 Cal. 2d 451, 456, 50 P.2d 438; Fletcher v. Dexter, 60 Cal.App.2d 275, 140 P.2d 697; see 2 Cal.Jur. 749; 1 Cal.Jur. 10-Yr.Supp. 465.

The union contends, however, that it would be entitled to recover damages from the company if the award were confirmed. In this regard the union asserts that subsequent to the award and before the new contract was made, thousands of union members failed to pay their dues and thereby became delinquent in their membership; that such delinquencies would not have occurred had the maintenance of membership clause been in effect; and that therefore the company, by opposing the award in the confirmation proceedings, was responsible for the union's loss of union dues. The union, however, could claim damages only if the company was guilty of a breach of contract. There was no such breach, for the company was under no duty to agree to the amendment of the contract in the absence of a confirmation of the award. Under the pertinent provisions of the Code of Civil Procedure an award becomes enforceable only if it is confirmed

by the superior court, § 1287. Upon such confirmation it is made enforceable by the entry of a judgment, § 1291, which "has the same force and effect, in all respects, as, and is subject to all provisions of law relating to, a judgment in an action; and * * * may be enforced, as if it has been rendered in an action in the court in which it is entered." § 1292. In the present case, since the company had made a motion to vacate the award, no order of confirmation and no judgment for the enforcement of the award could be entered until the motion to vacate the award was disposed of. §§ 1287, 1288. Since the order that the trial court entered before the new contract was made was in effect an order vacating the award, the company was under no enforceable duty to agree to the amendment.

The duty that would have been imposed upon the company by the award had it become enforceable did not exist independently of the award. The award was not made to determine existing contract rights; its purpose was to create contract rights that had not previously existed and therefore could not be enforced or violated before the award became enforceable. There is a clear distinction between such an award and an award determining that existing contract rights have been violated. "Arbitration is frequently used as a method in the settlement of labor disputes. Occasionally it is used to interpret the terms of an existing contract, but more often it is utilized for the purpose of making a contract, or creating or perfecting the relation of employer and employee between the respective parties. Arbitrations concerning wage disputes and union recognition are of this type. They are not judicial in their nature but are rather a part of the collective bargaining process. These arbitrations are like commercial arbitrations in name alone." 6 Williston, Contracts, rev. ed., § 1930. The present award is also clearly distinguishable from an award prescribing an increase in wages as of a specified date. If such an award is confirmed after the date specified for the commencement of the wage increase, it follows from the terms of the award that back-pay can be collected thereunder after its confirmation. Such back-pay represents, not the payment of damages for violation of a contract, but the performance of an obligation created by the award.

[7, 8] The union also contends that a determination that the award was valid and should have been confirmed would greatly improve its bargaining position. In this respect it refers to the provision in the present collective bargaining agreement that the agreement will not affect the contentions of the parties as to the advisability of including therein provisions on maintenance of membership and check-off. It contends that "The very existence of maintenance of membership and check-off clauses in the recently expired contract would provide a greater arguing point for the union in demanding the same in its present 1945–1946 contract and in all future contracts. * * * It is well known among those who participate actively in collective bargaining negotiations that the presence or absence of a particular clause in a recently expired contract often is the most influential factor in determining the presence or absence of the same provision in the next following contract." If present rights of the union or the company depended on the validity of the award, the appeals would not be moot even though the amendment could not be put into effect. Thus, if the present agreement provided that maintenance of membership and check-off provisions should be inserted therein if the award validly provided such amendment of the former agreement, the determination of its validity would involve present contract rights of the parties and would therefore not be an abstract decision. The union does not claim, however, that its rights under the new contract depend upon the determination of the present litigation. It contends merely that its chances to improve its present contract would be increased if it were determined that the award should have been confirmed. An appeal is prevented from becoming moot only if the rights of the parties are directly affected by its determination. Their interest must be "immediate * * * and not a remote consequence of the judgment." Hamilton Trust Co. v. Cornucopia Mines Co., 9 Cir., 223 F. 494, 499, 139 C.C.A. 42; California Pac., etc., Co. v. California Mining & D. Syndicate, supra, 17 Cal.App.2d 353, 354, 61 P.2d 1181. The possibility that the union might be able to utilize a favorable decision on its present appeal for the creation of future contract rights does not constitute such an immediate interest in the present litigation as is required for pro-

ceeding therewith to a judgment on the merits.

The questions presented on these appeals having become moot, the appeals are dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



27 Cal.2d 802

EDWARDS v. HOLLYWOOD CANTEEN.

L. A. 19463.

Supreme Court of California, in Bank.

March 28, 1946.

Rehearing Denied April 25, 1946.

1. Workmen's compensation ⇐238, 244, 255

Under definition of "employee" in workmen's compensation statutes, there must be a contract of hire or employment, though pecuniary consideration is not required, and services voluntarily and gratuitously performed are not included. Labor Code, §§ 3351, 3601, 3706.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Workmen's compensation ⇐255, 2089

A professional dancer and radio actress who gratuitously acted as hostess at servicemen's recreation center was not an "employee" within workmen's compensation statutes, and hence was not barred from recovering at law from operator of the center for injuries suffered while dancing with a boisterous marine. Labor Code, §§ 3351, 3601, 3706.

3. Theaters and shows ⇐6

Ordinances making it a misdemeanor to permit intoxicated, boisterous or disorderly persons to enter or remain in public dance, if applicable to servicemen's recreation center, could be considered in ascertaining the standard of conduct required of operator of the center as affecting liability to hostess injured while dancing with boisterous marine.

4. Negligence ⇐11

A suit for damages is based on theory that the conduct inflicting injuries is a common-law tort, and significance of statute in civil suit for negligence lies in its formulation of standard of conduct that the court adopts in determination of such liability, only because the court accepts and applies it except where result would be to impose liability without fault.

5. Theaters and shows ⇐9

Ordinances making it a misdemeanor to permit intoxicated, boisterous or disorderly persons to enter or remain in public dance indicated intent to include dances to which large and more or less indiscriminate groups of public are invited, regardless of whether charge is made.

6. Statutes ⇐184

Legislation must be interpreted where possible to fully carry out its purpose.

7. Theaters and shows ⇐9

Dances held at servicemen's recreation center, though not "public" in strictest sense, were subject to ordinances against permitting intoxicated, boisterous or disorderly person to enter or remain in public or club dance.

See Words and Phrases, Permanent Edition, for all other definitions of "Public".

8. Negligence ⇐2

A duty to protect plaintiff from boisterous and rough conduct of third persons may be based upon common-law principles of negligence.

9. Theaters and shows ⇐6

A corporation operating servicemen's recreation center received a benefit greater than intangible social benefit, from presence of professional dancer and radio actress acting gratuitously as hostess, and hence owed duty to her to exercise ordinary care to render the premises safe and to protect her from injury.

10. Negligence ⇐32(1)

The occupier of premises is under duty to protect visitors, from whom occupier receives a benefit greater than intangible social benefits by taking appropriate measures to restrain conduct by third persons which occupier should be aware of and should realize is dangerous.

11. Theaters and shows ⇐6

Evidence supported findings that corporation operating servicemen's recreation

center violated ordinances and was negligent in permitting boisterous marine to remain on premises and injure hostess by rough jitterbug dancing.

12. Workmen's compensation ⇐2110

Determination that plaintiff was not an "employee" under Workmen's Compensation Law would not mean that she was not within statute abolishing defense of assumption of risk in actions for employee's injuries based upon employer's negligence. Labor Code, §§ 2801, 3351, 3601, 3706.

13. Theaters and shows ⇐6

A finding that marine danced boisterously with hostess rendering gratuitous services at servicemen's recreation center, "against her will", was sufficient to show that hostess could not have assumed the risk of marine's conduct if hostess were deemed not an employee of the center. Labor Code, § 2801.

14. Theaters and shows ⇐6

In action by hostess rendering gratuitous services at servicemen's recreation center, for injuries suffered while dancing with boisterous marine who insisted on jitterbug dancing, evidence supported findings that plaintiff did not assume risk and was not guilty of contributory negligence.

15. Charities ⇐45(2)

A corporation operating servicemen's recreation center was not exempt from liability to hostess injured while dancing with boisterous marine on ground that it was a charitable organization, since hostess was not a recipient of charitable benefits.

16. Charities ⇐45(2)

Persons who are not recipient of charity, such as employees and strangers, may sue charitable organization for negligence.

17. Damages ⇐132(3)

$5,000 was not excessive for dislocated coccyx, wrenched vertebrae and severe shock, causing great pain and loss of plaintiff's earning capacity as dancer and radio actress.

18. Damages ⇐133

Evidence supported award of $55 a week, less actual earnings from date of accident to entry of judgment, as special damages to professional dancer and radio actress for loss of earnings.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Florida Edwards against the Hollywood Canteen, a corporation, for personal injuries sustained at recreation center operated by defendant. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 160 P.2d 94.

Schell & Delamer, of Los Angeles, for appellant.

Keith & Creede and Donald Gallagher, all of San Francisco, Richard Barry, of Placerville, Kathryn Flanagan, of Los Angeles, and Everett A. Corten and R. C. McKellips, both of San Francisco, as amici curiæ on behalf of appellant.

Stanton & Stanton, of Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff, a volunteer hostess at the defendant Hollywood Canteen, was injured while dancing with a member of the armed forces on premises maintained by defendant. She brought this action for damages based on asserted negligence by defendant in permitting plaintiff's dancing partner to engage in rough and boisterous conduct without plaintiff's consent. Defendant has appealed from a judgment in favor of plaintiff.

The Hollywood Canteen is a corporation created for the purpose, among others, of providing recreational facilities for men in the armed forces. Plaintiff, a professional dancer and a radio actress, was requested by a federation of radio artists to which she belonged to assist defendant in entertaining enlisted men. She volunteered to act as a hostess on Saturday evenings and her services were gratuitously given as a contribution of the local entertainment industry to the war effort.

Defendant maintained a dance floor and provided orchestras. Servicemen were admitted, free of charge, in groups of 500, and all men were inspected as they entered the premises by members of the military police and the navy shore patrol.

On October 31, 1942, at the time of the accident, the dance floor was very crowded. At about 11 o'clock plaintiff, on duty as a hostess, consented to dance with a member of the marine corps. He immediately began to "jitterbug." Plaintiff protested,

whereupon he took a firm grip on her arm and started to "throw" her around in "wild jitterbug antics." After dancing three or four minutes, during which plaintiff vainly attempted to get away and repeatedly screamed for help, the marine whirled or spun plaintiff around, letting go of her completely. He struck a table, lost his balance and failed to catch her, as a result of which she fell and was injured.

The trial court found that the serviceman's conduct in dancing in such a manner against plaintiff's will and on the crowded dance floor was dangerous and constituted him a boisterous person, that defendant in permitting him to dance in this manner violated city ordinances which made it unlawful for persons in charge of "any public dance hall, public dance or club dance" to permit any intoxicated, boisterous or disorderly person to enter or remain, or assist in any such dance, and that defendant was negligent.

[1] A preliminary question is whether plaintiff was an "employee" within the meaning of the workmen's compensation provisions of the Labor Code, since, if she was, she should have applied to the Industrial Accident Commission for relief rather than to the superior court, it not appearing that defendant had failed to secure payment of compensation to employees as required by the code. Labor Code, §§ 3601, 3706. Section 3351 of the Labor Code, which governs workmen's compensation cases, defines "employee" to mean "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed * * *." It is asserted that plaintiff does not fall within this provision because the trial court found that the junior hostesses, including plaintiff, were "volunteers," that none of them received pay, and that their services were "gratuitously given as a contribution of the local entertainment industry * * * to entertain and render comforts to service men on leave."

Under the statutory definition there must be a contract of hire or employment, although a *pecuniary* consideration is not required, and services voluntarily and gratuitously performed are not included. McBurney v. Industrial Acc. Comm., 220 Cal. 124, 30 P.2d 414; Hartford A. & I. Co. v. Industrial Acc. Comm., 139 Cal.App. 632, 637, 34 P.2d 826; see Gabel v. Industrial Acc. Comm., 83 Cal.App. 122, 125, 256 P. 564; Union Lumber Co. v. Industrial Acc. Comm., 12 Cal.App.2d 588, 595, 596, 55 P. 2d 911; 27 Cal.Jur. 277, 278. For example, the Industrial Accident Commission has said that a carpenter injured while donating his services to the Red Cross was not working in its employ, because a gift, rather than a contractual relationship, was intended. Hitchcock v. American Red Cross, 1919, 6 I.A.C. 58. In another case the commission concluded that an individual acting as a guard during a liberty bond drive "was rendering gratuitous service as a mere volunteer" and was not working under a contract of hire. Vest v. Shaul, 1922, I.A.C. 292; see, also, Heinrichs v. Trustees of Zion Church, 7 C.C. 164; Calavan v. Fitts, 10 I.A.C. 24.

A like interpretation has been made in other jurisdictions having statutes similar to section 3351. In Bituminous Casualty Co. v. Industrial Comm., 1944, 245 Wis. 337, 13 N.W.2d 925, school teachers injured while assisting in issuance of war ration books were held to be volunteers, moved solely by patriotism, and not working under a contract of hire. A person voluntarily participating in a carnival for prospective students of a university was not considered to be an employee under a contract of hire. Athletic Ass'n of University of Illinois v. Industrial Comm., 384 Ill. 208, 51 N.E.2d 157. See, also, Brannaman v. Richlow Mfg. Co., 106 Colo. 317, 104 P.2d 897, 898; Harris v. Seiavitch, 336 Pa. 294, 9 A.2d 375; Smith v. State Ind. Acc. Comm., 144 Or. 480, 23 P.2d 904, 25 P.2d 1119; cf. Powell v. Twin Drilling Co., 300 Mich. 566, 2 N.W.2d 505.

The case of County of Monterey v. Industrial Acc. Comm., 199 Cal. 221, 224, 226, 248 P. 912, 47 A.L.R. 359, is distinguishable. It was there held that a deputy sheriff serving under an "appointment," rather than under a "contract of hire," was an employee even though he received no pay. It is clear, however, that a citizen compelled by a sheriff to act as a deputy is not a "volunteer," since the law imposes a duty to serve. The difference between compulsory service in public emergency (giving rise to a legal relationship of employment), and purely volunteer service, has been recognized in other jurisdictions, although the rule is not uniformly adopted. Eaton v. Bernalillo County, 46 N.M. 318, 128 P.2d 738, 142 A.L.R. 647; see cases

collected in 142 A.L.R. 657; cf. City of Long Beach v. Industrial Acc. Comm., 4 Cal.2d 624, 51 P.2d 1089. In Department of Natural Resources v. Industrial Acc. Comm., 208 Cal. 14, 279 P. 987, it was held that a volunteer deputy fish and game warden, serving without pay, was not entitled to workmen's compensation.

Tucker v. Cooper, 172 Cal. 663, 158 P. 181, cited by the Industrial Accident Commission in an amicus curiae brief, does not hold that a person can be an employee although serving gratuitously. The case involved an exchange of services between the plaintiff and the defendant, which supplied ample consideration for a contract, and the court properly held that the right of control existed and that there need be no *pecuniary* compensation. 172 Cal. at pages 667, 668, 158 P. at pages 182, 183. Furthermore, the Tucker case did not involve the workmen's compensation law.

[2] It is unnecessary to pass upon the question of whether the Legislature, under section 21 of article XX of the Constitution, may provide compensation benefits for persons injured in the course of services which are rendered gratuitously. See, for example, Labor Code, §§ 3361, 4301–4337, relating to registered volunteer firemen and registered civilian defense workers. We hold only that volunteer gratuitous services are not within section 3351, the only provision which might bring plaintiff within the compensation law.

The next question, therefore, is whether defendant was negligent in failing to stop plaintiff's partner from dancing with her in a boisterous manner. There are two aspects to the problem: first, whether defendant owed plaintiff a duty of care to protect her against such conduct by her partner, and, second, whether the evidence supports the finding that, under all the circumstances of this case, defendant violated its duty.

[3, 4] In determining that such a duty of care existed, the trial court relied, at least in part, on the city ordinances which made it a misdemeanor for any person to permit any intoxicated, boisterous, or disorderly person to enter or remain in any public dance hall, public dance, or club dance. The court found that defendant violated these ordinances and was negligent. If it appears that the ordinances, under their terms, were applicable, it was clearly proper for the trial court to look to them in ascertaining the standard of conduct required of defendant. As said in Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777, 778: "A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort. * * * The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. (See Holmes, The Common Law, 120–129; Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L.Rev. 453.) The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. * * * When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them * * *, except where they would serve to impose liability without fault." See, also, Hopper v. Bulaich, Cal.Sup., 164 P.2d 483.

[5-7] Defendant contends that it is not within these ordinances because it did not admit all members of the public, but only enlisted men in the armed forces, and, further, because it did not charge an admission fee. The fact, however, that the ordinances cover club dances as well as public dances indicates an intent to include dances to which large and more or less indiscriminate groups of the public are invited, regardless of whether any charge is made. Also, legislation must be interpreted where possible to fully carry out its purpose, and here the obvious intent was to afford certain safeguards for the protection of persons attending such dances. Although the dances held at the canteen may not have been "public" in the strictest sense of the term, they were clearly of the type to which the prescribed safeguards were appropriate, and plaintiff was within the class designed to be protected.

[8, 9] Moreover, a duty of care to protect plaintiff from boisterous and rough conduct of third persons may be based upon common-law principles of negligence. In considering this question it is first necessary to determine the relationship between the parties. It appears that plaintiff was on defendant's premises at the re-

quest or invitation of defendant for the purpose of aiding it in the promotion of its objective of providing gratuitous entertainment for members of the armed forces. Thus while plaintiff was invited on the premises for what might be viewed in the nature of a social affair, the entertainment carried on was part of defendant's corporate function and plaintiff was present to aid in fulfillment of that function, and it is therefore quite clear that defendant received a benefit from the presence of plaintiff. See Kalinowski v. Y. W. C. A., 17 Wash.2d 380, 135 P.2d 852; Heckman v. Sisters of Charity, etc., 5 Wash.2d 699, 106 P.2d 593. The benefit conferred in this case on defendant by plaintiff was not that intangible social benefit conferred by social visitors which Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588, 92 A.L.R. 1002, held was not sufficient to entitle the plaintiff there involved to a duty of care higher than that owing to a gratuitous licensee.

The fact that the benefit conferred by plaintiff on defendant corporation was of a nonmonetary character does not affect the duty owed to her. In Kalinowski v. Y. W. C. A., supra, the plaintiff, a volunteer supervisor of a dance group was not a paid employee, nor had she paid admission to the dance, yet it was held that she was not a social guest since she was there to benefit the defendant in the carrying out of its program. See, also, 4 Shearman & Redfield on Negligence, § 779, pp. 1783–1789; cf. Davis v. Central Congregational Society, 1880, 129 Mass. 367, 37 Am.Rep. 368.

Thus if plaintiff was on the premises with the express or implied invitation and for the sole benefit of defendant occupier, or for their mutual benefit, defendant owed a duty to plaintiff to exercise ordinary care to render the premises safe and to protect her from injury. Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 157 P.2d 57; Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807 deliveryman on premises delivering goods when injured; Locke v. Red River Lumber Co., 65 Cal.App.2d 322, 150 P.2d 506 purchaser of goods remaining on premises after store hours. In the Kalinowski case, supra, 17 Wash.2d at page 391, 135 P.2d at page 858, it was declared that the volunteer supervisor there involved was an invitee to whom the defendant owed a duty to exercise ordinary care.

[10] The next question is whether the standard of care imposed in the foregoing cases applies where the injury results from acts of a third person on the premises. In Thomas v. Studio Amusements, Inc., 50 Cal.App.2d 538, 123 P.2d 552, the plaintiff sought recovery for defendant's failure to control reckless and speedy roller skating by third parties on defendant's rink. It was there held that while the operator of the skating rink was not an insurer of the patron's safety, nevertheless he owed a duty to protect patrons from risks other than those normally incident to the sport. The court said that "it cannot be argued that one of the normal risks involved is the reckless action of other skaters capable of being prevented by guards * * *." 50 Cal.App.2d at page 543, 123 P.2d at page 555.

In Worcester v. Theatrical Enterprises Corp., 28 Cal.App.2d 116, 82 P.2d 68, which presented facts wherein a patron in a theater was kicked in the back by an intoxicated person, the court recognized that the possessor of premises is liable only where it knew, or should have known, of existing danger. See, also, Anderson v. Ocean Sport Fishing, Inc., 28 Cal.App.2d 712, 83 P.2d 515; Fitzgerald v. Million Dollar Theatre, Inc., 61 Cal.App.2d 17, 141 P.2d 935. Other jurisdictions have recognized this affirmative duty to control another's conduct and thus protect a business invitee who is on the premises for the mutual benefit of the land occupier and the invitee. Rest., Torts, § 348; Prosser on Torts, pp. 199, 609; 35 Mich.L.Rev. 843; 43 Yale L.J. 886. From the foregoing it is clear that the occupier is under a duty to protect visitors such as plaintiff by taking appropriate measures to restrain conduct by third persons which he should be aware of and which he should realize is dangerous.

[11] The evidence in the present case is sufficient to support the findings that defendant violated the ordinances and was negligent. Plaintiff's testimony shows that her partner danced with her in a rough and boisterous manner for a period of approximately three or four minutes immediately before the accident, during which time she repeatedly screamed for help. He weaved his way in and out of the crowd on the floor, dancing "fast and furious," and plaintiff said she was hitting people every way she turned. She testi-

fied, further, that the tempo of the music suddenly increased and that her partner "became wild with it * * * getting so rough he was almost tearing me to pieces." He threw plaintiff out from him and spun her around and then grabbed her and pulled her back to him at least once before she fell. Another hostess, observing a strange expression on plaintiff's face, attempted to reach plaintiff and her partner to ask him to leave the floor, but before she could do so the accident occurred. From this testimony the trier of fact could reasonably conclude that those in charge of the dance, in the exercise of due care, should have observed the marine's conduct, realized that it was likely to result in injury, and stopped it. (See Thomas v. Studio Amusements, Inc., 50 Cal.App.2d 538, 543, 123 P.2d 552, where reckless conduct for a similarly short period of time was held sufficient to permit a finding that the proprietor should have prevented its continuance.)

[12-14] The trial court concluded as a matter of law that the defense of assumption of risk was not available to defendant, and in a written opinion cited section 2801 of the Labor Code which provides that assumption of risk is not a defense in an action for personal injuries by an employee based upon negligence of the employer. Defendant contends that plaintiff was not an employee within the meaning of this section and, therefore, that the trial court erred in failing to find thereon. Although we have determined that plaintiff was not an employee under the workmen's compensation law, this, of course, does not necessarily mean that she is not entitled to the benefits of section 2801 of the Labor Code. We find it unnecessary, however, to determine whether plaintiff was within the cited section because a complete answer to defendant's contention is that the court found that the marine danced boisterously with plaintiff "against her will," and this finding, supported by the evidence, is sufficient to show that plaintiff could not have assumed the risk of his boisterous and reckless conduct. As shown, plaintiff protested dancing the jitterbug as soon as her partner commenced it, whereupon he took a firm grip on her arm and refused to let her go. Plaintiff testified also, that because of her inexperience with the jitterbug dance, the manner in which he held her and the gyrations of the dance she was unable to free herself when the marine whirled or spun her. Although he had let go of her momentarily, there is other testimony to the effect that in dancing the jitterbug the girl cannot escape from a spin into which she has been launched, without "landing on her ear * * * she can't walk away from it upright." The evidence is sufficient to support the finding, and we cannot say that the trial court acted unreasonably in adopting plaintiff's version of what took place and in rejecting evidence to the contrary.

There is also evidence to support the finding that plaintiff was not guilty of contributory negligence. While there is testimony indicating that the marine had been drinking, the trial court could have concluded that plaintiff's dancing partner gave no appearance of being either intoxicated or of a dangerously boisterous character until he had grasped plaintiff and commenced dancing with her, after which she could not escape.

[15, 16] Defendant is not exempt from liability on the ground that it is a charitable organization. The authorities in other jurisdictions are divided on the question of whether a *recipient* of charitable benefits may recover for negligence by the charitable organization, but by the great weight of authority, and clearly the rule in California, persons who are not recipients of the charity, such as employees and strangers, may maintain an action based on negligence. See cases collected in 3 Scott on Trusts (1939), § 402; 14 A.L.R. 576, 581, 585; O'Connor v. Boulder Colorado Sanitarium Ass'n 105 Colo. 259, 96 P.2d 835, 133 A.L.R. 821; Silva v. Providence Hospital, 14 Cal.2d 762, 772, 773, 97 P.2d 798; Phoenix Assur. Co. v. Salvation Army, 83 Cal.App. 455, 256 P. 1106. In the Silva case it was held that a charitable organization must respond in damages to a paying patient whom it injures, the court stating that the policy of the law requiring individuals to be just before generous is applicable to charitable corporations. 14 Cal. 2d at page 775, 97 P.2d 798. It is obvious that the plaintiff in this case was not a recipient of charitable benefits and, therefore, is not barred by any rule of exemption.

[17] Defendant finally contends that the award of general and special damages is excessive. The evidence shows that as a result of the accident plaintiff suffered a dislocated coccyx, wrenched vertebrae

in the lower spine and severe shock. Her injuries caused great pain which continued to the time of trial, and resulted in a loss of earning capacity. An operation, which might relieve the condition, would cost about $1,000. Under the circumstances, we cannot say that the award of $5,000 general damages is excessive. Mondine v. Sarlin, 11 Cal.2d 593, 599, 81 P.2d 903; Slaughter v. Van Winkle, 213 Cal. 573, 2 P.2d 789.

[18] The accident confined plaintiff to her home for two months and thereafter she took whatever employment was available, but she was unable to hold any position for an extended period because of the pain she was suffering. As a result of the accident she was replaced by another person on a weekly radio program which, together with her other earnings, would have provided her with at least $55 a week. The trial court awarded her approximately this sum per week, less her actual earnings, from the date of the accident to the entry of judgment. The award of special damage is supported by the evidence.

The judgment is affirmed.

SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

Rehearing denied; SCHAUER, J., dissenting.



73 Cal.App.2d 889

REDSTED v. WEISS et al.

Civ. 12984.

District Court of Appeal, First District, Division 2, California.

April 10, 1946.

Rehearing Denied May 10, 1946.

Hearing Denied June 3, 1946.

1. Vendor and purchaser ⇐44

In action to recover realty, evidence supported finding that defendants completed the purchase in their own names and for their own purpose, precluding plaintiff's recovery on theory that the property was purchased by the defendants as the agents of the plaintiff.

2. Appeal and error ⇐717

Where trial court expressed opinions in written opinion contrary to his findings of fact and conclusions of law, such contrary opinions were not effective on appeal to override the decision, notwithstanding the rule which makes the written opinion of the trial judge a part of the record on appeal. Rules on Appeal, rule 5(a).

3. Trusts ⇐89(1), 110

In action to recover realty on theory that defendants had purchased the realty as agents for plaintiff, a finding supported by the evidence that there was no agency and no agreement for purchase for the benefit of plaintiff precluded finding of either a resulting or constructive trust.

4. Appeal and error ⇐989

On appeal the District Court of Appeal could not base its decision on the testimony of the appellant alone and disregard conflicting testimony and evidence, and the adverse findings of the trial court.

5. Trusts ⇐89(5), 110

One who would claim ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by evidence that is clear, satisfactory, and convincing, and whether the evidence in any particular case is of this character must be determined by the trial court, which determination thereon will be accepted on appeal as conclusive.

6. Tender ⇐12(2)

In action to recover realty allegedly purchased by defendants as agents of plaintiff, where defendants claimed to have purchased the realty for their own benefit and purposes, an offer in complaint to repay $600 or allow it to stand as a mortgage was insufficient as a tender, where defendant had paid $600 down and given a deed of trust for balance of purchase price and plaintiff failed to tender what was paid and due under the deed of trust.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Belle Redsted against Abraham L. Weiss, true name Albert L. White, and Reva L. Weiss, also known as Reva L. White, for the recovery of real property. From judgment for defendants, plaintiff appeals.

Affirmed.

Phil F. Garvey and George Olshausen, both of San Francisco, for appellant.

A. Don Duncan, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for the recovery of real property on the theory that the property was purchased by defendant Albert L. White acting as agent for plaintiff and title taken in the name of his daughter Reva L. White contrary to the terms of the agency. The cause was tried to the court without a jury and resulted in findings and judgment for the defendants. The burden of plaintiff's appeal is that the findings of fact and conclusions of law adverse to her are in conflict with a written opinion of the trial judge and with oral comments during the course of the trial.

In August, 1943, plaintiff took title to property at 431–435 Duboce Avenue in San Francisco. She employed defendant Weiss, whose name was changed to A. L. White, to make some repairs to the building. White was a carpenter but not a contractor. When plaintiff planned to convert the upper floors of the building into apartments she consulted White and the suggestion was made that he take a portion of the title in his name so that he could perform the work of conversion as part owner and thus avoid the necessity of securing a contractor's license. Plans were prepared which were rejected by the authorities and the parties were notified that the contemplated reconversion was contrary to the building laws and regulations. Plaintiff then attempted to purchase an adjoining property fronting on Belcher Street. She borrowed $100 from A. L. White which she paid to the agent of the owner. This was returned to plaintiff when the owner refused to sell. After repeated demands the $100 was returned to A. L. White, but not until after plaintiff had been compelled to redeem a bad check which she had given White for the purpose.

Plaintiff thereafter found that another piece of property was for sale. This is designated as 439–441 Duboce Avenue and is the property in suit. She testified that she made the offer in the name of Reva L. White with the understanding that title was to be transferred to her at a later date. In this she was contradicted in the testimony of defendant A. L. White and Reva L. and the trial court found that all the allegations of her complaint relating to the purchase of the property were untrue.

[1] A large part of the voluminous transcript consists of testimony relating to the previous conversations of the parties relative to the reconversion of the property owned by plaintiff and has no bearing on the present controversy. From the relevant testimony it appears that plaintiff first attempted to purchase the property in suit but had no money to pay. She advised A. L. White that the property was for sale and he arranged for the purchase by his daughter Reva L. White. The latter paid $600 of her own funds and gave a deed of trust in the sum of $3600 payable in monthly instalments of $65 with interest. The plaintiff paid nothing. Her testimony that A. L. White made the purchase as her agent and with an agreement to reconvey to her was contradicted by other witnesses and found untrue. The testimony fully supports the theory of the defendants that, though plaintiff first discovered that the property was for sale and expressed the desire to purchase it, she was unable to do so and permitted the defendants to complete the purchase in their own names and for their own purpose.

[2] The first question argued by appellant is whether the judgment can stand on the findings of fact and conclusions of law which are contrary to some expressions of opinion made by the trial judge. The question is not a debatable one. Notwithstanding the rule of practice in the Federal courts the accepted rule in the courts of this state is that: "Remarks of the trial judge made in the course of trial or in a final opinion of the court are ineffective to override the decision embraced in the findings and conclusions. DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444; Lord v. Katz, 54 Cal.App.2d 363 [367], 128 P.2d 907; In re Lasker, 51 Cal.App.2d 120 [121, 122], 124 P.2d 72." Wuest v. Wuest, Cal. App., 164 P.2d 32, 35.

Appellant's argument that the change in the Rules on Appeal (subd. (a) Rule 5) which make the written opinion of the trial judge a part of the record on appeal, alters the rule of the earlier cases is answered in So.Cal., etc., Lines v. San Diego, etc., Ry. Co., 66 Cal.App.2d 672, 676, 152 P.2d 470, 472, where the court said: "We do not believe that it was the intention of the rule

makers to change the long established rule that the written opinion of the trial judge may not be used to impeach his solemn findings and judgment. Such opinions are often an aid to an appellate court in order to disclose the process of reasoning of the trial judge in reaching his ultimate decision. The new rules make such opinions available to appellate courts and this is as far as they go. There is nothing in the rules evidencing a contrary intention. See 17 So.Cal.L.Review 107."

[3] Appellant argues that the defendant A. L. White was plaintiff's agent and that by putting the title in himself through his daughter he holds it subject to a resulting trust in favor of appellant. The trial court found that all the allegations of the complaint in support of this theory were untrue, and the evidence fully supports that finding. Since there was no agency, and no agreement to purchase for the benefit of appellant, there could be no resulting trust. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478, and Viner v. Untrecht, Cal.Sup., 158 P.2d 3, cited by appellant, have no bearing in face of the adverse findings that there was no agency, no confidential relationship, and no agreement between the parties.

[4, 5] For the same reason appellant's argument that a constructive trust arose from the transaction must fall—the evidence and the findings do not support the premise. The argument on this and the previous question rests upon the mistaken theory that the appellate court should base its decision on the testimony of appellant alone and disregard the conflicting testimony and evidence, as well as the adverse findings of the trial court. It is true that the issues of a constructive or resulting trust were not specifically raised in the pleadings, but the findings are sufficiently comprehensive to embrace all pleadings upon which those issues could be discussed on this appeal. The confusion and evasiveness of the allegations of the amended complaint emphasize the wisdom of the rule upon which this court relied in Palmer v. Burnham, Cal.App., 165 P.2d 50, from which we quote: "In Harris v. Harris, 136 Cal. 379, 384, 69 P. 23, 25, it was said: 'The rule is well settled that one who would claim the ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by evidence that is clear, satisfactory, and convincing.' Woodside v. Hewel, 109 Cal. 481, 42 P. 152; Plass v. Plass, 122 Cal. 3, 54 P. 372. Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive.' In accord are 25 Cal.Jur., p. 348; Bollinger v. Bollinger, 154 Cal. 695, 703, 99 P. 196; Noble v. Learned, 153 Cal. 245, 251, 94 P. 1047; Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947; Taylor v. Bunnell, 211 Cal. 601, 606, 296 P. 288."

[6] Appellant failed to prove any cause for equitable relief. She paid nothing for the property and assumed no obligation to make any payment. She alleged that the down payment of $600 was made by Reva L. White with money which the latter agreed to loan to her, but she incurred no obligation to repay the loan. Her offer made in her complaint to repay this sum (or to permit it to stand as a mortgage against the property) was insufficient as a tender for any purpose. The respondent had purchased the property for $4000. She paid $600 in cash, and gave a deed of trust for the balance payable in monthly instalments of $65. For appellant to tender a mortgage to secure the sum of $600, which would be second to this deed of trust, and her failure to tender what had been paid and what was due under the deed of trust, evidences bad faith on her part and eliminates any consideration of equities in her favor. The trial court, following an extensive trial, found that appellant had no legal or equitable interest in the property and the record fully supports this finding.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

73 Cal.App.2d 967

In re ETTLINGER'S ESTATE.

ETTLINGER v. SLEVIN et al.

Civ. 13021.

District Court of Appeal, First District, Division 2, California.

April 13, 1946.

1. Wills ⇐781

Where will seeks to impose a responsibility upon or curtail a property right of one who is named as a devisee or legatee, the latter must elect to take the gift upon the conditions imposed by testator or renounce the devise or bequest and reserve the rights which are required thereby to be surrendered.

2. Wills ⇐782(3)

Declaration in will that all property owned or possessed by testator or in his name or under his control was his separate property and that will should operate upon the whole thereof, referred only to property actually disposed of by will, and did not require widow to elect between taking separate property of testator bequeathed to her by will and asserting community interest in proceeds of life policies not mentioned in will, payable in trust for adult daughters, which policies widow contended were paid for in part from community funds.

3. Wills ⇐782(1)

To put beneficiary of a will to an election, testator's intention so to do must clearly appear on the face of will itself, either expressly or by reasonable implication.

4. Wills ⇐782(3)

Widow's obligation to elect arises only where testator has, by terms of will, clearly manifested intention to make testamentary gift to her stand in lieu of her interest in community property, either by expressly so providing or by clearly manifesting an intent to dispose of the whole of community property in such manner that widow cannot take the moiety given her by law without, to that extent, defeating the plain intent of testator.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of Isaac L. Ettlinger, etc., deceased, wherein Clare Ettlinger filed a petition against Marian Ettlinger Slevin and others for declaratory relief asking the court to adjudicate that petitioner was not put to an election between taking the property left to her by decedent's will and asserting her community interest in proceeds of life insurance policies. From a judgment decreeing that she was put to her election, petitioner appeals.

Judgment reversed with directions to enter judgment in accordance with opinion.

Harold H. Price and Frederick W. Kant, both of San Francisco, for appellant.

Sloss & Turner, of San Francisco, for respondent.

DOOLING, Justice.

Appellant is the widow of Isaac Ettlinger, deceased. They were married in 1935 and at the time of this marriage the life of Isaac Ettlinger was insured by two policies issued by Connecticut General Life Insurance Company for an aggregate sum of $65,000, payable upon his death in trust for two adult daughters. Isaac Ettlinger died testate in 1941. By his will he left separate property of considerable value to his widow, the appellant. The widow, claiming that the premiums paid on the life insurance policies after her marriage to Isaac Ettlinger were made with community funds, filed a petition for declaratory relief asking the court to adjudicate that she was not put to an election between taking the property left to her by the will and asserting her community interest in the proceeds of the life insurance policies. The court decreed that she was put to her election and from that judgment this appeal is taken.

[1] The doctrine of election under a will is thus stated in 26 Cal.Jur. 1021, 1022:

"Where the provisions of the will seek to impose a responsibility upon or curtail a property right of one who is named as a devisee or legatee, the latter is in the necessity of making an election, either to take the gift upon the conditions imposed by the testator or to renounce the devise or bequest and preserve the rights which are required thereby to be surrendered. In the language of recent authority, 'The doctrine of election under a will is a familiar one. Where property to which one may have a valid claim (as in the case of

community property, a surviving wife), is disposed of by will in violation of those rights, while at the same time other property, to which the claimant would not be entitled, is devised to the claimant, an election is forced. The claimant cannot at the same time take the benefits under the will and repudiate the losses. He must either accept the terms of the will in toto or reject them in toto.'"

The will contained the following provision: "Second: I declare that all property owned or possessed by me, or in my name or under my control, is my separate property; and I make this my will to operate upon the whole thereof so far as existing at my death."

[2] Respondents point to the words "possessed by me, or in my name or under my control" and argue that they are broad enough to include the life insurance here in question, citing Andrews v. Kelleher, 124 Wash. 517, 214 P. 1056; Estate of Vogt, 154 Cal. 508, 98 P. 265; Estate of Dargie, 179 Cal. 418, 177 P. 165. In making this argument respondents fail to consider the final clause of the quoted paragraph. It is not contended that the testator undertook or intended to dispose of this life insurance by his will. Reading the second paragraph of the will as a whole it is too clear for dispute that the declaration of the first clause that the property therein referred to is the testator's separate property is limited to the property which is actually disposed of by the will. No other construction can be given to the language of the second clause "and I make this my will to operate *upon the whole thereof* so far as existing at my death."

This may be made clear by interpolating the words "including my life insurance" in the second paragraph of the will. It would then read: "I declare that all property owned or possessed by me, or in my name or under my control (including my life insurance), is my separate property; and I make this my will to operate upon the whole thereof so far as existing at my death."

The result of such interpolation would be to make the will "operate upon" the life insurance, and the residuary clause would carry the proceeds of the life insurance, since it is not anywhere expressly mentioned in the will. No such construction is contended for, nor would the language of the will support it.

[3] It is a settled rule of law that in order to put the beneficiary of a will to an election the testator's intention so to do must clearly appear on the face of the will itself, either expressly or by reasonable implication.

"In testamentary law, election, says the court in Morrison v. Bowman, 29 Cal. [337], 347, 348, citing Story's Equity Jurisprudence—'is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases when there is a clear intention of the person from whom he derives one, that he should not enjoy both * * *.'" Estate of Moore, 62 Cal.App. 265, 271, 216 P. 981, 983.

[4] "The widow's obligation to elect arises only where the testator has, by the terms of the will, clearly manifested the intention to make the testamentary gift to her stand in lieu of her interest in the community property. The provision may be 'declared in terms to be given in lieu of' the right as survivor of the community (Morrison v. Bowman, 29 Cal. 337), or the language of the will may be such as to show clearly an intent to dispose of the whole of the community property in such manner that 'the widow cannot take the moiety given her by law without, to that extent, defeating the plain intent of the testator.' (Citing cases.) * * *

"In every case in which the widow has been held to be put to her election, the will contained language which, when read in the light of the circumstances, showed plainly that the testator was undertaking to dispose of the entire community property, and that his intention could not be given effect if one-half of such property were withdrawn from the operation of the will." Estate of Prager, 166 Cal. 450, 454, 455, 137 P. 37, 39.

We conclude that the language of the will cannot be construed to put appellant to an election with regard to her claim of a community interest in the proceeds of the life insurance policies.

Respondents further argue that the will and the policies must be construed together to put appellant to an election. No authority is cited to support this argument and we have found none. The case is not similar to Mazman v. Brown, 12 Cal.App. 2d 272, 55 P.2d 539, where the widow was made a beneficiary of the policy itself and was held by virtue of that fact to be put to her election to take under the policy

or to claim her community interest and renounce her rights as beneficiary. Appellant is not here claiming any property disposed of, or even referred to, in the will, and her claim is not inconsistent with any of the will's provisions. If she is put to an election here then every widow to whom a husband left any separate property by will, where he also left a life insurance policy paid for in whole or in part with community funds with some one other than the wife named as beneficiary, would be put to a similar election.

The judgment is reversed with directions to enter a new judgment conforming to the views herein expressed.

NOURSE, P. J., and GOODELL, J., concur.



73 Cal.App.2d 838

WALL v. STATE et al.

No. 3194.

District Court of Appeal, Fourth District, California.

April 5, 1946.

Rehearing Denied April 26, 1946.

Hearing Denied June 3, 1946.

1. Counties ⇐153½

County appropriations to veterans' organizations under authority of Military and Veterans Code were not "gifts" prohibited by Constitution. Military and Veterans Code, §§ 1261, 1262; Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gifts".

2. Pleading ⇐8(4), 34(2)

An allegation in complaint that county appropriations to veterans' organizations were gifts was a conclusion of the plaintiff and, being contrary to the facts pleaded, was not considered as controlling on demurrer to the complaint.

3. Counties ⇐192

In proceeding to determine correct amount of taxes properly chargeable against plaintiff's property on redemption, validity of county appropriations to veterans' organizations could not be attacked on ground that expenditures of such appropriations might have been erroneous or irregular. Military and Veterans Code, §§ 1261, 1262; Revenue and Taxation Code, § 3618 et seq.

4. Counties ⇐191

A taxpayer waived objections to county budget appropriations by failing to appear and register such objections at budget hearings prescribed by statute, and could not thereafter raise such objections in proceeding to determine correct amount of taxes properly chargeable against plaintiff's property on redemption. Pol.Code, § 3714; Revenue and Taxation Code, § 3618 et seq.

5. Counties ⇐192

Procedural or ministerial defects in the description in the budget or otherwise of county appropriations to veterans' organizations were validated by the Curative Acts of 1943 and 1945. Military and Veterans Code, §§ 1261, 1262.

6. Counties ⇐191

The fact that tax rates fixed raised more money than was required by the county budget did not invalidate taxes in view of Curative Acts of 1943 and 1945.

7. Schools and school districts ⇐100

Under 1929 School Code, board of supervisors had duty to levy a tax for a kindergarten fund according to estimates furnished and approved, and kindergartens were not to be supported from state elementary school funds. School Code, § 4.440 et seq.

8. Schools and school districts ⇐103(1)

The Curative Acts of 1943 and 1945 cured claimed irregularity in respect to levy of separate kindergarten rates by school district in 1931 where claimed irregularities did not deprive taxing officials of jurisdiction to levy the tax and did not involve due process. School Code, §§ 4.375, 4.440 et seq.; Pol.Code, § 3714.

9. Schools and school districts ⇐103(1)

The 1945 Curative Act includes school district levies and may be effective as to pending litigation.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Clifford S. Wall against the State of California to determine the cor-

rect amount of taxes properly chargeable against the plaintiff's property upon redemption. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Roy A. Linn, of Los Angeles, for appellant.

Norbert Baumgarten, Co. Counsel, of Bakersfield, Robert W. Kenny, Atty. Gen., E. G. Benard, Deputy Atty. Gen., and J. H. O'Connor, Co. Counsel, and H. W. Kennedy, Deputy Co. Counsel, both of Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiff, by his first amended complaint, filed December 6, 1944, is seeking relief under the provisions of Chapter 5.7, Part 6, Division 1 of the Revenue and Taxation Code, and asks for an interlocutory judgment determining the correct amount of taxes properly chargeable against his property upon redemption. Several parcels of property are involved. They are situated in the Mojave and Red Rock School Districts and also in Antelope Valley Joint Union High School District. Each school district, the County of Kern, as well as the State of California, were made party defendants.

Plaintiff claims, first, that the county illegally budgeted, levied a tax for, collected, and appropriated large sums of money as donations to the American Legion, the Veterans of Foreign Wars, the Disabled Veterans, and the Spanish American War Veterans. The tax for this purpose covered the fiscal years from 1931–1932 to 1942–1943, inclusive. The first amended complaint sets forth in detail these claimed defects, inconsistencies and illegalities (together with other claimed defects which will hereinafter be mentioned), for the several years above set forth. Demurrers to the first amended complaint were sustained without leave to amend. Plaintiff thereafter moved to amend and presented therewith his proposed second amended complaint for filing, which second amended complaint greatly amplified and restated these same contentions. The motion was denied. Judgment of dismissal followed. Plaintiff appealed.

It is argued that the tax sale and tax deeds of plaintiff's property were, on the first ground, invalid because the taxes were levied to make "gifts", in contravention of Article IV, section 31 of the Constitution of California.

The appropriation to several veterans' organizations commenced in 1931 in the approximate sum of $12,000, and reached the approximate sum of $19,000 in 1943. Exhibit C, attached to the second amended complaint, is a copy of the Kern County Budget for the year 1933–1934, and shows the manner in which the items were listed and the purposes for which the appropriations were made. They appear under the heading "County Miscellaneous Expenditures * * * Maintenance and Operation * * *" Then follows "American Legion * * * allowed 6/30/34 $9,000 * * * Disabled Veterans World War $900 * * *" etc. Then follows a "detailed statement of veterans' items" in which each organization in the American Legion is named, setting forth its class and a segregation of its general allowance into such items as "Salaries and Wages", "Maintenance and Operation" and "Capital Outlay". The same system of budgeting prevailed as to appropriations to other veterans' organizations.

Many cases are cited, such as Dranga v. Rowe, 127 Cal. 506, 59 P. 944, which in effect hold that to be valid, the assessment and levy must be made strictly as provided by law, and that all proceedings in the nature of assessing property for the purpose of taxation and in levying and collecting taxes thereon are in invitum, and must be stricti juris.

Defendants argue that it is within the power of counties to make such appropriations and that they constitute a public purpose and therefore such appropriations are not a violation of Article IV Section 31 of the Constitution; that the statutory authority for such action by counties is contained within sections 1261 and 1262 of the Military and Veterans Code, which read in part as follows:

"Section 1261. * * * Any political subdivision may lease any lot or building * * * or may acquire and lease or sublease any lot or building or part thereof for not exceeding twenty years, to a veterans' association organized in such political subdivision to be used for the purposes of such veterans' association. The rental shall be fixed by the governing body of the political subdivisions. * * *

"Section 1262. * * * Any county may provide and maintain buildings, memorial halls, meeting places, memorial parks,

or recreation centers for the use or benefit of veterans' associations. For these purposes the board of supervisors of any county may" lease buildings, manage, and control the same, furnish and repair such buildings, and provide custodians and employees for their maintenance, and may appropriate public money for any other similar purposes in connection therewith.

See, subdivisions (a) and (b), inclusive, § 1262, supra. These sections are based on former section 4041f of the Political Code. The constitutionality of the latter section has been upheld in Allied Architects Ass'n v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029, and the appropriation of public money for such reasons has been held to be for a public purpose and that it did not constitute a gift contrary to said constitutional provision. Board of Directors v. Nye, 8 Cal.App. 527, 97 P. 208; Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531; Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A.L.R. 1515.

[1, 2] The appropriations, as far as the budget appears, are valid and in conformity with the power granted by sections 1261 and 1262 of the Military and Veterans Code, supra. The fact that plaintiff pleaded that the appropriations were gifts is but a conclusion of the pleader. Conclusions alleged in a pleading contrary to the facts pleaded are not considered as controlling. Gosewisch v. Doran, 161 Cal. 511, 516, 119 P. 656, Ann.Cas.1913D, 442; Glide v. Dwyer, 83 Cal. 477, 23 P. 706; Silvers v. Grossman, 183 Cal. 696, 192 P. 534; Menzel v. Primm, 6 Cal.App. 204, 211, 91 P. 754; 21 Cal.Jur. p. 44, § 24.

[3-5] It was stated in Rideout v. Eich, 105 Cal.App. 597, 288 P. 450, that the Budget Act should be given a reasonable construction. The fact that such appropriations might be or might have been expended erroneously or illegally, is not open to attack in this proceeding. Nothing to the contrary is alleged. Furthermore, as to any objections to said budget appropriations, the failure of the taxpayer to appear and register such objections at the budget hearings prescribed by section 3714 of the Political Code effectively waived such objections. Curative Act of 1903, Stats.1903, p. 63, chap. LIX; Curative Act of 1943, Stats.1943, chap. 458; Curative Act of 1945, Stats.1945, chap. 1134; Strong v. Mack, 64 Cal.App.2d 739, 149 P.2d 401; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Chase v. Trout, 146 Cal. 350, 80 P. 81; Gottstein v. Gray, 66 Cal.App.2d 587, 592, 152 P.2d 742. In this connection it is also argued by plaintiff that the Legislature could not have originally authorized the levies made for the benefit of the veterans' organizations, and therefore it had no power to pass a Curative Act which would validate and in effect be levying such tax by the Legislature, acting indirectly through a county or city, citing City of Los Angeles v. Lewis, 175 Cal. 777, 167 P. 390; Section 31, Article IV, Constitution; Sec. 12, Article XI, Constitution; City of Redwood City v. Myers, 7 Cal.2d 283, 60 P.2d 291, 108 A.L.R. 727; City & County of San Francisco v. Liverpool & L. & G. Ins. Co., 74 Cal. 113, 15 P. 380, 5 Am.St.Rep. 425; Gottstein v. Gray, supra.

In Gottstein v. Gray, supra, cited and relied upon by plaintiff, the court said, 66 Cal.App.2d at page 592, 152 P.2d at page 744: "The Legislature may, if it sees fit, do away with a budget plan and adopt another, and it may validate the defective proceedings under the budget plan, except where the omitted steps were necessary to constitute due process of law or to comply with any other constitutional prerequisite." (Citing Chase v. Trout, supra.)

As to the appropriations for veterans' associations, they are authorized by statute and as far as the budget shows, were appropriated pursuant to said statute, which said statute has been held constitutional, and, as to any procedural or ministerial defects in the description of the appropriation in the budget or otherwise, they are waived by failure of the taxpayer to object at the budget hearing, and are validated by the Curative Acts of 1943 and 1945.

Summarizing plaintiff's additional objections to the tax sales in question, he complains (1) that the tax rates fixed raised more money than was required by the budget and were thus excessive; (2) that the Mojave School District levied a separate kindergarten rate when none was authorized by statute, which rate should have been added to the regular school rate; (3) that there were certain irregularities in the failure of the tax roll to show the proper funds and districts involved; (4) that there was a single tax deed made for all of the parcels even though separately assessed; and (5) that the delinquent tax list was published in a supplement to the official newspaper described and was therefore not published in a newspaper of general circulation, and

certain other claimed procedural irregularities, such as erroneous statement of penalties and costs, and that the delinquent list showed the amount of taxes due to be one cent less than the amount actually due.

It seems clear to us that the Curative Acts are also properly applicable to all of the circumstances above related on the basis of the decisions that have interpreted those acts.

[6] As to objection No. 1, the complaint alleges that during certain specified years the Board of Supervisors fixed a tax rate for certain items set forth in the budget and that the sum raised by the tax exceeded the amount specified in the budget, such as, in the year 1931–1932 the board approved the sum of $30,386 for special advertising; that a rate of .02 was applied to the assessed value of the property in the county; that there was an excess of $4,446.33 raised for that purpose over and above the amount budgeted; that therefore the rate was excessive and illegal to that extent. It is claimed that an excess of $43,264.34 was raised for the payment of a highway bond of 1913; that in that same year the budget, as adopted, called for an expenditure of $1,378,810; that a tax rate of $.83 on each $100 value raised $1,441,200.24, an excess of $62,390.24; and that the tax rate was excessive by $.0775 for $100 valuation. Several similar claims are made as to levies made, and excess funds raised thereby, in the several school districts here enumerated. It is also alleged that such excess rates illegally increased the taxes upon plaintiff's property and that such tax levy did not include unsecured personal property tax. In this connection, plaintiff cites Otis v. Los Angeles County, 1937, 9 Cal.2d 366, 70 P.2d 633.

There is language used in that case tending to support plaintiff's argument. The curative acts above mentioned, and relied upon by defendants, were enacted in 1943 and 1945 respectively. These curative acts validate anything the Legislature could have dispensed with or any matter of procedure for which the Legislature could have provided. In Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921, defendants claimed the invalidity of the tax sale proceedings by reason of various asserted irregularities, one of which was that the tax rate in the year involved produced more revenue than the budget requirements, resulting in an excessive rate. In that case the court held that the irregularities relied on were such as the Legislature could cure by ratifying statute.

It was said in Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531, 536, that the Legislature can cure all matters within its sphere except defects sometimes termed jurisdictional. Among jurisdictional requisites are: "(a) a duly constituted taxing authority; (b) property to be taxed within the territorial jurisdiction of the taxing body; (c) property or subject matter legally subject to the tax; and (d) sufficient notice and opportunity for hearing to constitute compliance with due process"; and the Legislature "may not enact curative legislation the effect of which would be to destroy or unlawfully infringe upon vested rights." In the instant action, according to the allegations, we perceive no violation of the due process clause of the Constitution. The facts recited do not bring plaintiff's case within the exceptions noted.

[7-9] As to the second objection, the allegation is that in 1931–1932 the Board of Supervisors, in respect to the Mojave School District Kindergarten fund, made a levy of $.15 per $100 assessed valuation; that the statute made no provision for the levy of such a tax at that time; that the statute allowing such a levy was repealed prior thereto and that therefore the levy, in 1931, was illegal.

The total tax for school purposes was not increased. It was merely levied in two parts instead of one. Under section 4.440 et seq. of the School Code of 1929, the duty devolved upon the Board of Supervisors to levy a tax for a "Kindergarten Fund" according to estimates furnished and approved. Kindergartens were not to be supported from State Elementary School funds. Los Angeles County v. Kirk, 148 Cal. 385, 83 P. 250; 23 Cal.Jur. p. 76, § 43. The Legislature (Stats.1931, Chap. 1184, Sec. 8, p. 2493) added section 4.375 to the School Code. This act amended section 4.440, supra, and repealed sections 4.460 to 4.501, inclusive, and certain other sections. Section 4.375 then provided a maximum tax rate for elementary school districts when such districts maintained one or more kindergartens. In 1937 that section was repealed (Stats.1937, p. 691, chap. 313), and a new section, No. 4.375, was added which provided for a maximum tax for combined kindergarten and elementary school purposes. The error complained of, if any, was one not involving due process and not one included within the so-called

jurisdictional defects noted in the above-mentioned exceptions. The claimed irregularity did not deprive the taxing officials of jurisdiction to levy the tax. No objection was made to the budget as presented and approved. Political Code, § 3714; City of Compton v. Boland, supra. The 1945 Curative Act includes School District levies and under Southern Service Co. Ltd. v. Los Angeles, 15 Cal.2d 1, 97 P.2d 963, and City of Compton v. Boland, supra, that act may be effective as to pending litigation. In those cases curative acts were applied to pending litigation. See, also, Miller v. McKenna, supra.

The Supreme Court, since the decision in Gottstein v. Gray, supra (particularly relied upon by plaintiff), in Chambers v. Duvall, supra, speaking through Mr. Justice Shenk, stated that [26 Cal.2d 143, 156 P.2d 923]:

"* * * in 1943, Stats.1943, p. 1993, the Legislature enacted a validating and ratifying statute, by which it provided that every act and proceeding theretofore taken relative to the preparation, computing or fixing the budget or tax rate, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, were thereby confirmed, validated and declared legally effective. By section 2 of the act its operation was limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements under which the acts validated were taken, and to the validation of acts and proceedings to the extent permitted under the state and federal Constitutions.

"In the present case the irregularities relied on by the defendants, including the claimed irregularities in the recitals of the deed, were such as the Legislature could cure by ratifying statute. No question of lack of notice or other element of due process affecting the defendants' rights is involved. No rights of third parties had intervened."

From the authorities cited and discussed, the application of the Curative Acts above mentioned precluded a recovery by plaintiff under the facts here alleged.

The same result follows as to plaintiff's remaining claims of irregularities. Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567; City of Compton v. Roland, supra; Penaat v. Terwilliger, 23 Cal.2d 865, 147 P.2d 552.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.



73 Cal.App.2d 943

McCARTHY v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

No. 13106.

District Court of Appeal, First District, Division 2, California.

April 12, 1946.

1. Jury ⇐12(1)

Action to recover damages for breach of contract in failing to pay for services rendered in procuring contracts for war housing projects was properly triable by jury. Code Civ.Proc. § 592.

2. Prohibition ⇐27

Prohibition will not lie to restrain the act of an inferior tribunal with jurisdiction over the subject matter, on the assumption that it will rule erroneously, since presumption is that such tribunal will hear and determine all questions and give a correct judgment thereon.

3. Trial ⇐3

An order granting motion for a separate trial on the special issue of illegality on condition that in the event verdict of the jury on that issue was against defendant the same jury should forthwith proceed to hear testimony and render a verdict on other issues in the case was merely an intermediate ruling which would not be binding on the trial judge, and trial judge would have power sua sponte to remove the condition.

4. Prohibition ⇐27

Prohibition to restrain inferior court from further proceeding with action, on the assumption that order granting motion for separate trial commanded that issue of illegality which was a question of law be tried before a jury, would not lie, since

trial court when matter came up for trial would presumably exercise his discretion in conformity with applicable statutes. Code Civ.Proc. §§ 591, 592, 597, 2042, 2102.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Prohibition proceedings by Robert McCarthy against the Superior Court of the State of California in and for the City and County of San Francisco.

Alternative writ discharged; peremptory writ denied.

Edward T. Mancuso and Thos. J. Riordan, both of San Francisco, for petitioner.

Melvin M. Belli, of San Francisco, for respondent.

GOODELL, Justice.

This proceeding arises out of an action for damages for breach of contract, pending in the Superior Court, San Francisco, wherein A. L. Adkins and John J. Wintersteen are plaintiffs and Robert McCarthy, the petitioner herein, is defendant. The complaint therein alleges that in 1942 petitioner engaged Adkins and Wintersteen to obtain for him certain contracts; that they procured two contracts for war housing projects at Richmond and one for a similar project at Alameda, and that petitioner's gross profit from the three contracts was $385,000; that ten per cent is a reasonable sum for their services, and that petitioner has refused to pay. The demand is for $38,500.

[1] The petitioner filed an amended answer wherein by a separate defense he pleaded that by presidential orders contracts such as those sued on are illegal. The case is ready for trial before a jury. It is properly triable by jury (sec. 592, Code Civ.Proc.) and the parties have stipulated to so try it.

Petitioner, proceeding under sec. 597, Code Civ.Proc., made a motion for "an order to proceed to trial upon the special defense * * * that the alleged contract * * * is illegal and void as against public policy and good morals." The presiding judge in granting the motion made an order (obviously in the interest of efficiency and economy) reading as follows: "In this action the motion for a separate trial on the special issue of illegality * * * is granted but on condition that in the event the verdict of the jury on that issue is against the defendant the same jury shall forthwith proceed to hear testimony and render a verdict on the other issues in the case, and on the further condition that the evidence taken on the issue of illegality, so far as it is relevant, competent and material, shall be considered on the trial of the remaining issues of the case."

Petitioner later made a motion to strike the conditions from the order on the ground that the issue touching public policy is one of law which must be determined by the court. This motion came before the succeeding presiding judge, who denied it and then set the case for trial.

[2] The petitioner alleges herein, and now contends, "that the action of said Respondent and the action proposed to be taken by Respondent Court in the selection of a jury for the trial of the issue of public policy involved therein are in excess of the jurisdiction and authority of said Respondent Court," and the prayer is that the respondent court be prohibited "from further proceeding with said action by having a jury hear and determine the issue of public policy * * *." In his brief petitioner says that the order "commands a jury trial of the issue of illegality raised by the amended answer * * *" and, again, that "respondent court has ordered that * * * a question of law be tried before a jury * * *." These contentions presuppose that the condition attached to the order, i. e. "that in the event *the verdict of the jury on that issue* [*illegality*] is against the defendant the same jury shall forthwith proceed to hear testimony and render a verdict on the other issues in the case" (emphasis ours) constitutes a mandate to the trial court to submit to the jury questions of law as well as of fact arising on the special defense. No such mandate is to be found in the order. The words "the verdict of the jury on that issue" carry the implication that such verdict would be reached *only under proper instructions on the law,* for this goes without saying. And it must be assumed that the trial judge would so interpret the language. The petitioner's claim assumes and presupposes that the trial judge will commit error by disregarding the requirements that "An issue of law must be tried by the court * * *" and that "All questions of law * * * are

to be decided by the court, and all discussions of law addressed to it." Secs. 591 and 2102, Code Civ.Proc. The answer to that is that "A writ of prohibition will not issue to restrain the act of an inferior tribunal where it has jurisdiction over the subject matter based on the assumption that the inferior court will rule erroneously." Heinecke v. Superior Court, 27 Cal. App.2d 480, 81 P.2d 179, 180. Indeed the presumption is to the contrary, namely, that the court "will hear and determine all questions, and give a correct judgment thereon." Kinard v. Police Court, 2 Cal. App. 179, 180, 83 P. 175.

In the main case the superior court clearly has jurisdiction of the parties and the subject matter.

When the case reaches the trial department the judge responsible for the handling of the case from then on will have before him the litigation in *all* its phases, which was not the case when the two preliminary motions were made in the department of the presiding judge. He will have control of the order of proof. Sec. 2042, Code Civ.Proc. In the light of all the circumstances then presenting themselves and in the exercise of his discretion he may conclude that the question of the legality of the contract is (a) purely one of law, in which event he will presumably follow sec. 591 and excuse the jury until that question is out of the way; or (b) that its solution depends on the settlement of certain disputed facts, rendering it a question of mixed law and fact (17 C.J.S., Contracts, § 615, p. 1278; e. g., Allison v. Dodge, 3 Cir., 287 F. 621), in which event he will presumably submit to the jury under proper instructions such subsidiary questions of fact as have to be decided to aid him in ruling on legality, or will propound interrogatories calling for categorical answers on such fact questions. As was said in the Heinecke case, supra: "There is nothing to indicate what action the respondent court will take when the objections urged here by petitioner are presented to it, and this court will assume in the absence of a showing to the contrary that the rulings of the Superior Court will conform to the law and the facts as they are made to appear at the time of the hearing."

[3] If the trial judge, with the whole case before him and upon due consideration of the business of the court, the convenience of litigants, attorneys, jurors, and witnesses and all other factors, should conclude that the conditions attached to the original order should be removed, he has the undoubted power sua sponte and unceremoniously to remove them, for the order was merely an "intermediate order or ruling" (In re Estate of Rawson's 66 Cal.App. 144, 145, 225 P. 474) not binding on the trial judge (Lawrence v. Ballou, 37 Cal. 518, 521; Wrightson v. Dougherty, 5 Cal.2d 257, 265, 54 P.2d 13). In De La Beckwith v. Superior Court, 146 Cal. 496, 499, 80 P. 717, there will be found a full discussion of the subject. See, also, Kelly v. Liddicoat, 35 Cal.App.2d 559, 564, 96 P.2d 186, and cases cited and 21 Cal.Jur. p. 124. Late cases applying the rule are Frantz v. Mallen, 204 Cal. 159, 161, 267 P. 314; Bank of America v. Superior Court, 20 Cal.2d 697, 702, 128 P.2d 357; Davis v. Stroud, 52 Cal.App.2d 308, 315, 126 P.2d 409, and Pulvermacher v. Los Angeles, etc., Committee, 61 Cal.App.2d 704, 711, 143 P.2d 974. Indeed the petitioner recognized that the original order had no finality when he moved its amendment in an attempt to remove the conditions.

[4] We express no opinion as to whether the issue of the legality of a contract is within the purview of sec. 597, Code Civ.Proc. That section is limited to cases where "the answer pleads that the action is barred by the statute of limitations, or by a prior judgment, or that another action is pending upon the same cause of action, or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof * * *." In Booth v. Bond, 56 Cal.App. 2d 153, 132 P.2d 520, the court concluded that the fact that the issues raised by the special defense involved the merits of the plaintiffs' cause of action did not prevent the trial in advance of those issues, in view of the power of the trial court which always existed to regulate the order of proof under sec. 2042, Code Civ.Proc. But there is no necessity to pass on that question herein.

The alternative writ of prohibition is discharged and a peremptory writ is denied.

NOURSE, P. J., and DOOLING, J., concur.

73 Cal.App.2d 853

HARMS v. REED et al.

Civ. 15037.

District Court of Appeal, Second District, Division 1, California.

April 8, 1946.

1. Evidence ⇐272

In action by husband against wife and her parents to quiet title to realty and for declaratory relief, where evidence disclosed that husband informed wife that he would not make any charge for his personal services in maintenance and operation of realty and thereupon wife wrote her parents a letter that she and her husband would look after property, even though husband's statements were not communicated directly to wife's parents, the statements constituted evidence which court could consider, along with other evidence, in determining agreement between parties.

2. Joint adventures ⇐5(2)

Evidence sustained finding that under joint enterprise agreement between parties plaintiff was not entitled to compensation for personal services in maintenance and operation of certain realty.

3. Appeal and error ⇐989

The power of a reviewing court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support judgment rendered.

4. Appeal and error ⇐996

Appellate court cannot substitute other inferences for those drawn by trial court on conflicting evidence.

5. Appeal and error ⇐996

Where facts established are such as reasonably to permit opposing inferences to be drawn therefrom and trial court has adopted one and rejected the other, appellate court will not disturb the finding.

6. Joint adventures ⇐5(2)

Evidence sustained finding that parents of plaintiff's wife contributed money necessary to acquire realty in joint enterprise and that plaintiff was to receive a one-fourth interest in realty in consideration of his services in connection with the purchase and upkeep of property.

7. Specific performance ⇐73

In action by husband against wife and wife's parents to quiet title to realty and for declaratory relief, where evidence established that plaintiff was to receive one-fourth interest in realty in consideration of his services in connection with purchase and upkeep of property purchased with money furnished by wife's parents, determination that plaintiff must continue to contribute his services in maintenance and operation of realty was not objectionable on ground that it violated statute against specific performance of personal service employment contract. Civ.Code, § 3390, subds. 2, 6.

8. Joint adventures ⇐2

Where realty was purchased for investment and resale with money furnished by defendants and plaintiff received a one-fourth interest in realty in consideration of his performing services in connection with purchase, maintenance and operation of realty, plaintiff was obligated to continue to contribute his services for upkeep and maintenance of property until resale was accomplished.

9. Appeal and error ⇐989

Where evidence did not explain why plaintiff ceased to maintain property as required by joint enterprise agreement nor whether he did so willingly, trial court was not called on to give and appellate court was not warranted in giving, consideration to that phase of differences between parties.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by C. Don Harms against Claude C. Reed and others to quiet title to certain real property and for declaratory relief. From an adverse judgment plaintiff appeals.

Affirmed.

Mark S. Feiler and Wood, Crump, Rogers & Arndt, all of Los Angeles, for appellant.

Marcus, Rabwin & Nash, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff herein brought an action against his wife, Hortense R. Harms, and his wife's parents, Mr. and Mrs. Reed, seeking to quiet title to certain real prop-

erty and for declaratory relief. From a judgment adverse to him he prosecutes this appeal.

By the first cause of action of his amended complaint plaintiff alleged that he and his wife were the owners of three described parcels of land in the County of Los Angeles; that the defendants Mr. and Mrs. Reed claimed an interest therein and that such interest was without right; that the interest of plaintiff's wife therein was a community interest only and that she was joined as a defendant because she had refused to join as a plaintiff. By his second cause of action plaintiff alleged that between January 11, 1936, and November 11, 1941, he and his wife borrowed money from the defendants Reed aggregating $6,200 for use by plaintiff in his real estate business and in the purchase and sale of real property in Los Angeles and elsewhere; that such loans were secured by a mortgage executed by Mr. and Mrs. Harms in December, 1938, in the sum of $5,000, on property known as 6405 Bryn Mawr Drive, Los Angeles. It was further alleged that to facilitate the purchase by plaintiff of Parcel No. 1, he caused title thereto to be taken in the name of Mrs. Reed and title to Parcel No. 2 to be taken in his wife's maiden name, Hortense Reed, but that both parcels were to be held in trust for plaintiff and his wife; that in November, 1941, defendants Reed loaned to Mr. and Mrs. Harms $1,700 for the purchase of Parcel No. 3, title to which was taken in the names of Mr. and Mrs. Reed and Mrs. Harms to secure the defendants Reed for the moneys so advanced; that a total of $6,200 was loaned by the Reeds, of which $2,820 was repaid, leaving unpaid a balance of $3,380 plus interest. It was further alleged that until June 1, 1944, plaintiff had exclusive possession of the three parcels, collecting rents, making repairs and defraying all expenses for upkeep, taxes, interest and mortgage installments when required, without the Reeds contributing any part; that his wife had instituted a suit for divorce and by reason thereof a controversy had arisen between the parties, the defendants contending that plaintiff held only a one-fourth interest in parcels Nos. 1 and 2 and had no interest whatever in Parcel No. 3.

By their answer defendants alleged that Mr. and Mrs. Reed owned one-half interest in Parcels 1 and 2; that the defendant Mrs. Harms owned a one-fourth interest as her separate property and that the remaining one-fourth was held by plaintiff and his wife as community property; that the defendants Reed owned Parcel 3 in its entirety. The defendants denied that they made loans to plaintiff and alleged that the moneys forwarded to him were for the purpose of making purchases of real estate for and on behalf of the defendants, and that in consideration of his services in that regard it was agreed that plaintiff should have a one-fourth interest in Parcels 1 and 2; that it was further agreed that plaintiff should make no charge for his personal services rendered in the repair and maintenance of Parcels 1 and 2, nor for his services as a broker, the consideration for such services being the transfer to him of a one-fourth interest in Parcels 1 and 2. As to the mortgage on the Bryn Mawr Drive property, defendants alleged that it was not made for the purpose of securing the monies above referred to, but "that in addition to the monies given to the plaintiff by these defendants for the purchase of properties for the defendants as hereinabove alleged, the defendants did make certain cash loans to the plaintiff and to the defendant Hortense R. Harms, and said loans were secured by the mortgage on the Bryn Mawr property"; that said mortgage exceeded the actual amount loaned and that defendants claimed under the mortgage only the amount that would be shown by an accounting to be due them for loans made. The defendants further asserted that title to Parcel 3 was taken in the names of all four parties in order to satisfy certain FHA financing requirements, but that it was agreed that plaintiff and his wife had no interest therein.

After trial without a jury, the court made findings of fact and conclusions of law as follows:

That the parties had orally agreed that the Reeds would furnish money for the purchase of income property, plaintiff to contribute his services in the purchase, upkeep and maintenance thereof, and that each of the four parties was to own a one-fourth interest therein "as separate property respectively"; that Parcels 1 and 2 were so purchased, title to Parcel 1 being taken in the name of Mrs. Reed and title to Parcel 2 by Mrs. Harms in her maiden name; that plaintiff maintained and managed said properties from the time of their purchase to June 1, 1944, and his wife had collected the rents thereof since that date;

that "an accounting shall be rendered by the plaintiff and the defendants as to the financial transactions handled by each of said parties affecting the properties involved in this action, the respective interests of each party to be charged or credited with the sums said accounting will show to be due to or from each of said parties."

The court further found (finding numbered XII) "that the plaintiff is to continue to contribute his services in the maintenance, operation and management of said properties inasmuch as in the agreement hereinabove referred to between the plaintiff and the defendants the plaintiff was to contribute his services in maintaining, operating and managing the properties, and also his services as a broker in the purchase thereof as consideration for the transfer to him of a one-fourth interest in said properties as his separate property."

As to Parcel No. 3, the court found that it was purchased with funds advanced specifically for that purpose by defendants Reed, said parcel to be the sole property of defendants Reed; that plaintiff was to contribute his personal services in the maintenance, operation and repair of Parcel 3 and was to make no charge for his brokerage services in the purchase of said property.

The court further found "that plaintiff had the exclusive possession, management and direction of the properties referred to hereinabove from the time of their purchase to June 1, 1944, but it is not true that he made all the repairs, defrayed all the expenses, paid all the taxes, insurance and interest and mortgage installments and it is not true that the defendants, Claude C. Reed and Eva Reed contributed no part thereof, and as to the amount of any personal funds used and applied by the plaintiff in and to the maintenance, repair and upkeep of said properties, said amount should be determined by an accounting. * * *"

By its judgment the court decreed that each defendant had an undivided one-fourth interest in Parcels 1 and 2; that Parcel 3 was owned by the defendants Reed, and that "an accounting shall be rendered by the plaintiff and the defendants setting forth all their dealings with reference to the properties * * * and in said accounting the plaintiff, Don Harms, shall make no charge for his personal services rendered in maintaining, operating and repairing the properties, and he shall make no charge for any services rendered as a broker in acquiring said properties."

Appellant does not urge that the judgment should be reversed in toto. In his brief he states: "We recognize that there is evidence in the record which supports the judgment in so far as the court has determined who are the owners of the respective properties. Nor, as we see it, is it necessary to remand the case for further proceedings, but we respectfully urge that the judgment should be modified by eliminating Parcel No. 3 from the fifth paragraph of the judgment, * * *." That part of the judgment to which appellant objects provides that in rendering an accounting the plaintiff "shall make no charge for his personal services rendered in maintaining, operating and repairing the properties, and he shall make no charge for any services rendered as a broker in acquiring said properties." Appellant's contention is that the judgment should be modified to provide that he "shall make no charge for his personal services rendered in maintaining, operating and repairing the properties described in paragraphs I and II hereof (parcels Nos. 1 and 2), and he shall make no charge for any services rendered as a broker in acquiring any of the properties described herein."

Appellant urges further that the foregoing finding numbered XII, so far as it obliges him "to continue to contribute his services in the maintenance, operation and management of said properties," should be eliminated.

Appellant first urges that the court erred in adjudging that in the accounting among the parties the plaintiff should make no charge for his personal services in maintaining or operating Parcel No. 3 (in which parcel the court found he had no interest), and that the finding upon which this portion of the judgment is based, is not supported by the evidence. Appellant contends that while it appears he was to make no charge for services on Parcels 1 and 2 because he was to receive a one-fourth interest in these parcels, no such agreement on his part is shown as to Parcel No. 3. In connection with this Parcel Mrs. Harms testified as follows:

"Q. Was anything said about Mr. Harms being compensated for his services in connection with 2008? A. No; he said, 'Hortense, in order to make amends, I will do whatever is necessary in the

negotiation of the purchase of that property.' * * * He said, 'Hortense, write your folks and say that we have found the ideal spot. * * *

"Q. Did he (plaintiff) ever tell you he was going to make a charge for his work? A. No, as a matter of fact, he said he wasn't going to make a charge for his work. He said, *'I am going to do the work'*—this was at the time, you see,—he said, *'I am going to do the work on this to compensate for how I acted when your folks were out here last time.'* (Emphasis added.)

"The Court: What was the extent of the work that he did on the property? A. Personally?

"The Court: Yes. A. He helped with a termite job that was necessary to qualify for the FHA loan. He directed the work of three other boys, and me.

"The Court: Is that all? A. Also he rented the property and collected the rents.

"The Court: No, I meant actual work. A. Oh, actual work?

"The Court: Yes. A. He has done some minor repairs. I remember a sewer job. He fixed the sink. I distinctly remember the sewer job and the sink stopping up, and restoring some draperies in the living room, cleaning and redecorating in the small studio apartment. Well, there was cleaning in the larger studio—in the main house, too."

The defendant Mr. Reed testified as follows:

"Q. Well, what was Mr. Harms to receive for the work that he was doing in 2008? * * * I don't know. There was no agreement with us in regard to any information on anything like that. * * *

"Q. Did he ever tell you—that is, Mr. Harms—that he would do it without any pay for his services? * * * A. No, sir."

[1-5] Appellant's contention is that the conversation between Mr. Harms and his wife did not constitute an agreement, neither of the defendants Reed being present, and that "it is incredible that if Mr. Harms had intended to bind himself not to make any charge for his personal services in the maintenance and operation, and particularly any repairs, that he would not have told his wife to so advise her parents, or if he did not do that, that she would not have so advised them instead of merely writing them that she and her husband would look after the property for them." This contention cannot be sustained. In the case at bar the trial court was called upon to determine the terms of an oral agreement entered into in 1936 and carried out and acted upon by the parties over a period of years. The testimony of Mrs. Harms above quoted was not contradicted. Concerning the purchase of Parcel No. 3, plaintiff testified that although he did not ask his wife to write to her parents, he knew that she did. Opposed to this was the testimony of Mrs. Harms that her husband *instructed* her to "write to the folks" with reference to every transaction which took place. It appears that all communication between the Harms' and the Reeds was carried out through letters written by Mrs. Harms to her parents. While the statements attributed to plaintiff were not communicated directly by him to the Reeds, nevertheless they constituted evidence which the trial court was entitled to consider, along with all the other evidence in the case, in determining what his agreement actually was. Plaintiff specifically told Mrs. Harms that he would not make any charge as to Parcel No. 3, whereupon she wrote her parents the letter (Exhibit 3), which the court interpreted as being to that effect. In such circumstances, this court cannot disturb the finding of the trial court. The power of a reviewing court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment rendered, and an appellate court cannot substitute other inferences for those drawn by the trial court upon conflicting evidence. Poe v. Lawrence, 60 Cal.App.2d 125, 140 P.2d 136. Where the facts established are such as reasonably to permit opposing inferences to be drawn therefrom, and the trial court has adopted one and rejected the other, an appellate court will not disturb the findings. Baylis v. Baylis, 48 Cal.App.2d 674, 120 P.2d 89.

The trial court chose to believe the testimony of Mrs. Harms as to what her plaintiff husband said to her, whereas in connection with the verity of the latter, the trial judge stated he "was quite unfavorably impressed with his reliability as a witness." The trial court characterized the testimony of Mrs. Harms as "for the most part, * * * the type you could

rely upon, from the manner in which she testified." In evaluating the testimony given by defendants Mr. and Mrs. Reed, the court said that they "tell a perfectly straightforward story, and they, all three of the defendants, are corroborated by all the other witnesses that testified, and apparently truthfully, * * * all their testimony corroborates the testimony of the defendants and their contentions as to how these properties were to be held." The record presents a situation where an appellate tribunal, under long established and recognized rules, is without power to substitute its judgment for that of the trier of facts.

Appellant asserts that the following portion of the court's findings is indefinite, uncertain and not supported by the evidence; "That the plaintiff is to continue to contribute his services in the maintenance, operation and management of said properties (parcels Nos. 1 and 2) inasmuch as in the agreement hereinabove referred to between the plaintiff and the defendants the plaintiff was to contribute his services in maintaining, operating and managing the properties * * * as consideration for the transfer to him of a one-fourth interest in said properties * * *."

As heretofore pointed out, the basis for the judgment determining the ownership of the respective properties was the oral agreement entered into between the parties in 1936. With reference to the conversation out of which the agreement arose, defendant Mr. Reed testified in part as follows: "I said, 'Well, if it is a good buy, which you say it is, you can do this work, as you say, and I will furnish the money to put up the payments with and for the work—to buy the materials—and we will then divide it up between the four of us.' That meant Harms, Mrs. Harms, my wife and myself, each of us owning one-fourth." In the same regard, defendant Mrs. Harms testified:

"A. After father and Don came back down onto the ground, after they had been in the building, Don again said he had no money with which to purchase the property or make deals; and he said if father would put up the money to purchase these properties, he would condition them and take care of them. And father said, 'I will furnish the money; you will do the work' —he said it to Don; 'and the properties will belong to Eva, Hortense, myself and Don.'

"Q. What did Mr. Harms say to that? A. All right."

[6, 7] Appellant asserts that the court's finding that he must continue to contribute his services in the maintenance and operation of parcels Nos. 1 and 2 contravenes subdivisions 2 and 6 of section 3390 of the Civil Code. Subdivision 2 provides that "an obligation to employ another in personal service" cannot be specifically enforced. The contract here under consideration was not one of employment. It was a joint enterprise wherein it was specifically agreed that defendants Reed were to furnish the necessary money and appellant was to do the work, contributing his services in the purchase of the properties and in their upkeep, maintenance and repair. The court found, and the evidence supports the finding, that in consideration of his performing the aforesaid services in connection with the purchase and upkeep of the property, he was to and did receive a one-fourth interest in parcels Nos. 1 and 2 under the agreement.

[8] In urging that the court's finding violates subdivision 6 of section 3390 of the Civil Code, appellant claims that the finding is uncertain as to the length of time he will be required to continue the contribution of his services. In that regard appellant asks, "Must he continue until the properties are sold? Or, if they are not sold, must he continue to do so as long as he lives? And just what must he do towards maintaining the properties?" Subdivision 6 of the cited section provides that an obligation cannot be specifically enforced when its terms "are not sufficiently certain to make the precise act which is to be done clearly ascertainable." In the instant case there was testimony that parcels 1 and 2 were purchased as an investment and for resale. Clearly, under the agreement, appellant was obliged to continue to contribute his services for the upkeep and maintenance of the property, as well as the collection of rents therefrom, until the purpose of the agreement—resale of the properties—was accomplished. The fact that at the time this litigation was initiated the properties had not been sold does not and cannot vary, alter or impair the terms of the original agreement under which the joint enterprise was established.

In answer to appellant's query as to what was meant by "maintain", it might be noted that defendant Mrs. Reed testified that ap-

pellant himself stated with reference to Parcels 1 and 2, that "he would purchase the properties and he would *maintain,* them, collect the rents, * * * * and in that way he would earn his one-fourth." (Emphasis added.) There was also testimony that in maintaining the property it was not intended that he pay for materials or labor, and that such charges were to be deducted from the rents collected by him. To us it seems clear that the parties clearly understood what was meant and intended by the word "maintain."

[9] In view of the fact that, as conceded by appellant, "the evidence does not explain why plaintiff ceased to maintain, manage, or operate the properties after June 1, 1944, nor whether he did so willingly or not", the trial court was not called upon to give, nor are we warranted in giving, consideration to that phase of the differences which have arisen between the parties herein.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



73 Cal.App.2d 915

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. CITIZENS NAT. TRUST & SAVINGS BANK.

Civ. 15125.

District Court of Appeal, Second District, Division 2, California.

April 11, 1946.

1. Courts ⇐486

In action in superior court to recover $121.56 in unemployment insurance contributions which deceased employer had allegedly failed to pay during her lifetime, superior court should have proceeded with the trial if legality of tax was involved, and, if legality of tax was not involved, action should not have been dismissed but should have been treated as ordinary action to recover money due and unpaid and transferred to municipal court. Gen.Laws, Act 8780d, § 9; Code Civ.Proc. § 89, subd. 1(a); § 396.

2. Courts ⇐486

In action in superior court to recover unemployment insurance contributions which deceased employer had allegedly failed to pay, denial that deceased was employer within Unemployment Insurance Act and had failed to pay contributions for which she was legally liable created a controversy involving "legality of any tax" and deprived municipal court of jurisdiction, and superior court should have proceeded with the trial. Gen.Laws, Act 8780d, § 9; Code Civ.Proc. § 89, subd. 1 (a); § 396.

See Words and Phrases, Permanent Edition, for all other definitions of "Legality of Any Tax".

3. Courts ⇐188(3)

The "legality of any tax" is involved within statute depriving municipal court of jurisdiction in case involving legality of any tax, where taxpayer denies liability for amount sued for as well as where validity of tax statute is brought into question. Code Civ.Proc. § 89, subd. 1(a).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the California Employment Stabilization Commission, etc., against Citizens National Trust & Savings Bank, administrator of the estate of Alice Boyer, also known as Alice D. Boyer, deceased, to recover unemployment insurance contributions which Alice Boyer had allegedly failed to pay in her lifetime. The complaint erroneously named the Citizens National Trust & Savings Bank as administrator. At the trial the bank was substituted as executor. From the judgment, the plaintiff appeals.

Reversed with directions.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for respondent.

WILSON, Justice.

The complaint alleges that decedent, Alice Boyer, was in her lifetime an employer as defined in section 9 of the Unemployment Insurance Act, Gen.Laws, Act 8780d, and was subject to the provisions of the statute; that she made payments of wages

with respect to employments subject to said act; that the commission had found that she had failed to pay contributions in the sum of $121.56 and prayed for judgment in said amount, with interest as provided by statute. The answer of the executor of the estate (erroneously named as administrator in the complaint, substitution having been made at the time of trial) denied all of said allegations.

When the case was called for trial defendant objected to any proceedings on the ground that the court was without jurisdiction in that the amount sued for was not within the jurisdiction of the superior court. The objection was sustained and the court ordered a judgment of dismissal to be entered.

Plaintiff's counsel asked that the ruling be set aside in order that he might make a motion for a transfer of the action to the municipal court. The motion was denied. Plaintiff appeals from the judgment of dismissal.

[1] If the legality of a tax was involved the court should have proceeded with the trial; if not, the case should not have been dismissed, but should have been treated as an ordinary action to recover money due and unpaid and transferred to the municipal court. Code Civ.Proc. § 396; Booge v. First Trust & Sav. Bank, 46 Cal.App.2d Supp. 879, 883, 116 P.2d 503; Morgan v. Somervell, 40 Cal.App.2d 398, 104 P.2d 866; See also Roos v. Jansen, 30 Cal.App.2d Supp. 773, 777, 78 P.2d 476.

[2, 3] The denial by defendant of the allegations that the decedent, Alice Boyer, was an employer within the meaning of the statute and had not made the contributions for which she was legally liable, created a controversy which involved the legality of a tax and deprived the municipal court of jurisdiction. Code Civ.Proc. § 89, subd. 1 (a). The legality of a tax is involved when the taxpayer denies liability for the amount sued for as well as when the validity of the statute is brought into question. The claim that the phrase "legality of any tax" as used in said section was inapplicable where the validity of the taxing statute was not challenged, was rejected in Unemployment Reserves Comm. v. St. Francis Homes Ass'n, 58 Cal.App.2d 271, 280, 137 P.2d 64, and in California Employment etc. Comm. v. Municipal Court, 62 Cal.App.2d 781, 784, 145 P.2d 361. In the St. Francis Homes case the court said [58 Cal.App.2d 271, 137 P.2d 69]: "The 'legality' of a 'tax' is involved when the taxpayer contends that the tax is illegally assessed or levied against him. It is the essence of the contention of the taxpayer in such a situation that the tax is illegal." It follows that this action was within the jurisdiction of the superior court.

The judgment is reversed with directions to the trial court to proceed with the trial of the action.

McCOMB, J., concurs.



73 Cal.App.2d 308

PECK v. HOWARD et al.
Civ. 14809.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1946.

As Modified on Denial of Rehearing Mar. 27, 1946.

Hearing Denied April 25, 1946.

1. Public lands ⇐114(2)

The doctrine of relation never carries a patent back to the date of any entry other than the entry upon which the patent is based.

2. Public lands ⇐137

A homesteader acquired no claims upon the land by purchasing improvements placed thereon by a previous squatter.

3. Public lands ⇐135(2)

The settlement which the law of Congress will recognize, except where the claim is made by the widow or heirs of a deceased settler, must be personal to the settler and not that of others who may have conveyed to the settler.

4. Public lands ⇐135(1)

A squatter was without power to create an easement over public land occupied by the squatter but not in the possession of or owned by the squatter.

5. Public lands ⇐31

A landowner, who filed for record in the county recorder's office his claims to water flowing from springs and thereafter

constructed a pipe line over unsurveyed public lands of United States to convey the water to his land, was not required to obtain an easement for such pipe line from squatter on the public land, since squatter was without ownership or proprietary interest in the public land, and therefore was without power to grant an easement thereon.

6. Waters and water courses ⇐27

Where landowner constructed a pipe line over unsurveyed and unoccupied public lands to convey water from springs to his land, the federal statute relating to right of way for canals and ditches operated as a grant by the United States of a right of way by which water was conveyed over such public lands. 43 U.S.C.A. § 661.

7. Waters and water courses ⇐27

Where landowner constructed a pipe line over unsurveyed and unoccupied public lands to convey water from springs to his land, the landowner or his successors in interest were licensees of the government, so long as the public lands continued to be part of the public domain, but such public lands, when they passed into private ownership by the filing of a homestead thereon, were burdened by the easement granted by the United States to landowner pursuant to statute relating to right of way for canals and ditches. 43 U.S.C.A. § 661.

8. Waters and water courses ⇐27

The words "ditches" and "canals", in federal statute confirming rights to the use of water, and to the maintenance of canals and ditches on the public lands acquired and which became vested in accordance with local customs and laws, are broad enough so that a right of way can be acquired for dams, flumes, pipes, and tunnels. 43 U.S.C.A. § 661.

See Words and Phrases, Permanent Edition, for all other definitions of "Canal" and "Ditch".

9. Public lands ⇐135(2)

A homesteader's deed for pipe line for passage of water from springs over homesteader's land to grantee's land was a nullity and was properly excluded in action to quiet title to pipe line, where grantee at time of execution of deed had title to line through statutory grant of right of way from the United States and the homestead deed expressly reserved and exempted such right of way. 43 U.S.C.A. § 661.

10. Waters and water courses ⇐152(7)

In action to quiet title to pipe line carrying water over defendants' land to plaintiff's land, refusal to admit evidence as to alleged consideration paid to squatter by defendants' predecessor who homesteaded defendants' land was not error, where plaintiff's predecessor had statutory grant of right of way for the pipe line from the United States. 43 U.S.C.A. § 661.

11. Waters and water courses ⇐152(7)

In action to quiet title to pipe line carrying water to plaintiff's land over defendants' land which had been homesteaded by defendants' predecessor after plaintiff's predecessor constructed pipe line, testimony that squatter exercised alleged right to prevent plaintiff's predecessor from building pipe line over unsurveyed government lands occupied by squatter was inadmissible, where plaintiff's predecessor had statutory grant of right of way for the pipe line from the United States. 43 U.S.C.A. § 661.

12. Evidence ⇐230(1)

In action to quiet title to pipe line carrying water to plaintiff's land over defendants' land which had been homesteaded by defendants' predecessor after plaintiff's predecessor constructed pipe line, statements made by plaintiff's predecessor to defendants' predecessor concerning deed for water pipe line executed by defendants' predecessor to plaintiff's predecessor were inadmissible, where plaintiff's predecessor at time of execution of deed already owned right of way for the pipe line. 43 U.S.C.A. § 661.

13. Evidence ⇐230(1)

In action to quiet title to pipe line carrying water to plaintiff's land over defendants' land which had been homesteaded by defendants' predecessor after plaintiff's predecessor constructed pipe line, testimony as to reliance of plaintiff's predecessor on deed for water pipe line executed by defendants' predecessor to plaintiff's predecessor was properly excluded, where plaintiff's predecessor at time of execution of deed already owned right of way for the pipe line. 43 U.S.C.A. § 661.

14. Evidence ⇐215(1)

In action to quiet title to pipe line carrying water to plaintiff's land over defendants' lands which had been homesteaded by defendants' predecessor after plaintiff's predecessor constructed pipe line,

deed from plaintiff's predecessor to third person purporting to show acceptance by plaintiff's predecessor of deed for water pipe line executed by defendants' predecessor to plaintiff's predecessor was inadmissible, where plaintiff's predecessor acquired nothing by the deed inasmuch as he already owned right of way for pipe line at time of execution of deed. 43 U.S. C.A. § 661.

15. Estoppel ⇐32(1)

Generally estoppel by deed is applied against grantor who is estopped by recitals in his deed purporting to grant absolute title to property from denying that before and at date he executed deed he had such absolute title and by deed in question conveyed such title to grantee. Code Civ. Proc. § 1962, subd. 2.

16. Estoppel ⇐29(1)

Generally grantee of land is not estopped, by recitals in a deed purporting to grant absolute title to property, from disputing validity of title of grantor. Code Civ.Proc. § 1962, subd. 2.

17. Estoppel ⇐29(1)

Grantee of deed from homesteader to a right of way for water pipe from springs over homesteader's land to grantee's land, who had previously acquired right of way by statutory grant from government and which right of way was exempted from homestead, was not estopped by deed from disputing validity of homesteader's claim of title to right of way. Code Civ.Proc. § 1962, subd. 2.

18. Estoppel ⇐29(1)

The rule of estoppel by deed will not be so applied to grantee of deed as to prevent grantee, on a trial to recover consideration paid for property to which grantor had no title, from asserting that such grantor sold property when he did not own it.

19. Waters and water courses ⇐4

The statute authorizing canal and ditch companies to acquire water rights in public lands was not intended to amend or repeal statute confirming rights to the use of water and to the maintenance of canals and ditches on the public lands acquired and which became vested in accordance with local customs and laws. 43 U.S.C.A. §§ 661, 946, 947.

20. Waters and water courses ⇐27

The statute authorizing construction of canals and ditches to supply water for public purposes was not intended to apply to an individual who takes water from springs to care for his personal needs for domestic and irrigation purposes. 43 U.S. C.A. §§ 946, 947.

21. Waters and water courses ⇐27

The statute authorizing canal and ditch companies to acquire water rights in the public lands applies to canals, ditches, or reservoirs utilized for supplying water for irrigation for public use as a commercial enterprise to the users thereof for pay, and does not affect an individual appropriating water for his individual use. 43 U.S.C.A. §§ 946–948.

22. Waters and water courses ⇐27

The failure of landowner to file map of his right of way for water pipe line over United States public lands, and to secure approval of same by Secretary of Interior pursuant to statute authorizing acquisition of water rights in public lands, did not impair or destroy vested rights to right of way for water pipe line obtained by landowner pursuant to another statute relating to appropriation of waters on public lands, where first statute related to appropriation of water for a public use and not to appropriation of water for individual use. 43 U.S.C.A. §§ 661, 946–948.

23. Waters and water courses ⇐137

A prescriptive right in defendants to use water flowing through pipe line on defendants' land could not arise between the time the defendants acquired the land in 1939 and October 1, 1940, when the plaintiff instituted action to quiet title to pipe line.

24. Waters and water courses ⇐127

To perfect a prescriptive water right, the use of the water must be actual, open and notorious, hostile and adverse to the original owner's title, continuous and uninterrupted for the statutory period, and under a claim of title in the claimant and not by virtue of another right.

25. Waters and water courses ⇐152(8)

A party who claims title to water rights by prescription must clearly prove by competent evidence all the elements essential to such title.

26. Adverse possession ⇐112

The law will not allow the property of one person to be taken by another on ground of user and prescription, without any conveyance or consideration, upon slight presumptions or probabilities.

27. Waters and water courses ⇐152(10)

In action to quiet title to water pipe line, wherein the defendants asserted that they had acquired a water right by user and prescription, whether use of water was under a claim of right or was a mere matter of neighborly accommodation was a question of fact to be determined in the light of the relations of the parties, their conduct, and all the surrounding circumstances.

28. Appeal and error ⇐1011(1)

A trial court's finding on conflicting evidence is conclusive upon the appellate court.

29. Appeal and error ⇐989

The appellate court's function is to consider, not the relative weight of conflicting evidence, but only legal sufficiency to support challenged finding.

30. Adverse possession ⇐31

The existence of a claim of right in the mind of a person claiming such right does not suffice to establish title by prescription, but the claim must be asserted in such a manner that the landowner is apprised of the claim.

31. Adverse possession ⇐13

Prescriptive rights are established only when the enjoyment thereof is adverse, continuous, and under claim of legal right, and not by consent, permission, or mere indulgence of the owner of the alleged servient estate.

32. Adverse possession ⇐31, 58

Owners are not affected by acts which do not bring to them knowledge of the assertion of an adverse right, and a use by an adverse claimant is not hostile unless there is an actual clash with the rights of the actual owners, and, before a right by prescription is established, the acts by which such establishment is sought must operate as an invasion of the rights of the parties against whom it is set up.

33. Waters and water courses ⇐152(8)

In action to quiet title to pipe line, wherein the defendants asserted that they had acquired a water right by user and prescription, evidence was insufficient to show that defendants' predecessors ever claimed title to any water right, or hostile or adverse rights against the owners of the pipe line or the waters therein.

34. Waters and water courses ⇐138

Estoppel is not created against an owner to assert his rights by mere passive acquiescence in the use of water by another.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Myrtle D. A. Peck against Frances Howard and another to quiet title to a pipe line and the water flowing therein and to enjoin the defendants from interfering with such pipe line and from diverting or using such water. The named defendant filed a cross-complaint. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Charles E. Hobart, of Los Angeles, for appellants.

James P. Clark, of Los Angeles, for respondent.

WHITE, Justice.

This is an action to quiet title to a pipe line and the water flowing therein and to enjoin defendants from interfering with said pipe line and from diverting or using said water. The trial court found in favor of the plaintiff and from the judgment which followed, defendants prosecute this appeal, urging (1) that the evidence does not support the findings and judgment that respondent and her predecessors in interest owned the right of way across the land of appellant, Frances Howard; (2) that the deed of Almeda T. Gookins created a water right appurtenant to said appellant's land and the court erred in refusing to admit said deed in evidence; (3) that a water right had been acquired by user and prescription which was conveyed with the land to the said appellant; (4) that the court erred in its rulings relating to admission of evidence; (5) that appellants are suffering irreparable injury by reason of the injunction granted by the trial court "cutting off their water from this pipe line before final judgment in the cause."

The complaint alleges that since July 6, 1932, plaintiff has been and is the owner of

a parcel of land situate in Los Angeles County, being a portion of Section 16, Township 8 North, Range 16 West, S.B. M., hereinafter referred to as section 16; that in addition she is also the owner "of a certain pipe line, right of way for the same and water rights" running from section 16 into the hills in the vicinity thereof for a distance of five miles, which pipe line and right of way pass through the land of defendants, being the northeast quarter of the southeast quarter of section 31, Township 8 North, Range 16 West, S.B.M., and hereinafter referred to as section 31; that plaintiff and her predecessors in interest for a period of 40 years have continuously maintained said pipe line as a means of conveying the water from certain springs at its head and have continuously used and appropriated all of the water flowing from the springs, and that "the title to the land for which said water was appropriated and the pipe line and water rights, have been assigned by mesne conveyances to the plaintiff herein"; and that she is the owner in fee simple of said pipe line, rights of of way and water rights and of the right to use on section 16 all of the water flowing from said springs. It is further alleged that defendants without any right whatsoever "claim and assert some right, title or interest in and to the water flowing through said pipe line and are unlawfully and wrongfully diverting said water from said pipe line and depriving the plaintiff of the use and benefit" thereof. Plaintiff prays for temporary and perpetual injunctions; that her title to the pipe line, right of way and water be quieted as against the claims of defendants and for $500 in damages.

A general and special demurrer to said complaint having been overruled, defendants answered admitting plaintiff's ownership of the pipe line and certain water rights appurtenant thereto but alleged a right in themselves "to the use of water from the pipe line for domestic purposes" as reserved in a deed dated September 3, 1904, from Almeda T. Gookins, to Henry Hatch, predecessor in interest of plaintiff." The answer then alleges upon information and belief that since 1894, "the said Almeda T. Gookins and her successors in interest * * * including these defendants, have actually diverted and used water flowing through and from said pipe line for domestic uses and purposes, including the use for irrigating a family garden not exceeding 400 square feet, and a small family orchard not exceeding twelve trees in all, and for watering animals; that said use is under a claim of right as reserved by the said Almeda T. Gookins in said deed * * * and also under a claim of right for domestic use as acquired by constant and continuous use for the statutory period and under the customs and laws of the State of California and the United States of America"; that said uses "have been open and notorious, within the plain sight and view of plaintiff and her predecessors in interest" and with her knowledge; further that said uses were hostile and adverse to the claim of plaintiff and have "diminished the flow of water from said springs and in said pipe line."

Defendant Frances Howard also filed a cross-complaint herein to quiet title, for declaratory relief and for an injunction in which it was alleged that on February 23, 1923, said Almeda T. Gookins conveyed section 31 by grant deed without any reservations to Helen Cherbbonno, who on August 22, 1925, transferred the property to Dana R. Weller without any reservations and the latter in turn conveyed said property to cross-complainant Howard "subject only to a right of way for pipe line purposes but without any reservations." It is also alleged that said Almeda T. Gookins and her successors in interest including said cross-complainant, "have actually diverted and used water flowing through and from a pipe line crossing cross-complainant's land above mentioned for domestic uses and purposes"; that said use was made under claim of right, as reserved in said deed; and "also under a claim of right for domestic use as acquired by constant and continuous use for the statutory period; has been open and notorious; hostile and adverse, and that cross-defendant's claims are without right and that she has no right in said water rights of the cross-complainant for domestic purposes.

Cross-defendant Peck's answer to the cross-complaint alleged that in July, 1894, section 31 was unsurveyed and unoccupied government land when Henry Hatch located and appropriated the said springs situated in the hills immediately south of section 31; that said Hatch completed the pipe line in July of 1895 and carried water by means thereof over a portion of said section 31 to his ranch on section 16; that said Hatch "was the owner of a right of way over said section 31 where the pipe line

is now situated, long prior to the time that said Alameda T. Gookins moved onto that part of said section 31 which she afterward took up as a homestead"; and that when the latter made the purported writing, she "did not own and had no right, title or claim in or to the right of way then occupied by the pipe line of said Henry Hatch, and that on the contrary, the said Henry Hatch was then the owner of and in possession of said right of way."

Among other things, the trial court found:

"III. That plaintiff and cross-defendant is and has been since July 6th, 1932, the owner of and in possession of a certain pipe line for carrying water from three springs located at the head of said pipe line to her said real property above described, to-wit, said Section 16; that said pipe line runs for a distance of about five miles in a southerly direction from said section 16 into the hills, where are situate the three springs supplying water for said pipe line; that plaintiff and cross-defendant is and has been since July 6th, 1932, the owner and in possession of said pipe line, the right of way wherein same is laid and the said three springs at the head of said pipe line, and has at all times during her said ownership of same used the waters of said springs on said section 16, for domestic and irrigation purposes.

"That the plaintiff and cross-defendant and her predecessors in interest have owned and been in possession of said pipe line, the right of way over which it is laid and the three springs for supplying water for said pipe line for more than forty years prior to the bringing of this action and during said period of time have kept in repair and maintained said pipe line as a means of conveying water from said three springs to said section 16 for domestic and irrigation purposes and during said time have continuously appropriated all of the water flowing from said three springs, and used same except as hereinafter found to have been used by defendants and cross-complainant and their predecessors in interest.

"IV. That said appropriation of water from said three springs was made by a predecessor in interest of plaintiff and cross-defendant in July, 1894, and the pipe line conveying said waters to Section 16 above mentioned, was completed in July, 1895, and water conducted through said pipe line to said section 16, and used thereon for domestic and agricultural purposes and have ever since been used by plaintiff and cross-defendant and her predecessors in interest for domestic and agricultural purposes on said section 16. That the title to the land for which said waters were appropriated, to-wit, said section 16, and said pipe line, right of way for same and said water rights have been assigned and conveyed by mesne conveyances to the plaintiff and cross-defendant and that she is the owner of and in possession of the same.

"V. That the defendant and cross-complainant, Frances Howard, is the owner of and together with her husband, defendant Frederick Howard, is in possession of the N.E.¼ of the S.E.¼ of section 31, Township 8 north, range 16 west, S.B.M., in the County of Los Angeles, State of California. That the above described pipe line and right of way for same, now owned by plaintiff and cross-defendant, passes over and through the above described property of defendant and cross-complainant; that at the time said pipe line was constructed and the right of way for same acquired in July, 1895, by a predecessor in interest of plaintiff and cross-defendant, the above described property of defendant and cross-complainant was unoccupied public land belonging to the United States Government.

"That the defendants and cross-complainant claim and assert some right, title and interest in and to the water flowing through said pipe line, but that such claims are without right, title or any interest whatsoever, and that defendants and cross-complainant have not nor either of them any right, title or interest in or to said pipe line, the right of way for same or to the water flowing through said pipe line or any part thereof."

It was further found that when Almeda Gookins executed the so-called deed dated September 3, 1904, she "did not own and was not in possession of, and had not prior thereto owned or been in possession of the right of way for pipe line, which said instrument purported to grant to Henry Hatch, the grantee named therein, but that at the time of the purported grant, the said Henry Hatch owned and was in possession of such right of way and had theretofore been the owner of and in possession of the same for about ten years immediately prior thereto."

In connection with their first point, appellants urge that the evidence does not

support that portion of finding of fact numbered three, above quoted, to the effect that "the plaintiff and cross-defendant and her predecessors in interest have owned and been in possession of said pipe line, the right of way over which it is laid and the three springs for supplying water for said pipe line, for more than forty years prior to the bringing of this action * * *"—for the reason that, while the evidence shows without dispute that the forty acres of land belonging to appellant Frances Howard was unsurveyed government land until 1901; that the survey thereof was approved August 29, 1902, and was filed in the land office August 29, 1903; that the pipe line crossing appellant's land was built by Henry Hatch in 1895, at which time said land was occupied by one Leo Frankenberg, a squatter; and that when Mrs. Gookins moved upon the property about October, 1895, she acquired the interests of said Frankenberg—no evidence was offered by respondent that Henry Hatch, who built the pipe line, secured the consent of said Leo Frankenberg to lay the pipe line over the property then in his possession and now belonging to appellants.

In 1894 Henry Hatch, predecessor in interest of plaintiff and cross-defendant located the aforesaid springs five miles south of his section 16 in the west end of Antelope Valley in a dry belt. In July, 1894, he filed for record in the office of the County Recorder of Los Angeles County his claims to the water flowing from these springs. All of these springs were discovered, located and appropriated upon unsurveyed and unoccupied government land. In each recorded claim Hatch set out as the intended use of the water that "Said water is to be conveyed in iron or other pipe of sufficient size to carry the same to Sec. 16, Township 8 N, Range 16 West, S.B.M. and other land to be used for irrigation, domestic and mechanical purposes."

In 1895 Hatch constructed an iron pipeline from the springs located by him the preceding year, and about July 1, 1895, water was flowing out of this pipe line onto section 16 and being used thereon by Hatch.

In December 1895, shortly after completion of the Hatch pipe line, Almeda T. Gookins settled on that part of section 31 now the property of defendants and cross-complainant and through which Hatch's pipe line passes. On September 15, 1903, Mrs. Gookins filed a homestead upon the land in question. In 1896 Bertram Gookins, the eldest son of Almeda T. Gookins, installed 1700 feet of pipe line from Twin Oaks Springs and brought the water down to the place where his mother was living on the west end of her homestead. The water taken through this 1700-foot pipe line supplied Mrs. Gookins with water for domestic use and for such cattle and chickens as she had on the place up to the winter of 1904-1905, when she moved with another son, Aurther, over to section 36 to the west and in another township. However, prior to such removal, Mrs. Gookins had filed on Twin Oaks Springs as a source of water supply for use on her homestead.

In their closing brief, appellants succinctly epitomize the grounds upon which they base their claims for relief herein as follows: "Appellants do not claim any water right appurtenant to the land now belonging to Frances Howard, except either by grant under the deed of Almeda T. Gookins to Henry Hatch, of September 3, 1904, or by the establishment of a prescriptive right through user."

We shall therefore first give consideration to appellants' claim of title under the deed executed September 3, 1904, by their predecessor in interest, Almeda T. Gookins, to Henry Hatch, accepted and recorded by him, as well as to the correctness of the court's ruling sustaining an objection to the introduction of said deed into evidence. The document entitled "Deed for Water Pipe Line," reads as follows:

"Know All Men by These Presents:

"That I, Almeda T. Gookins, of Los Angeles County, State of California, hereby deed, set forth and relinquish unto Henry Hatch (or assigns) of said County and State, so much of my land as is now occupied by a pipe line now owned by said Hatch, upon or in N ½ of S.E. ¼ of Section 31, Township North 8 and Range West 16, San Bernadino Meridian and Base, and hereby bind myself, heirs and assigns for the continuance of the same. This with the express understanding that I am to have the continuance of the right to use water for domestic purposes only for one (1) family, and such stock as can be constantly maintained by said family only by herbage grown upon my land as set forth above.

"And I further agree to allow the owner or owners of said pipe line to have for themselves, agent or agents and helpers, free acess and use of such of my land as may be needed for making repairs to said line.

"Almeda T. Gookins."

[1, 2] It is appellants' contention that the title to the right of way for the pipe line across the property now owned by them was vested in plaintiff's predecessor in interest, Henry Hatch, for the first time only after the execution and delivery of said "Deed for Water Pipe Line" and the recording thereof. At the time Mrs. Gookins moved onto the property, she acquired the interest of one Frankenberg, who was then occupying the property referred to on a squatter's right. Before Mrs. Gookins' entry upon the property, some improvements in the form of a small house and a barn had been made thereon. However, we have searched the record in vain for any material or substantial evidence that, at the time in July 1894 when Hatch located his springs, Frankenberg was on the property now owned by defendants. In any event, defendants' attempt to extend the time of settlement by Mrs. Gookins upon the land back to the date when the same was occupied by Frankenberg because of the purchase of improvements on the land covered by such former settler's homestead is futile. The law seems clearly established that the doctrine of relation never carries a patent back to the date of any entry other than that upon which it is based. The settlement of Mrs. Gookins alone can be considered and that dates, as already stated, from December 1895, sometime after the location of the Hatch Springs and the completion of his pipe line. It is only Mrs. Gookins' own settlement that can be considered, unaffected by her purchase of improvements from the squatter Frankenberg. The latter had no claims upon the land when Mrs. Gookins settled thereon and she acquired none through her purchase of improvements thereon from such previous occupant. Lewis v. Rio Grande W. Ry. Co., 17 Utah 504, 54 P. 981, 983; Quinby v. Conlan, 104 U.S. 420, 422, 26 L.Ed. 800; Haight v. Costanich, 184 Cal. 426, 430, 194 P. 26.

[3-5] The settlement which the law of Congress will recognize—except where the claim is made by the widow or heirs of a deceased settler—must be personal to the settler and not that of others who may have conveyed to him. The squatter Frankenberg was without power to create an easement over the land occupied by him, because he did not possess or own such land, and it is axiomatic that no one can sell or convey to another that which he does not himself own. Therefore, Hatch was not required to obtain from squatter Frankenberg, an easement for his pipe line over the land now owned by defendants because the latter, being without ownership or proprietary interest in such land, was without power to grant an easement thereon.

[6] At the time the springs in question were located, and later when the pipe line was constructed, the property now owned by defendants was unsurveyed and unoccupied government land and, being public lands of the United States at the date when the pipe line was constructed upon such land, the Act of Congress of 1866, U.S. Revised Statutes, sec. 2339, 43 U.S.C.A. § 661, operated as a grant by the United States of the right of way by which the water was conveyed over said land.

The Section just cited reads as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed * * *."

Later this act was amended by the addition of section 2340, 43 U.S.C.A. § 661, to the effect that all homesteads allowed should be subject to vested and accrued water rights and rights to ditches used in connection therewith.

In Wood v. Etiwanda Water Co., 122 Cal. 152, 157, 54 P. 726, 728, it was held:

"As to the lands owned by the plaintiffs which were not within the grant to the railroad, and which were public lands of the United States at the date of the appropriation under which defendant claims the water, the act of Congress of 1866 (Rev.St. U.S., § 2339) operated as a grant by the United States of the water so appropriated and diverted, and of the right of way for ditches and canals by which the water is conveyed; and by the next

section (2340): 'All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section'; so that, as to plaintiffs' lands acquired from the United States after the water now claimed by the defendant was appropriated, defendant's right rests upon the statute, * * *."

And in Ware v. Walker, 70 Cal. 591, 595, 12 P. 475, 477, the court said:

"The plaintiff, by the construction of his ditch and the appropriation and user of the water of the stream, acquired, as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant. Where the use of a thing is granted, everything is granted essential to such use. Such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement."

[7] In the instant case, while the land in question continued to be part of the public domain, Hatch or his successors in interest were licensees of the government, but when such part of the public domain passed into the private ownership of Mrs. Gookins through her filing of a homestead thereon, it was burdened by the easement granted by the United States to Hatch. Smith v. Hawkins, 110 Cal. 122, 125, 42 P. 453; Happy Valley Land and W. Co. v. Nelson, 169 Cal. 694, 695, 696, 147 P. 966.

[8] Although the federal statute speaks only of "ditches and canals", these terms are broad enough so that a right of way may be acquired for dams, flumes, pipes and tunnels. Utah Light & Tr. Co. v. United States, 10 Cir., 230 F. 343, 345.

[9-14] In view of the foregoing, it must be held that on September 3, 1904, when Almeda T. Gookins executed the aforesaid document denominated "Deed for Water Pipe Line," Henry Hatch, plaintiff's predecessor in interest, was then vested with and had title, through statutory grant from the United States of the right of way for his pipeline over the property of defendants' predecessor in interest. The deed from the United States to Almeda T. Gookins conveying to her a homestead expressly reserved and exempted the vested right of way. When Mrs. Gookins executed the aforesaid "Deed for Water Pipe Line" she had nothing to convey, the instrument was a nullity and the trial court properly excluded it from evidence.

Appellants' contention that Henry Hatch or any of his successors in interest, including plaintiff herein, were estopped by the provisions of subdivision 2 of section 1962 of the Code of Civil Procedure from questioning the recitals in and contents of Mrs. Gookins' deed is unavailing.

[15] The general rule is that estoppel by deed is applied against the grantor, who is estopped by the recitals in his deed purporting to grant absolute title to the property, from denying that before and at the date he executed the deed he had such absolute title and by the deed in question conveyed such title to the grantee. Stinchfield v. Gillis, 96 Cal. 33, 36, 30 P. 839; De Frieze v. Quint, 94 Cal. 653, 659, 30 P. 1, 28 Am.St.Rep. 151.

[16-18] But a vendee or grantee of land is not estopped from disputing the validity of the title of the vendor or grantor. Wenzel v. Schultz, 100 Cal. 250, 254, 255, 34 P. 696; Robinson v. Thornton, 102 Cal. 675, 683, 34 P. 120. That is exactly the situation confronting us. In the instant case plaintiff, as the successor in interest of Henry Hatch, the grantee under Mrs. Gookins' deed, challenged and repudiated any title or right in Mrs. Gookins, contending that she did not convey anything because she had nothing to convey, for the reason that at the time Mrs. Gookins executed her deed plaintiff's predecessor in interest was then himself vested with title to the right of way for his pipeline over Mrs. Gookins' property through a statutory grant from the United States. This plaintiff had a right to do. Were the rule as contended for by appellant, the grantee under a deed would be estopped, on a trial to recover the consideration paid for property to which the grantor had no title, from asserting that such grantor sold the property when he did not own it. Such is not the law. As was said in Wenzel v. Schultz, supra, 100 Cal. at page 255, 34 P. at page 698, quoting from City and County of San Francisco v. Lawton, 18 Cal. 465, 476, 79 Am.Dec. 187, "'A grantee in fee may deny that his grantor had any title.'" From what we have

hereinbefore said, it follows that the court committed no error in refusing to admit evidence as to the consideration paid by Almeda T. Gookins to the squatter Frankenberg for his claimed rights in the land later homesteaded by Mrs. Gookins, and a portion of which was later conveyed to defendant Frances Howard by mesne conveyances. The proffered testimony was immaterial, as was the testimony concerning differences over water rights between Henry Hatch and one Pratt, which testimony was offered to show that Pratt, a squatter on unsurveyed public lands, had the right to keep others from invading his right of possession and that Pratt exercised that right in allegedly preventing Henry Hatch from building his pipeline over the unsurveyed government land then occupied by Pratt as a squatter. Equally inadmissible were Henry Hatch's conversations with and statements to Almeda T. Gookins concerning the aforesaid deed of September 3, 1904, involving the right of way for the pipeline, because at the time of the execution of the deed Hatch was already the owner of the right of way for his pipeline over the property affected by the deed in question. For the same reason, testimony as to defendant Fred Howard's reliance on the recorded deed of Almeda T. Gookins of September 3, 1904, was properly excluded. No error was committed by the court in refusing to admit into evidence a deed from Henry Hatch to one Whipple and others dated March 8, 1905. This document was offered in evidence for the stated purpose of "further establishing the fact that Henry Hatch had accepted the deed of September 3, 1904, from Almeda T. Gookins conveying the pipe line right of way across the 40 acres involved herein * * *." This deed was inadmissible for the reasons herein pointed out that by it Mrs. Gookins divested herself of nothing for she owned nothing of what she attempted to convey, and by such deed Henry Hatch therefore acquired nothing.

[19, 20] Appellants urge that inasmuch as Henry Hatch failed to file a map of his right of way over public lands of the United States and secure the approval of the same by the Secretary of the Interior in accordance with the provisions of the Act of March 3, 1891, 26 Stat. 1095, he did not have a right of way over the Gookins Homestead, and that her deed to him of September 1904 was essential to vest such title in him. This claim is without merit. The aforesaid Act of March 3, 1891, entitled "An Act to repeal timber-culture laws, and for other purposes," by its very language negatives any legislative intent to amend or repeal the aforesaid Acts of 1866 and 1870 embodied in U.S.Rev.Stats. sections 2339 and 2340. The Act upon which appellants rely reflects upon its face that it was enacted to cover a very different and wider field of irrigation, viz., the construction of canals and ditches to supply water for public purposes, and was not intended to apply to an individual who, as in the instant case, takes water from springs to care for his personal needs, for domestic and irrigation purposes as disclosed by the record in this case.

The provisions of the Act of March 3, 1891, Secs. 18, 19, Chap. 561, 43 U.S.C.A. §§ 946, 947, read in part as follows:

"Sec. 18. The right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; * * *."

"Sec. 19. Any canal or ditch company desiring to secure the benefits of this act, shall within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir * * *."

[17] While it is true, as contended by appellants, that section 20 of the Act, 43 U.S.C.A. § 948, contains a provision that the same shall apply to "all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals * * *," nevertheless, the purpose and intent of the Act remains unchanged and definitely applies to canals, ditches or reservoirs utilized for supplying water for irrigation, etc., for pub-

lic use as a commercial enterprise to the users thereof for pay and does not affect an individual appropriating water for his individual use. The Act was construed in the case of United States v. Tunjunga Water & Power Co., D.C., 18 F.2d 120, 122, wherein it was held that the purpose of the Act of March 3, 1891, authorizing the acquiring of water rights in the public lands by canal and ditch companies for irrigation, "was quite plainly to aid irrigation and other projects, having the main and in view to render dry lands productive. The supplying of communities, either thickly or sparsely inhabited, with water for domestic and yard irrigation, is fairly within the main object to be accomplished." And further that "it is not that the government is interested in having constructed conduits and storage reservoirs of the exact and particular kind contemplated by the parties who make locations on Government land; if, within the general plan outlined by the maps of location, substantial improvements are made, which are of practical *use to an irrigation company in its business of supplying water to the inhabitants of the particular territory,* the requirements of the statute are satisfied and the rights obtained may not be disturbed." (Italics ours.)

That the Act of March 3, 1891, did not amend or repeal the aforesaid Revised Statute, Sec. 2339, Act of July 26, 1866, was the holding in United States v. Utah Power & Light Co., D.C., 208 F. 821, 823, and cases therein cited. On appeal to the United States Circuit Court of Appeals, 10 Cir., 209 F. 554, the judgment of the District Court was reversed on the ground that another Act of Congress, that of May 14, 1896, 29 Stat. 120, 43 U.S.C.A. § 957, relating to electric light companies did modify the aforesaid section 2339 of the Revised Statutes. At page 561 of its decision in 209 F., the court said:

"The government does not contend that section 2339 of the Revised Statutes has been wholly repealed, but merely that the subsequent act of 1896 has withdrawn from operation of that section the subject of generating, manufacturing, or distributing electric power, the manner of acquiring rights of way over the public lands for those purposes, and the nature and extent of such rights. We think this contention is sound."

Again, on page 562, of 209 F. the court says:

"Obviously, that act was not intended to interfere with the operation of section 2339; for no such proviso is found in the act of May 14, 1896. * * * It will thus be seen that Congress has wisely adapted and molded its legislation to meet the requirements of irrigation in a 'dry and thirsty land.'"

In Rasmussen v. Blust, 85 Neb. 198, 122 N.W. 862, 133 Am.St.Rep. 650, the syllabus reads:

"The failure of the irrigator to file a map in the land office and to secure the approval of the secretary of the interior in accordance with the act of congress approved, March 3, 1891, entitled 'An Act to repeal timber-culture laws, and for other purposes,' and the acts supplementary thereto do not destroy the privileges protected by sections 2339, 2340, Revised Statutes of the United States."

In the Rasmussen case, supra, at page 864 of 122 N.W., the following language of the Secretary of the Interior in the case of Lincoln County Water Supply & L. Co. v. Big Sandy Reservoir Co., 32 Land Dec. Dept. Int. 463, 465, is quoted with approval:

"While the clause above quoted from section 20 of the act of March 3, 1891, extends the benefits of the act to all canals, ditches, or reservoirs theretofore constructed upon the public domain, among which is the right to file in that behalf with the land department a map of such canals, ditches, and reservoirs, and secure the approval of the Secretary of the Interior thereof, *yet the right of claimants under section 2239 of the Revised Statutes are in no wise dependent upon * * * an approval of such maps.*" (Emphasis added.)

In the case of Gila Water Co. v. Green, 27 Ariz. 318, 232 P. 1016, 1018, we find the following:

"The appellant may claim through either or both of these sources. In other words, the Act of 1891 does not repeal sections 2339 and 2340, supra, but is simply a method of acquiring a more extensive and secure right than is gotten through these sources. United States v. Utah Power & Light Co., D.C., 208 F. 821; 1 Weil on Water Rights, § 440; Rasmussen v. Blust et al., supra; Cottonwood Ditch Co. v. Thom, supra [39 Mont. 115, 101 P. 825, 104 P. 281.]"

To the same effect is the case of Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 101 P. 825, 104 P. 281.

[21] It must therefore be held that the failure of Hatch to file a map and secure the approval of the same by the Secretary of the Interior pursuant to the provisions of the aforesaid Act of Congress of March 3, 1891, did not affect, impair or destroy the vested rights to a right of way for his pipeline obtained by him pursuant to the provisions of sections 2339 and 2340 of the Revised Statutes of the United States.

We come now to a consideration of appellants' second and final major claim, which is that they had acquired a water right by user and prescription in accordance with the laws and customs of the State of California in the water flowing through the pipeline of respondent, for the use and benefit of the land acquired by appellants.

[22] The trial court found that defendants' predecessors in interest, "commencing about 1915, and from time to time thereafter, but not continuously did take and use water from the pipe line of plaintiff and cross-defendant for household use; that such use of water was not hostile or adverse to plaintiff and cross-defendant or her predecessors in interest or to their rights and claims in and to said water, and did not appreciably diminish the flow of the water in said pipe line to plaintiff and cross-defendant's said ranch." In short, the court found that up to the time appellants acquired title and possession of the lands in question in 1939 no prescriptive rights had arisen in and to the water flowing through the pipeline constructed by respondent's predecessor in interest, Henry Hatch. Since the action with which we are here concerned was commenced October 1, 1940, it is obvious that no prescriptive rights have arisen since appellants obtained title to and possession of the land through which the pipe line passes.

[23–26] The facts or elements which are necessary to the existence of a prescriptive water right have been set forth in a veritable forest of cases. To perfect such right, the use of the water must be: (1) Actual, (2) open and notorious, (3) hostile and adverse to the original owner's title, (4) continuous and uninterrupted for the statutory period, and (5) under a claim of title in the claimant, and not by virtue of another right. 25 Cal.Jur. 1156, sec. 171, and cases therein cited. The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The law will not allow the property of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities. Niles v. Los Angeles, 125 Cal. 572, 576, 58 P. 190.

[27-29] Applying the above tests to the evidence in the case here under consideration, we are convinced that the finding of the court as to the defendants' alleged prescription are correct and just. The question as to whether or not the use was under a claim of right, or the mere matter of neighborly accommodation up to 1939, was a question of fact to be determined by the court in the light of the relations of the parties, their conduct, and all the surrounding circumstances. The court below saw the witnesses, heard them testify, and found the facts against the defendants. And where the court's finding is based upon conflicting evidence, it is conclusive upon the appellate court whose function is not to consider the relative weight of conflicting evidence, but only the legal sufficiency to support the challenged finding. Dell v. Hjorth, 51 Cal. App.2d 576, 578, 125 P.2d 505.

There was before the court testimony that no one lived on the homestead of Mrs. Gookins until the fall of 1910, at which time her son Bertram built a house on the east end of the property; that he put a hole in respondent's pipe line and attached a stand pipe, under which a bucket could be placed. Mr. Gookins described it as a "three-quarter inch stand pipe with a three-quarter inch valve." When asked "How did you take the water then from the pipe line to the house?" he replied "What little we took up was carried in buckets or barrels." In reply to the question whether he used any water from the pipe line other than what he carried up to the house, the witness stated "just for watering stock." The stock was taken down to the pipe line for watering. The witness moved away from the house on the homestead in 1911, returning in 1913. During these two years the house was unoccupied. Upon his return, the witness used water from the pipe line during the fall of 1913, all of the year 1914, and part of the following year. In 1915, when Bertram Gookins moved away, the house on his mother's homestead was occupied by Mr. and Mrs. Cherbbonno, the latter of whom was Bertram's sister. The three children of the

Cherbbonnos and Bertram's mother also lived in the house. When the City of Los Angeles constructed its acqueduct, the workmen used water from the pipe line, apparently with the consent of one Van Every, who was a tenant on section 16. The City, at that time, patrolled and repaired the pipe line. That the witness Bertram Gookins never considered he had a right to extract water from the pipe line is indicated by his testimony relative to a previous conversation with respondent's counsel concerning any water right possessed by his mother Almeda T. Gookins, wherein the witness stated: "I said to you at that time that I don't know anything about her ever having a water right." Another circumstance that impairs the claim that Mrs. Gookins ever claimed she had title or a right to water from the Hatch pipe line is the fact that, at considerable expense, she piped water from Twin Oaks Springs to a house on the west end of her homestead using such water for domestic purposes, for watering chickens and live stock from the fall of 1896 until she moved over to section 36 with her son Arthur in the winter of 1904-1905, a period of some eight years. Mrs. Gookins also filed on and made an appropriation of the waters from this spring as appurtenant to her homestead. She moved away from her homestead for a period of some ten years, while residing on section 36 in another township, and did not return until 1915, when she went to live with her daughter and the latter's husband and family as heretofore narrated. While the Cherbbonnos occupied the homestead, a limited use was made of the water—first in buckets, and after 1921 for a time with a faucet installed at the kitchen sink.

[30, 31] Bertram Gookins' use of the water was not continuous. During the five years in question he was only intermittently at the house. Furthermore, Bertram Gookins had no title to the land and so far as the evidence shows did not occupy the status of a tenant, but that of a mere squatter. The Cherbbonno family occupied the homestead property from December 1915 to 1924. Until she acquired the property in 1923 by deed from her mother, Mrs. Cherbbonno's use of the water could hardly be said to have built up a prescriptive right in herself or in her mother. It is also noteworthy in connection with appellants' claim that Mrs. Gookins believed she had a water right in respondent's pipe line, that when she executed the deed to the homestead in favor of her daughter, Mrs. Cherbbonno, she made no mention of the water right, which her purported deed to Hatch in 1904 attempted to grant. Neither was any such mention made in the deed from Helen Cherbbonno to Dana R. Weller, executed in 1925. The existence of the claim of right in the mind of the person claiming it will not suffice to establish title by prescription. It must be asserted in such a manner that the owner is apprised of the claim. As was said in Clarke v. Clarke, 133 Cal. 667, 670, 66 P. 10, 11, "If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law." Prescriptive rights are established only when the enjoyment thereof is adverse, continuous and under claim of legal right, and not by consent, permission or mere indulgence of the owner of the alleged servient estate. It should also be borne in mind that, except for a time during the construction of the acqueduct when the City of Los Angeles patrolled and repaired the pipe line, it was maintained solely by Hatch and his successors in interest. The theory of permission or acquiescence in the taking of water from the pipe line is strengthened by the fact that when measured in 1940 the water was estimated at something more than 40,000 gallons per day, while the amount of water carried in buckets and additional water used for live stock, if it averaged even 50 gallons per day, would not seriously impair the supply of water to the owners of the pipe line. The same situation prevailed from 1925 to 1934 when Judge Weller owned the property. This constituted no real invasion of respondent's rights to the water supply and would lend credence to the theory of implied permission. In 2 Farnham, Waters, paragraph 535, the author says:

"If the use which was made of the water was one which the proprietor had a right to make, and it did no injury to the other person, it would not make the slightest difference how long it had continued. It was not until the use of the water became wrongful as to another or injured his

rights that it became adverse so that its continuance would give a good title".

And in Jobling v. Tuttle, 75 Kan. 351, 89 P. 699, 703, 9 L.R.A.,N.S., 960, 964, it is said that "It must therefore be adverse, and this character of the use has been defined to be a use under a claim of right known to the owner of the servient tenement—use such as the owner of an easement would make of it without permission asked or given, and disregarding entirely the claims of the owner of the land."

[32-34] That owners are not affected by acts which do not bring to them knowledge of the assertion of an adverse right, and that the use by the adverse claimant was not hostile unless there was an actual clash with the rights of the actual owners, and that before a right by prescription is established the acts by which such establishment is sought must operate as an invasion of the rights of the parties against whom it is set up, was the holding in Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 192, 30 P. 623; City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 133, 287 P. 475; Churchill v. Louie, 135 Cal. 608, 611, 67 P. 1052; Skelly v. Cowell, 37 Cal.App. 215, 218, 173 P. 609; Faulkner v. Rondoni, 104 Cal. 140, 147, 37 P. 883; Pabst v. Finmand, 190 Cal. 124, 128, 129, 211 P. 11. To the same effect was the holding in the well considered case of Jobling v. Tuttle, 75 Kan. 351, 89 P. 699, 9 L.R.A.,N.S., 960, 965, 966, and Dondero et al. v. O'Hara et al, 3 Cal.App. 633, 86 P. 985. The record justified the conclusion by the trial court that none of the owners of the 40 acres later acquired by appellants claimed title to any water right, or hostile or adverse rights against the owners of the pipe line or its waters, until such claim was urged by appellants in 1939. We have examined the cases relied upon by appellants and find that both the factual background thereof and the legal issues presented therein are dissimilar to the case at bar. Estoppel is not created against an owner to assert his rights by mere passive acquiescence in the use of water by another. Holbrook Irr. Dist. v. Arkansas Valley S. B. & Irr. L. Co., D.C., 42 F.2d 541, 548.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

73 Cal.App.2d 894

PEOPLE v. EGAN.

Cr. 2392.

District Court of Appeal, First District, Division 2, California.

April 10, 1946.

Hearing Denied May 9, 1946.

1. Indictment and information ⇐196(1)

An argument that an indictment for first-degree murder was void and should be dismissed must be made in court in which accused is arraigned, before demurrer or plea, and a failure to do so at that time constitutes a waiver of any future objections. Pen. Code, §§ 995, 996.

2. Prohibition ⇐5(4)

On denial of defendant's motion made on arraignment to set aside an indictment, the appropriate remedy of defendant is the filing of a petition for writ of prohibition to restrain court from proceeding with the trial.

3. Criminal law ⇐1023(8)

Even if a motion to set aside an indictment is made at a seasonable time, an appeal will not lie directly from the order denying the motion, since such motion is reviewable only on appeal from judgment itself. Pen.Code § 1237.

4. Criminal law ⇐1023(8)

Attempted appeal from order denying motion to set aside indictment for first-degree murder was dismissed, since no direct appeal lies from such an order. Pen. Code, § 1237.

5. Habeas corpus ⇐119

Where grounds of motion to set aside judgment of conviction for first-degree murder and issues argued on appeal from denial of the motion were identical with issues finally adjudicated in prior habeas corpus proceedings by defendant, prior judgment operated as an estoppel or conclusive adjudication on those issues.

6. Criminal law ⇐997

A motion to set aside a final judgment of conviction for first-degree murder was in nature of application for writ of error coram nobis at common law, where motion was made after new trial was denied and after time for granting new trial had expired.

7. Criminal law ⇐997

A "writ of error coram nobis" is not intended to authorize any court to review and revise its opinions, but only to enable court to recall some adjudication made while some fact existed which, if before the court, would have prevented rendition of judgment, and which, without any fault or negligence of the party, was not presented to the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Error Coram Nobis".

8. Criminal law ⇐997

A writ of error coram nobis may not be used to cure irregularities occurring at the trial except in such circumstances of extrinsic fraud which actually deprives the petitioner of a trial on the merits.

9. Criminal law ⇐997

A writ of error coram nobis cannot be utilized to set aside a judgment in a case in which defendant was given a full trial on the merits.

10. Criminal law ⇐997

Defendant's contention relative to a deprivation of counsel and the verity of the testimony at his murder prosecution could not be considered on motion to set aside final judgment of conviction, which was in the nature of a petition for a writ of error coram nobis at common law.

11. Criminal law ⇐997

Where defendant, who was convicted of first-degree murder, made a motion for new trial and filed a notice of appeal but failed to perfect the appeal, he was not entitled to maintain motion to set aside final judgment of conviction, which was in the nature of an application for a writ of error coram nobis at common law, since writ of error coram nobis cannot be entertained where remedies exist by statute which were not available at common law, such as right to make a motion for new trial and to appeal.

12. Criminal law ⇐997

A showing of diligence must be made in an application for writ of error coram nobis.

13. Criminal law ⇐997

A writ of error coram nobis should be applied for at or near time of moving for a new trial.

14. Criminal law ⇐997

Where motion to vacate judgment of conviction, which was in the nature of a writ of error coram nobis at common law, was not filed until approximately 13 years after judgment, court had no alternative but to deny motion on ground that it was not seasonably made.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Frank Egan was convicted of first-degree murder. From an order denying defendant's motion to set aside the indictment and from an order denying defendant's motion to annul, vacate, and set aside judgment of conviction, defendant appeals.

Appeal from order denying motion to set aside indictment dismissed, and order denying motion to annul, vacate and set aside judgment of conviction affirmed.

Elizabeth Cassidy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

On June 6, 1932, Frank Egan, who was then public defender of the city and county of San Francisco, was indicted jointly with Albert Tinnin and Verne Doran for the murder on April 29, 1932, of Mrs. Jessie Scott Hughes. Upon their demand for separate trials a severance was granted as to Doran but denied as to the other two defendants. At the time of arraignment and before entry of plea defendants Egan and Tinnin moved to set aside the indictment but the motion was denied. Doran confessed to the murder, turned State's evidence, and subsequent to the conviction of Egan and Tinnin pleaded guilty to manslaughter; he was sentenced to San Quentin for the time prescribed by law and was released on parole in November of 1934. As a result of Doran's testimony, together with other evidence connecting them with the crime, Egan and Tinnin were found guilty of first degree murder and on September 14, 1932, were sentenced to life imprisonment. After denial of their motions for new trial each defendant filed a

separate notice of appeal. Tinnin completed his appeal and the judgment against him was affirmed in People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951, wherein a full statement of the facts is recited. Egan failed to perfect his appeal within the time prescribed by law and on November 28, 1933, upon motion of the attorney general, the appeal was dismissed. People v. Egan, 135 Cal.App. 479, 27 P.2d 412.

A petition by Egan for a writ of habeas corpus was denied by the State Supreme Court on September 15, 1938. On February 2, 1942, Frank Egan, on behalf of himself and Albert Tinnin, filed a second petition for a writ of habeas corpus with the same court. The writs were issued and Judge Edward I. Butler of Marin County was appointed as referee to hear testimony on the questions of whether any witness at the original trial committed perjury, whether, in the event that perjury was committed, the prosecution permitted any testimony to be introduced knowing that it was perjured and, finally whether Frank Egan was deprived of counsel during the trial. After numerous hearings Judge Butler filed his findings and report with the supreme court, adverse to Egan and Tinnin. Exceptions to the report were filed by the petitioners and the matter was argued and submitted. On June 5, 1944, the court rendered its decision against the parties, discharging the writs and remanding petitioners to custody. In re Egan, 24 Cal.2d 323, 149 P.2d 693. A petition for writ of certiorari was denied by the United States Supreme Court on December 4, 1944. Egan v. California, 323 U.S. 785, 65 S.Ct. 272.

On September 5, 1945, the instant proceedings were commenced by the filing of a motion to set aside the indictment as to defendant Frank Egan and a motion to annul, vacate and set aside the judgment of conviction of defendant Frank Egan, together with supporting affidavits. The former motion was based upon seventeen grounds to the general effect that the indictment was obtained on incompetent, improper and insufficient evidence. The motion to set aside the judgment was based upon forty-one grounds wherein it was alleged principally that the judgment was secured by perjured testimony with the connivance of the prosecution. These motions were argued in the court below and upon submission the court made an order denying each motion on the ground that it had been untimely made. Separate notices of appeal were filed from the order denying the motion to set aside the indictment and from the order denying the motion to set aside the judgment.

[1, 2] In support of his appeal from the order denying the motion to set aside the indictment the appellant has presented a lengthy and repetitious argument in an attempt to show that the indictment based upon the testimony of Doran was void and should be dismissed. Such an argument cannot be considered at this late date either by the trial court or by this court on appeal. The records indicate that upon arraignment and before entry of plea Egan and Tinnin made a motion to set aside the indictment. The law is well settled that such a motion under section 995 of the Penal Code must be made in the court in which the accused is arraigned before demurrer or plea and that a failure to so move at that time constitutes a waiver of any future objections. Penal Code, sec. 996; People v. Kellogg, 6 Cal.2d 448, 454, 57 P.2d 1305; People v. Harris, 219 Cal. 727, 730, 28 P.2d 906; People v. Stacey, 34 Cal. 307, 308; People v. Linton, 102 Cal. App. 608, 611, 283 P. 389. Upon denial of the motion made on arraignment the appropriate remedy of the accused would be the filing of a petition for a writ of prohibition to restrain the lower court from proceeding with the trial. Greenberg v. Superior Court, 19 Cal.2d 319, 323, 121 P.2d 713. The motion involved in the instant appeal was not made until thirteen years after the entry of judgment at the time when this remedy was not available to the appellant. The trial court would not be permitted to entertain a motion to set aside a final judgment on the ground of insufficiency of the indictment (People v. Wallington, 77 Cal.App. 366, 246 P. 815) and it was correct in holding that the indictment could not be set aside subsequent to the entry of the judgment.

[3, 4] However, even if the motion to set aside the indictment had been made at a seasonable time an appeal would not lie directly from the order denying the motion. Penal Code, sec. 1237; People v. Simmons, 119 Cal. 1, 2, 50 P. 844; People v. Wilde, 42 Cal.App.2d 482, 485, 109 P.2d 415; People v. Izlar, 8 Cal.App. 600, 602, 97 P. 685. The order would be reviewable only on appeal from the judgment itself. People v. Duncan, 50 Cal.App.2d 184, 188, 122 P.2d 587. Hence the attempted appeal

from the order denying the motion to set aside the indictment must be dismissed. People v. Calkins, 8 Cal.App.2d 251, 253, 47 P.2d 544.

[5] On his appeal from the order denying the motion to set aside the judgment the appellant attempts to argue the case on its merits as though it were an original appeal from the judgment. The main contentions on this appeal seem to be that Egan was convicted upon the perjured testimony of Verne Doran and that he was deprived of counsel during the trial. The identical issues were before the Supreme Court in the previous habeas corpus proceeding. As stated above, testimony was taken on these issues and the report of the referee, excepted to by appellant, was argued and submitted. In its decision (In re Egan, supra) the court stated at page 335, of 24 Cal.2d, at page 700 of 149 P.2d: "On such a record there is no basis whatsoever for a tenable conclusion that the petitioners or either of them were convicted on testimony as to any material matter which was false, or that the prosecuting officials or any other representatives of the State suffered the introduction of false testimony knowing it to be false." It was also held in that proceeding that Egan was not deprived of the service of counsel, the court stating at page 339 of 24 Cal.2d, at page 702 of 149 P.2d: "Finally, the petitioners are making a collateral attack on judgments rendered ten years before this particular proceeding was initiated. The burden was upon them to show that they were deprived of some constitutional right. Neither has established such a deprivation on the basis of alleged false testimony given at the trial, and neither has proved that he was deprived of the assistance of counsel in a substantial sense. Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357. The court therefore would not be justified in declaring the judgments void." Hence the grounds of the motion and the issues argued on this appeal are identical with the issues finally adjudicated in the prior habeas corpus proceedings between the same parties. The prior judgment must be held, therefore, to operate as an "estoppel or conclusive adjudication" on those issues. Sutphin v. Speik, 15 Cal.2d 195, 201, 202, 99 P.2d 652, 655, 101 P.2d 497; In re Stratton, 133 Cal.App. 738, 740.

[6-8] Further, the motion herein to set aside the final judgment of conviction, having been made after a new trial was denied and after the time for granting a new trial had expired, was in the nature of an application for a writ of error coram nobis at common law. People v. Mooney, 178 Cal. 525, 528, 174 P. 325; People v. Butterfield, 37 Cal.App.2d 140, 142, 99 P.2d 310; People v. Kretchmar, 23 Cal.App.2d 19, 22, 72 P.2d 243, and authorities cited therein. "The writ of error coram nobis is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." 1 Freeman on Judgments, Fifth Edition, sec. 256; People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657; People v. Mooney, supra, 178 Cal. 528, 174 P. 325. It is well settled that the writ may not be used to cure irregularities occuring at the trial except in such circumstances of extrinsic fraud which actually deprived the petitioner of a trial on the merits. People v. Schwarz, 201 Cal. 309, 314 and 315, 257 P. 71; People v. Reid, 195 Cal. 249, 258, 232 P. 457, 36 A.L.R. 1435; People v. Mooney, supra, 178 Cal. 529, 174 P. 325; People v. Lewis, 64 Cal.App.2d 564, 565, 149 P.2d 27; People v. Deutsch, 16 Cal.App.2d 121, 122, 60 P.2d 155.

[9, 10] In view of the narrow limits placed on the application of the writ it seems that appellant, in arguing the merits of his case, has misconceived the scope of the remedy attempted to be invoked. The authorities cited above are unanimous in holding that the writ of coram nobis cannot be utilized to set aside a judgment in a case in which the defendant was given a full trial on the merits. Appellant's contentions relative to a deprivation of counsel and the verity of the testimony at his trial cannot be here considered. In connection with the latter argument the court in the Mooney case held in a similar situation at pages 529 and 530 of 178 Cal. at page 327 of 174 P.:

" 'In the trial of the case of Thomas J. Mooney the truth or falsity of the testimony of the witnesses Oxman and Edeau was a part of the issue submitted to the jury, and that issue, upon the return of the verdict, became an adjudicated issue of fact, which cannot now by the writ of coram nobis be readjudicated. The remedy in such case is by motion for a new trial,

and if newly discovered evidence is too late in its production, its consideration cannot be brought about under the guise of a motion to vacate the judgment upon the ground of fraud. The defendant in such case is without remedy.

" 'In this state it is the settled law that a judgment cannot be set aside because it is predicated upon perjured testimony, or because material evidence is concealed or suppressed. The fraud which is practiced in such cases upon both the court and him against whom the judgment is pronounced is not such fraud as is extrinsic to the record; and it is only in cases of extrinsic fraud that such relief may be had. Pico v. Cohn, 91 Cal. [129] 134, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St. Rep. 159; In re Griffith's Estate, 84 Cal. [107], 112, 23 P. 528, 24 P. 381; Allen v. Currey, 41 Cal. [318], 321.' "

[11] There is another reason why the remedy sought by the appellant in this proceeding was not available to him. The records show that Egan made a motion for a new trial and that he filed a notice of appeal which he failed to perfect. The authorities are unanimous in holding that where remedies exist by statute which were not available at common law, the right to make a motion for a new trial and to appeal, the writ of coram nobis cannot be entertained. People v. Reid, supra, 195 Cal. 255 and 256, 232 P. 457, 36 A.L.R. 1435; People v. Davis, 187 Cal. 750, 751, 203 P. 990; People v. Mooney, supra, 178 Cal. 529, 174 P. 325.

[12-14] Finally, in this case the judgment of conviction was entered on September 14, 1932, and the within motion to vacate that judgment was not filed until September 5, 1945, approximately thirteen years later. Upon this showing the lower court denied the motion on the ground that it was untimely made. The courts of this state require that a showing of diligence be made in the application for a writ of error coram nobis. 27 Cal.Law Rev. 232. It was held in People v. Black, 114 Cal.App. 468, 473, 300 P. 43, that the writ should be applied for at or near the time of moving for a new trial, and in People v. Vernon, 9 Cal.App.2d 138, 142, 49 P.2d 326, that the application must be "within a reasonable time" after the entry of judgment. In applying these rules the courts have held that six years and eight months was an untimely delay (People v. Lumbley, 8 Cal.2d 752, 761, 68 P.2d 354), that a six and one-half years' delay was unreasonable (People v. Lewis, supra), that six years was too long a period (Vernon v. Rappaport, 25 Cal.App.2d 281, 77 P.2d 257), and that a delay of five years was unreasonable. People v. Harincar, 49 Cal. App.2d 594, 596, 121 P.2d 751. In view of these authorities, all of which involved a considerably shorter period of delay than was shown to exist in the present litigation, the lower court had no alternative but to deny the motion on the ground that it was not seasonably made.

The appeal from the order denying the motion to set aside the indictment is dismissed. The order denying the motion to annul, vacate and set aside the judgment of conviction is affirmed.

GOODELL and DOOLING, JJ., concur.



73 Cal.App.2d 863

PEOPLE v. LEYVAS et al.

Cr. 3973.

District Court of Appeal, Second District, Division 1, California.

April 8, 1946.

1. Robbery ⇐4

The Legislature by its definition of the words "personal property" did not intend to limit the subject of robbery to the properties enumerated therein, "money, goods, chattels, things in action and evidences of debt", in view of other statutes enumerating other kinds of personal property and the enactment of the Black Market Bill. Pen.Code, § 7, subd. 12; §§ 211, 496c, 540–543; Civ.Code, § 663.

2. Robbery ⇐4

Robbery does not depend upon the value of the property taken, and the crime is made out even though the property taken may be of slight value if the other elements of the crime are present. Pen. Code, § 211.

3. Robbery ⇐4

Property which is the subject of larceny is also the subject of robbery, since

robbery contains the elements of larceny, with the element of either force or fear added. Pen.Code, § 211.

4. Robbery ⇐4

Gasoline rationing stamps are "personal property" so as to be subject of robbery, as against contention that stamps are only permits for licenses to buy gasoline and therefore not personal property which could be the subject of robbery. Pen.Code, § 7, subd. 12; §§ 211, 496c, 540–543.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Henry Leyvas and Ray Obregon were charged with an offense, and first-named defendant was convicted of robbery in the first degree, and he appeals.

Affirmed.

Katz, Gallagher & Margolis, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

By information, defendants were jointly charged with the crime of robbery, to-wit, that on or about May 23, 1945, they forcibly took from the person and immediate presence of Arthur Sage "assorted gas ration stamps authorizing 4066 gallons of gasoline, of the approximate value of $800.00." At the conclusion of a jury-waived trial, defendants were found guilty, as charged, and the court found the crime to be robbery of the first degree. Defendant Leyvas has perfected this appeal from the judgment of conviction and from an order denying his motion for a new trial.

It appears from the record that about 4:30 p.m. of May 23, 1945, Arthur Sage, an employee of the Wilshire Oil Company, was driving a tank truck along Washington Boulevard in the City of Los Angeles; that when he stopped at the boulevard stop at the intersection of Washington Boulevard and Telegraph Road, an automobile drove up on the left side of the truck; that defendant Obregon alighted from the automobile and stepped on the running board of the truck, holding a .32 revolver in his hand. He put the gun across the window in front of the driver Sage and said: "Okay, Bud, let's have the gas stamps. * * * Let's have them, or I will blow your head off." Sage then unlocked a box on the truck in which he was carrying several sheets, furnished by the government, to which had been pasted O.P.A. gasoline ration stamps of all types, fifty stamps to a sheet, and turned them over to said defendant. Mr. Sage estimated that the stamps had a value of 4,066 gallons of gasoline. He was taking them to the company's plant, to be accounted for and turned into the bank for credit to the account of the company. While defendant Obregon was taking the stamps from the driver of the truck, appellant Leyvas remained sitting behind the steering wheel of the automobile from which Obregon had alighted; as soon as the latter accomplished his purpose, he jumped into the automobile which speeded away in an easterly direction.

It is here urged that gas ration stamps were only permits or licenses to buy gasoline; "were not personal property as defined by the Penal Code, and therefore could not be the subject of a robbery," which is defined by section 211 of the Penal Code as "the felonious taking of *personal property* in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

In this connection appellant argues that by its definition of the words "personal property" in subdivision 12, section 7, of the Penal Code, the legislature intended to limit the subject of robbery to "the five kinds of property" therein enumerated, to-wit: "money, goods, chattels, things in action, and evidences of debt."

Appellant apparently has overlooked Penal Code, sections 449a, the arson statute; 491, in which dogs are named as personal property, and 496c, which defines as personal property "any private and unpublished *paper,* book, record, map or file containing information relating to the title to real property * * *."

Also, that in 1944, the legislature of this state enacted the so-called Black Market Bill, which added sections 540, 541, 542 and 543 to the Penal Code, making it a crime to counterfeit, buy, sell or *steal* "any coupon, stamp, token, certificate, or other ration evidence or document issued by the United States Government or any agency thereof in furtherance of its rationing program."

"Every kind of property that is not real is personal." Section 663, Civil Code.

[1, 2] As stated in People v. Thomas, 45 Cal.App.2d 128, 135, 113 P.2d 706, 710: "* * * robbery does not depend upon the value of the property taken. The other elements being present, the crime is made out even though the property taken be of slight value. 22 Cal.Jur. 841; People v. Walbridge, 123 Cal. 273, 55 P. 902; People v. Razo, 43 Cal.App. 251, 184 P. 881 * * *." In the Walbridge case, 30¢ in money was taken, and in the Razo case, two coins, a five and a ten cent piece.

In People v. Caridis, 29 Cal.App. 166, 154 P. 1061, the defendant was charged with stealing a lottery ticket of the value of $1250. The court held that the lottery ticket had no legitimate value except as the evidence of a debt due from an enterprise which is denounced by law and conducted in defiance thereof, and therefore was not the subject of grand larceny of the amount of money which could be collected thereon. However, by way of dictum, the court in that case said, at page 169 of 29 Cal.App. at page 1062 of 154 P.: "Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however, small, would have sufficed to make the wrongful taking of it petit larceny, and, if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer. 1 McClain on Criminal Law, § 543."

Relying upon the Caridis and other cases as authority, it was held in the recent case of People v. Dunsworth, 323 Ill.App. 470, 56 N.E.2d 52, 55, that gasoline ration stamps are property, possess intrinsic value and are a subject of larceny.

[3] Ration stamps are evidences of the permission granted by the government to buy rationed commodities (see 16 Cal.Jur. 187), and as such evidences, they have a tangible being and an intrinsic value, even though slight, which makes the stealing of them larceny. Since robbery contains the elements of larceny, with the element of either force or fear added (22 Cal.Jur. 838 and authorities there cited), property which is the subject of larceny, is also the subject of robbery.

[4] From the foregoing, it is apparent that gasoline rationing stamps are personal property, as that term is defined by the various sections of the Penal Code, above referred to, including sections 540, 541, 542 and 543, which make it a crime, among others, to *steal* any type of ration stamp or coupon.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.



73 Cal.App.2d 959

HARROUN v. BARNES et al.

Civ. 15117.

District Court of Appeal, Second District, Division 3, California.

April 12, 1946.

Rehearing Denied May 1, 1946.

Hearing Denied June 6, 1946.

1. Executors and administrators ⇨454

In action by individual, who was successor to corporate employer, against employee's executors to recover money stolen by employee, where executors challenged individual's right to maintain action, finding that individual was owner of right, title and interest of corporation including property into which money had been transmuted by the employee meant that if corporation had owned property which had been purchased with stolen money, individual was owner, and where judgment directed sale of property with proceeds to be paid to individual less amount secured from insurance, findings and judgment did not determine that individual was owner of property but established that he had lien thereon.

2. Executors and administrators ⇨454

Where, in action by corporate employer's successor against employee's executors to recover money stolen by employee, judgment directed sale of realty which had been purchased with stolen money in name of employee and his wife as joint tenants, the sale was not one in partition and there was a right of redemption. Code Civ.Proc. § 700a.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action to quiet title by Irene M. Harroun against Evadna L. Barnes and another. Judgment for plaintiff, and defendants appeal.

Reversed with directions.

Britton Bowker, of Tujunga, for appellants.

Don Lake, of Los Angeles, for respondents.

WOOD, Justice.

In this action to quiet title to real property, the defendants appeal from the judgment in favor of plaintiff.

Plaintiff claims title by grant deed from C. K. Brodie, who claimed title under the "decision" in a certain action, which decision, according to plaintiff, appeared in the findings of fact and conclusions of law, as distinguished from the judgment therein. Defendant McKenna claims title under a certificate of redemption issued by the sheriff to him, as successor in interest of Evadna L. Barnes, after a sale of the property under the provisions of the judgment in that action. Plaintiff contends further that there was no right of redemption under such a sale.

Defendant Evadna L. Barnes is the widow of W. B. Barnes, who had embezzled about $5,000 from his employer, Brodie Bros., Inc. A part of that money was used by Barnes and his wife to purchase the real property involved herein and to pay premiums on his life insurance. After the death of Barnes in 1939, C. K. Brodie, the successor and assignee of Brodie Bros., Inc., sued Barnes' executors, who were his widow and son, to recover the stolen money, and in that action he obtained judgment on March 11, 1941, for $3,365.03. Recovery of the stolen money in excess of the amount of said judgment was barred by the statute of limitations as of 1936. That judgment provided that the *entire* proceeds of the insurance, $2,000, should be paid to plaintiff. It also provided that the real property should "be sold by the sheriff * * * and the proceeds thereof, after payment of costs and expenses of sale, be paid to the plaintiff to the amount of $3,365.03, less the amount secured to plaintiff from said insurance above mentioned, and the balance to be paid to the defendant, Evadna L. Barnes, and in case said insurance and real property do not produce the sum of $3,365.03 and plaintiff's costs herein to plaintiff, that a judgment be entered against the Estate * * * for the amount of such deficiency."

On April 8, 1941, at the request of plaintiff therein, execution was issued, and thereafter publication of notice of sale of said real property was made. At the sheriff's sale on June 16, 1941, the plaintiff Brodie purchased the real property for $300, and the sheriff issued and delivered his certificate of sale to plaintiff and recorded a duplicate thereof. The certificate of sale recited thereon: "That the same is subject to redemption in like cash, lawful money of the U. S., pursuant to the statutes made and provided."

On July 11, 1941, Mrs. Barnes and Francis R. McKenna entered into an agreement whereby she agreed to sell to him and he agreed to buy from her the said real property for $1,800. On July 30, 1941, Mr. McKenna asked the sheriff what amount of money was required in order to redeem the property. On August 2, 1941, said plaintiff filed a notice of motion to set aside the execution sale and to quash the execution. On August 4, 1941, Mrs. Barnes executed a grant deed to said property to Mr. McKenna, as grantee, which deed was recorded on that day. On August 5, 1941, at the instance of said plaintiff, an order to show cause was issued directing that the executors show cause on August 6, 1941, why they should not be restrained from procuring a certificate of redemption pending the determination of the motion to set aside the sale and execution; and also on that day an order was made restraining the issuance of a certificate of redemption pending the hearing of the order to show cause. On August 6, the motion to set aside the sale and quash the execution was denied, and said restraining order was dissolved. No appeal was taken from those orders and they became final.

The defendants in that case, the executors, appealed from said judgment above mentioned, and that portion of the judgment providing that the *entire* insurance proceeds be paid to plaintiff was reversed with a direction to ascertain the amount of premiums paid since 1936, and to grant plaintiff a pro tanto interest in the proceeds—some of the premiums having been paid before 1936, the date prior to which stolen money could not be recovered; and the portion of the judgment concerning the real property was affirmed. Brodie v.

Barnes, 1942, 56 Cal.App.2d 315, 132 P.2d 595.

Upon the retrial of that case in April, 1943, after the reversal, the trial judge did not follow the direction relative to granting a pro tanto interest in the insurance proceeds, but rendered judgment again that plaintiff should recover the entire proceeds. That judgment was reversed on appeal with a direction that judgment for plaintiff be entered for a certain fractional interest of the proceeds. Brodie v. Barnes, 1944, 65 Cal.App.2d 1, 149 P.2d 899. A few days before that second judgment was rendered in the trial court, the plaintiff therein made another motion to set aside the sale, stating as the sole ground therefor that the ascertainment of the amount of the insurance proceeds was a condition to be performed before it could be known whether a sale of the property should be made. That motion was granted, but that ruling was reversed on appeal. Brodie v. Barnes, 1944, 65 Cal.App.2d 3, 149 P.2d 900, 901. In the opinion reversing that order it was said: "* * * the writ of assistance was properly issued * * * and the sale * * * was regular. No ground appears which justified setting the sale aside. * * * The amount bid by plaintiff * * * was $300, resulting in a credit on the judgment of only $270.65, due to costs of sale. There seems no occasion for plaintiff's belated concern that the sale might not be necessary and should not have been held until it was determined what portion of the $3,365.03 judgment would not be paid by the proceeds from the $2,000 life insurance policy."

At the trial in this present case, the plaintiff Harroun introduced in evidence a grant deed to said real property, dated August 1, 1941, made by Mr. and Mrs. Brodie, as grantors, to plaintiff, as grantee. The plaintiff then introduced in evidence, by reference, the judgment roll in the above-mentioned action, and she directed attention particularly to the findings of fact and conclusions of law.

Also at the trial herein, the defendant McKenna introduced in evidence a grant deed to said real property, dated August 4, 1941, made by defendant Evadna L. Barnes, as grantor, to him, as grantee. He then introduced in evidence a certificate of redemption, covering said real property, issued to him by the sheriff on August 6, 1941, and recorded on August 8, 1941.

It was stipulated that Mr. and Mrs. Barnes took title to said real property as joint tenants.

After both sides had rested, and while the case was being discussed by the judge and counsel, the plaintiff introduced in evidence the return of the sheriff, filed June 19, 1941, showing that the property had been sold to C. K. Brodie for $300, that a certificate of sale had been delivered to him and that a duplicate thereof had been filed in the recorder's office.

[1] Appellants contend that the evidence did not show title in the plaintiff, but on the contrary showed title in defendant McKenna by reason of the grant deed from Mrs. Barnes (who was the surviving joint tenant) and the certificate of redemption.

Respondent states that she does not claim title through the sale proceedings, that she claims title as above indicated through the findings of fact and conclusions of law, and that her title was "derived through the embezzlement, the purchase of the property with the embezzled money and the acquisition of title by respondent from C. K. Brodie." She argues that a certain finding in the action by C. K. Brodie to recover the stolen money, established that he was the owner of the property. She refers to the finding therein, upon the subject of C. K. Brodie being the successor to Brodie Bros., Inc. That finding stated that "* * * said corporation, Brodie Bros. Inc., was * * * dissolved according to law, leaving as the sole owner of its corporate stock, plaintiff herein, C. K. Brodie, who * * * is the owner of all the property, assets, books, choses in action, accounts, rights, titles and interests theretofore owned and possessed by said corporation, including the right, title and interest in and to all of said $3,365.03 so coming into the hands of said W. B. Barnes and retained by him, and to any and all properties into which said money or any part thereof has been transmuted by the acts of said W. B. Barnes, or the defendant Evadna L. Barnes." Respondent (plaintiff) asserts, as above indicated, that said finding and the conclusions of law constituted the decision in the action, and that decision was that C. K. Brodie was the owner of said real property. The defendants therein, executors of the Barnes will, had challenged the right of C. K. Brodie, individually, doing business as Brodie Bros., to maintain the action, as

distinguished from the right of Brodie Bros., Inc., a corporation, the employer of Barnes, to maintain it. It is to be noted that said finding was a paragraph of the findings relating to the status of C. K. Brodie as successor of Brodie Bros., Inc., a corporation; it being stated therein that he was owner of "rights, titles and interests *theretofore owned*" by the corporation, "including the right, title and interest in and to any and all properties into which said money * * * had been transmuted by the acts of said W. B. Barnes * * *." (Italics added.) The proper interpretation of that finding, insofar as ownership of this property is concerned, is that if the corporation had theretofore owned any right, title or interest in property which had been purchased with the stolen money, then C. K. Brodie, as successor to the corporation, was the owner of such right, title or interest. In Brodie v. Barnes, supra, 56 Cal.App.2d 315, at page 321, 132 P.2d 595, at page 598, it was said: "The trial court's finding demonstrates that respondent succeeded to the ownership of all assets of the corporation, including *this claim* * * *." (Italics added.) It is also to be noted that one of the conclusions of law, which respondent asserts was a part of the decision that Brodie was the owner of this property, was "That plaintiff is entitled to have said real property sold *as on execution* under judgment herein * * *." (Italics added.) That conclusion cannot be reconciled with a decision that Brodie was the owner.

As to the right, title and interest of Brodie, as such successor, in the property here involved, the judgment is determinative. It is significant that the judgment provided that he was owner and entitled to recover the proceeds of the insurance policy, but as to the real property here involved it provided that it be sold by the sheriff and the proceeds be paid to Brodie to the amount of $3,365.03, less the amount secured from the insurance, and the balance of the proceeds, if any, to be paid to Mrs. Barnes; and that if such proceeds be not sufficient to produce $3,365.03, then judgment be entered for the deficiency. Such provision indicates that, in considering ownership, a distinction was made between Brodie's interest in the insurance and his interest in the real property,—ownership being limited to the insurance. It was decided in Brodie v. Barnes, supra, 56 Cal.App.2d 315, at page 322, 132 P.2d 595, at page 599, that under the said judgment C. K. Brodie was not the owner of said real property. It was there said: "It will be noted that the trial court *did not give plaintiff the real property* as it might well have done. It limited plaintiff's rights to *a lien*, ordered the property sold, and provided that the recovery by plaintiff should be limited to the amount embezzled." (Italics added.) As to the fact that Brodie bid $300 for the property which he claimed he already owned, respondent asserts in effect that it was of no significance and it "simply added to the loss" already sustained. It was not determined by said judgment, or by the findings and conclusions of law, that C. K. Brodie was the owner of said property, but the judgment did establish that he had a lien upon said real property.

[2] Respondent asserts further that the sale provided for in the judgment was "in the nature of a partition," and there was no right of redemption. The conclusion of law, "That plaintiff is entitled to have said real property sold as on execution," indicates that it was not intended that there be a partition sale. The provision in the judgment for a deficiency judgment indicates that the sale was not to be one in partition. Under the terms of the judgment, the plaintiff having a lien upon the real property, it was proper, in following the direction that the real property "be sold by the Sheriff," to sell it as on execution. A sale under execution is subject to redemption. Code Civ.Proc. § 700a. The certificate of sale, which recited "That the same is subject to redemption," was in Brodie's possession about six weeks—until defendant McKenna inquired concerning the amount necessary to redeem—before he raised any question as to the sale or the right to redeem. When he did move to vacate the sale and to enjoin the issuance of a certificate of redemption, the trial court denied the motion, and that decision became final in 1941. It was decided in Brodie v. Barnes, supra, 65 Cal.App.2d 3, 149 P.2d 900, upon appeal from a later order vacating the sale, that the sale was regular and there was no ground for setting it aside. That decision became final in 1944. The sale was not one in partition, and there was a right of redemption.

Brodie's bid of $300 indicates that he intended to acquire the property for con-

siderably less than its value and thereby to regain some of the stolen money, the recovery of which had been barred by the statute of limitations. As to the value of the property, the record shows that at least $2,248 had been paid by Mr. and Mrs. Barnes on the purchase price. He had been awarded the insurance proceeds of approximately $2,000 (at the time of the bid), and the right to a deficiency judgment. He had recovered judgment for $3,365.03, and the statute had barred the recovery of approximately $2,000 of the stolen money. The judgment in his favor in the action to recover the stolen money afforded him an opportunity, upon making an adequate bid, to acquire the whole property or the full amount of his loss (less that barred by statute) in the event the property should be redeemed.

The judgment is reversed, and the superior court is directed to enter judgment in favor of defendant McKenna quieting title to said real property.

DESMOND, P. J., and SHINN, J., concur.



74 Cal.App.2d 22

PEOPLE v. JACKSON.

Cr. 1945.

District Court of Appeal, Third District, California.

April 15, 1946.

1. Homicide ⇐244(1)

Evidence authorized conviction of manslaughter as against plea of self-defense.

2. Criminal law ⇐741(1), 1160

Weight of the evidence is for jury in first instance and for trial court after jury has concluded its deliberations and a verdict has been reached, and does not come within province of reviewing court.

3. Criminal law ⇐1160

Where jury has found against defendant and trial court has denied a motion for a new trial, such conclusions will not be set aside on appeal on the ground of insufficiency of the evidence, where it is not made to clearly appear that upon no hypothesis is there sufficient substantial evidence to support conclusion reached in trial court.

4. Homicide ⇐174(2)

In prosecution for murder, wherein defendant interposed a plea of self-defense, testimony that holes in a sheet covering deceased's body as it lay in bed corresponded with wounds in body was competent.

5. Criminal law ⇐438

Posed photograph of officer in same bed in which he found deceased was properly admissible upon testimony of officer that his pose was based upon his recollection of how deceased looked at the time of discovery and that photograph correctly portrayed condition in the room as officer found it over objection that photograph was irrelevant and misleading. Pen.Code, § 1102.

6. Criminal law ⇐438

Under proper restrictions of proof, models, facsimiles, and photographs are admissible in criminal as well as in civil cases. Pen.Code, § 1102.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Juanita W. Jackson was convicted of manslaughter, and, from the judgment and from the order denying a motion for new trial, she appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction on a verdict of the jury finding her guilty of the crime of manslaughter, and from the order denying a motion for new trial.

By an information filed by the District Attorney of Sacramento County defendant was charged with the crime of murder, to wit, the unlawful killing of her husband, Sumner H. Jackson. Two trials ensued. The first resulted in a disagreement, and the second in a verdict of manslaughter. Her motion for a new trial was denied, and

she was sentenced to the California Institution for Women at Tehachapi for the period prescribed by law. Thereafter she filed her notice and appeal, and, although not separately stated, her assignments of error in effect contain three charges: (1) That the evidence was insufficient to sustain the verdict; (2) that the trial court erred in admitting, over her objection, certain testimony; (3) that the trial court erred in admitting over her objection a photograph connected with such testimony.

[1-3] We find no merit in defendant's first contention. Her sole defense to the admitted killing was that of self-defense. the argument which her counsel has addressed to us upon this issue concerns the threats made upon the life of defendant by her husband, his general demeanor on the day of the shooting and his actions immediately prior thereto, matters which were all presented to the jury. It is not the province of this court to weigh the evidence. That is the function of the jury in the first instance and of the trial court after the jury has concluded its deliberations and a verdict has been reached. Where, as in the present case, the jury has found against the defendant and the trial court has denied a motion for a new trial, such conclusions will not be set aside on appeal on the ground of insufficiency of the evidence where it is not made to clearly appear "that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780.

[4] We likewise find no merit in defendant's second charge of alleged error, i.e., admitting testimony that holes in a sheet covering deceased's body corresponded with the wounds in the body. The testimony in question was given by a deputy sheriff who testified that on the evening of the shooting he and a companion officer were directed to the motor court where the defendant and her husband lived; that upon entering the room he found the deceased lying upon a bed in a dying condition; that he assisted with the taking of a photograph of deceased at the county morgue; that a second photograph exhibited to him was of a scene posed by himself and correctly portrayed the position in which he found the deceased when he entered the room; that the latter photograph also correctly portrayed the position of a sheet upon the decedent's body; and that the sheet admitted in evidence was the one which covered the deceased at that time. Upon cross-examination he was asked if the posed photograph of himself in the same bed where he found the deceased was based upon his recollection of how the deceased looked at that time, and he answered that it was. Thereafter, on redirect examination the officer was asked if he had observed the holes in the sheet and the wounds on the body of Mr. Jackson. His reply was that he had. He was then asked by the prosecution, "Where were those holes in relation to the wounds on the man's body? A. Well, the holes were right over the wounds." On recross the witness testified that the wounds were to be observed very easily when he sat down (presumably on the edge of the bed) and looked at the body.

[5, 6] It is likewise contended—and this is defendant's third charge of error—that her objections to the admission of the posed photograph should have been sustained, in that it was irrelevant and misleading; and in support of this contention counsel has relied upon the case of People v. Maughs, 149 Cal. 253, 86 P. 187, 192. That case involved the introduction in evidence of a woodcut which had been reproduced from a newspaper photograph taken and posed by two men neither of whom "ever saw the body of the dead man on the porch." An entirely different situation is disclosed in the present case. The photograph properly was admitted upon the testimony of one who personally saw the deceased, who observed the position in which he lay on the bed, and who testified that the photograph correctly portrayed the conditions in the room as he found it. In the case last cited, the court, 149 Cal. at page 264, 86 P. 192, stated the general rule to be that: "The rules of evidence in civil actions are applicable to criminal actions (Pen.Code, § 1102), and, under proper restrictions of proof, models, facsimiles, and photographs are admissible in criminal as well as in civil cases." This court, following this well established rule, held in the case of People v. Sambrano, 33 Cal.App.2d 200, at 213, 91 P.2d 221, 228, that the trial court did not err in admitting photographs "to show the nature of the surroundings where the homicide occurred. Courts are authorized to receive in evidence photographs in the same class as diagrams, when they accurately depict the locality of the crime, together with weapons, objects and physical conditions which are unchanged in status or in rela-

tion to other surrounding conditions as shown at the trial by accompanying testimony. People v. Phelan, 123 Cal. 551, 564, 56 P. 424; People v. Crandall, 125 Cal. 129, 132, 57 P. 785; People v. Mahatch, 148 Cal. 200, 203, 82 P. 779; People v. Grill, 151 Cal. 592, 598, 91 P. 515."

The judgment and the order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



74 Cal.App.2d 80

PEOPLE v. ROBINSON.

Cr. 639.

District Court of Appeal, Fourth District, California.

April 17, 1946.

Hearing Denied May 16, 1946.

1. Prostitution ⇐4

Under a charge of pandering, guilt is established if the evidence sufficiently shows that the defendant assisted or induced, or persuaded or encouraged the female in question to become an inmate of a house of prostitution.

2. Prostitution ⇐5

In prosecution for pandering, question whether complaining witness was so intoxicated that she did not know whether prostitution was being practiced was for jury.

3. Prostitution ⇐4

In prosecution for pandering, evidence that prosecuting witness went to house with defendant, that she was given a room, and that she had sexual intercourse with a man from whom she received $10, and that after man left, she was visited by two other men each of whom gave her $10, and that she then gave the $30 to defendant who allegedly promised to divide the money equally at the end of the week, supported finding that act of prostitution occurred at such time and place.

4. Prostitution ⇐4

In prosecution for pandering, evidence sustained finding that defendant had knowledge and consented, and assisted and encouraged prosecuting witness in acts of prostitution.

5. Prostitution ⇐4

In prosecution for pandering, evidence sustained finding that house occupied by defendant was used as a house of prostitution at time in question.

6. Prostitution ⇐4

In prosecution for pandering, where deputy sheriff testified that defendant was commonly reputed to have operated a house of prostitution, admission by officer that he knew of the reputation of such particular house only for a period of two months following April 30, 1945, where the alleged act of pandering occurred on April 17, 1945 affected the weight of the testimony and not its admissibility.

7. Prostitution ⇐4

Reputation may be used to prove that a house is being operated as a house of prostitution.

8. Criminal law ⇐730(3)

In prosecution for pandering, questions asked deputy sheriff concerning record of similar and previous charges against the defendant did not constitute reversible error where no objections, nor motions to strike, or specification of error and appeal were made and court later instructed jury not to regard any statements made in their presence on either side and to look entirely to the evidence in determining the facts.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Lulu Robinson was convicted of pandering and she appeals.

Affirmed.

Raymond E. Hodge and Duckworth, Mussell & King, all of San Bernardino, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Judge.

The defendant was charged with the crime of pandering in that on April 17, 1945, she procured a place as an inmate in a house of prostitution for one Bertha Conway, a female person. She was found guilty by a jury and has appealed from the

judgment which followed, and from an order denying her motion for a new trial.

The complaining witness was a white woman 21 years of age and married. On the morning of April 17, 1945, she met two colored men named Williams and Brooks at a bar in San Bernardino. She told Brooks she was looking for work as a waitress and Brooks told her of appellant's "ranch" and that appellant needed a girl for housekeeping work. This "ranch" was in the foothills a few miles north of Fontana. The appellant had recently moved there from a place she operated in Fontana. The house, which had about ten rooms, was not completely finished but it had six bedrooms which were furnished. The appellant also had a stock of liquor there, including 25 or 20 cases of beer. Williams and Brooks took the complaining witness to this place, arriving there shortly after noon. The appellant was not there when they arrived so they waited until she returned about three p. m. Mrs. Conway testified "they told her I was there seeking employment and introduced me to her and told her to be good to me and all of that and she taken me up and showed me my room." There is evidence that a fight occurred between Brooks and Mrs. Conway shortly after she was taken to her room; that this ended in about 20 minutes when appellant's husband and Williams brought Brooks downstairs; that Mrs. Conway fell asleep and did not waken until after dark; that she then came downstairs and asked the appellant where she was; that at about 8:30 or 9 p. m. on that evening three unidentified white men arrived at appellant's house; that Mrs. Conway was not introduced to them; that after some drinks were had Williams took Mrs. Conway upstairs where they quarrelled until they were stopped by the appellant; that Mrs. Conway then first learned why she had been brought to appellant's place; and that, thereafter, the three white men in turn visited Mrs. Conway in her room. It appears that Mrs. Conway left the place the next forenoon with another man who had arrived during the night; that the appellant objected to her leaving but acquiesced when told Mrs. Conway was going to procure some clothes; that Mrs. Conway went back with Williams about a week later for the purpose of getting part of the money she had earned the night of the 17th; and that she received no money.

[1] It is well settled that under the charge with which we are here concerned guilt is established if the evidence sufficiently shows that the defendant assisted or induced, or persuaded or encouraged the female in question to become an inmate of such a house. People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437.

The appellant earnestly contends that the evidence is not sufficient to support the judgment because it fails to show that Mrs. Conway engaged in prostitution on this occasion; that she did so with the acquiescence, consent or knowledge of the appellant; and that the appellant's house was being used as a house of prostitution at the time in question. With respect to the question as to whether prostitution was practiced at all it is argued that the only proof thereof consists in the testimony of Mrs. Conway; that it clearly appears that she was so intoxicated that she did not know what was going on and therefore her testimony may not be accepted; that the evidence indicates that no money was paid since Mrs. Conway admits that she did not demand a part of it before she left the next morning; and that, in any event, Mrs. Conway directly testified to an act of intercourse with but one man, which does not constitute an act of prostitution.

[2] The evidence is conflicting with respect to the degree of intoxication on the part of Mrs. Conway, as it is on many other matters. While there is evidence that she was quite intoxicated when the appellant arrived about three p. m. and when she was taken to her room, the appellant's husband testified that at that time "she seemed to be a little intoxicated, but not very bad." Moreover, there is no evidence of intoxication on her part some six or seven hours later, after she had been asleep and when the acts in question are alleged to have occurred. The question of intoxication, like other material questions here, was one of fact for the jury.

[3] With respect to the acts of prostitution it appears that after the three men arrived during the evening, to whom Mrs. Conway was not introduced, she was taken to her room by Williams and another quarrel ensued. She testified that Williams told her that she knew why she had come to the place; that he threatened her; and that "then he made me agree to go ahead and do it and I did it"; that while they were quarreling the appellant came

in and told Williams that there were "three customers" downstairs and that "they were going to leave if we didn't break it up"; that the appellant was present when Williams told Mrs. Conway why she had been brought to the place; and that after Williams left the appellant "told me that I could stay there and do that and give her half or I could pay her so much for the room." She then testified that the three men downstairs came to her room, one after another, but were not present at the same time; that she had sexual intercourse with the first man for which she received $10; that after this man left she was visited by the other two men, in turn, each of whom paid her $10; that after the three men left she went downstairs and talked with the appellant; that the substance of her conversation with the appellant was "that I would give her the money and she would split it with me at the end of the week"; and that she gave the appellant the $30 she had received from the men and returned to her room. The argument that this evidence fails to show acts constituting prostitution is based on the fact that Mrs. Conway specifically mentioned an act of sexual intercourse only with the first man, and that she did not directly testify as to such an act with either of the other two. The appellant had referred to these men as "customers", Mrs. Conway testified that each of them visited her room separately, and that each paid her $10. This evidence, with the reasonable inferences therefrom, is entirely sufficient to support the finding and conclusion that acts of prostitution occurred at this time and place. It may be said here as was said in People v. Hirsch, 21 Cal.App. 737, 132 P. 1062, 1063, under somewhat similar circumstances, "Manifestly, he did not go to bed with her for the purpose of saying his prayers."

[4] Aside from several other matters which need not be mentioned, the evidence to which we have referred is entirely sufficient to show knowledge and consent on the part of the appellant, and that she assisted and encouraged Mrs. Conway in these acts of prostitution.

[5-7] It is next contended that the evidence is not sufficient to show that this house, occupied by the appellant, was used as a house of prostitution at the time in question. There is ample evidence that it was so used on this occasion with the knowledge and consent of the appellant. The evidence above referred to is material on this point. In talking with Mrs. Conway, the appellant referred to the three men downstairs as "customers," and the only reasonable inference is that she wanted them to visit the complaining witness. Although the house was not fully completed the bedrooms were completed and furnished. The appellant testified that she did not run a hotel; that she rented rooms at times but did not "rent them out weekly"; and that Williams had been a customer at her other place. When asked as to whether it was customary for colored men to come to her place with white women she replied: "Not at that place but at other places it was." Three men, who were unknown to the complaining witness, were sent to her room, with the consent and assistance of the appellant. There was evidence that two other men came to the house much later on the night of April 17, and when appellant was arrested on April 30, two other women were seen in the house, one colored and one white. However, the appellant admitted that three other girls were in the house at that time. A deputy sheriff testified that the appellant was commonly reputed to have operated a house of prostitution. This last testimony is attacked by the appellant because, on cross examination, the officer admitted that he knew of the reputation of this particular house only for a period of two months following April 30, 1945. Not only does this affect the weight of the testimony but the matter of reputation is only one way of proving that a house is being operated as a house of prostitution. Taking all of the evidence into consideration, including significant statements made by the appellant herself, it cannot be held that the evidence is not sufficient in this regard.

[8] Finally, the appellant contends that the court committed prejudicial error in permitting certain questions to be asked of and answered by a deputy sheriff. Having testified that he did not know the appellant personally, he was asked "Do you know whether she has been charged previously with similar offenses?" An objection was made and before it was ruled on, the following occurred:

"By Mr. Smith: Q. Do you have any records in the Sheriff's office to indicate it? A. Yes, sir.

"Q. Have you got them with you? A. Yes, sir.

"Q. Where are they? A. Right here.

"Q. You are holding in your hand right now a book—

"Mr. Hodge: Let me see what it is.

"By Mr. Smith: Q. Is this from the County jail records? A. Yes, sir."

The first improper question was not answered and no request to strike it was made. When the questions were asked about the records the officer was holding there was no objection by appellant's counsel but a request to see "what it is" was made. Apparently, these were preliminary questions going to the point whether or not the witness was familiar with the general reputation of the appellant and her house. Nothing further was done and it does not appear that the contents of any records were disclosed to the jury. Neither proper objections nor motions to strike were made and no definite specification of error is here made. The court later instructed the jury to be careful not to regard any statements which had been made in their presence on either side, and to look entirely to the evidence received in determining the facts. Under the circumstances here shown, no reversible error appears in this connection.

The judgment and order appealed from are affirmed

MARKS and GRIFFIN, JJ., concur.



74 Cal.App.2d 26

PEOPLE v. CRENSHAW.

Cr. 1953.

District Court of Appeal, Third District, California.

April 15, 1946.

Rehearing Denied April 26, 1946.

1. Constitutional law ⇐42

The statute declaring prisoner, possessing or carrying on his person any sharp instrument while in state prison, guilty of felony, is not invalid as too general because it might be construed to prohibit possession of knife used by prisoner in prison cannery, kitchen, or shops, in absence of possession of instrument under such circumstances by prisoner charged with violation of statute. Pen.Code, § 4502.

2. Statutes ⇐241(1)

A penal statute should receive reasonable and common-sense construction, and its force should not be frittered away by niceties and refinements at war with practical administration of justice.

3. Statutes ⇐241(1)

The principle of strict construction of penal statutes does not allow court to make an offense of act which is not such by legislative enactment, but common sense should be applied to terms of act in order to avoid absurdity, which Legislature should not be presumed to have intended.

4. Convicts ⇐5

In prosecution of prisoner for possessing and carrying sharp instrument on his person while at state prison, testimony as to fight between defendant and another prisoner and such prisoner's threat to kill defendant on day before instrument was found on his person was inadmissible to prove that defendant's possession thereof was for defense against anticipated assault, as statute prohibiting such possession contains no exception. Pen.Code, § 4502.

5. Convicts ⇐5

Since intent, with which prisoner carried sharp instrument while at state prison, is not element of crime of carrying such weapon, self-defense is not valid defense in prosecution for such crime. Pen.Code, § 4502.

6. Convicts ⇐5

The statute prohibiting prisoner from possessing or carrying on his person any sharp instrument while at state prison is not invalid as depriving him of right of self-defense against assault by another prisoner, since he may defend himself by other means or seek protection by informing prison authorities of danger of assault. Pen.Code, § 4502.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

James Crenshaw was convicted of possessing and carrying a sharp instrument

while confined in a state prison, and he appeals.

Affirmed.

E. Vayne Miller, of Sacramento, and Raymond F. McClure, of North Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Defendant was charged with a violation of section 4502 of the Penal Code, in that on the 12th day of March, 1945, he wilfully and unlawfully and feloniously, while a prisoner confined in Folsom Prison, did possess and carry upon his person and have under his custody and control, a sharp instrument. He was convicted by a jury, a motion for a new trial was denied, and he has appealed from both the judgment and the order denying a new trial.

Section 4502 of the Penal Code, which was enacted in 1943, so far as material here provides:

"Every prisoner committed to a State prison who, while at such State prison * * * possesses or carries upon his person or has under his custody or control any instrument or weapon of the kind commonly known as a black-jack, slungshot, billy, sandclub, sandbag, or metal knuckles or any explosive substance or any dirk or dagger or sharp instrument, or any pistol, revolver or other firearm, is guilty of a felony and shall be punishable by imprisonment in a State prison for a term not less than five (5) years."

The evidence shows that defendant was assigned to mechanical work in the prison, repairing lawn mowers. He had a bench behind the Educational Building, where he had for use a vise, chisels, and files. He testified that he had heard through the prison "grapevine" that he was "on the spot," and that in order to protect himself he had beveled off the edges of a "rat tail" file about six inches long until same had a very sharp point; that on leaving his place of employment about 4:00 p.m. he placed this instrument in a sheath which he had fashioned out of the tongue of his shoe, and concealed it on his back between his shoulders. He left his cell about 6:45 for supper in the mess hall, still carrying the weapon. In the line of prisoners was another inmate, Marco Easter, who advised a guard who was in attendance: "That man [indicating defendant] has got a knife in his pocket, take it away from him." Thereupon defendant was searched and the instrument found concealed between his shoulders.

On this appeal it is contended that the judgment should be reversed on two grounds, first, that section 4502 of the Penal Code is invalid, and, second, that the trial court erred in refusing to admit proffered testimony regarding an alleged assault upon defendant made by Marco Easter on March 11, 1945, at which time Easter had struck defendant in the face and threatened to kill him.

[1] Appellant's argument regarding the validity of the statute is that it is too general in its prohibition of the possession of "any sharp instrument"; that it might be construed to prohibit the possession by a prisoner of a knife used by him in the prison cannery or in the prison kitchen, or the possession by prisoners of other sharp instruments necessarily used by them in the various other prison shops.

The answer to this contention seems to be plain—that defendant was not in possession of the sharp instrument under such circumstances. In People v. Ferguson, 129 Cal.App. 300, 18 P.2d 741 (hearing in Supreme Court denied), defendant was convicted of the possession of "metal knuckles". Stats. 1923, p. 695, Stats. 1925, p. 542, and Stats. 1931, p. 2316. It was there contended by defendant that he kept the knuckles as curios or keepsakes, and did not use them or intend to do so; and that to hold that such mere possession constituted a crime might render guilty the keeper of a museum in which such knuckles were on display. The court said, 129 Cal.App. at pages 304, 305, 18 P.2d at page 742:

"Whether or not the law would apply to a museum keeper is outside of this case, for the reason that there is no evidence that puts appellant in the category of a museum keeper. It may well be added, however, that the legality of statutes is not measured by extreme or unlikely situations. United States v. Kirby, 7 Wall. 482, 19 L.Ed. 278; In re Reineger, 184 Cal. 97, at page 104, 193 P. 81. When the statute is read as a whole it seems clear that the Legislature meant to enact no half-way measure, for it is therein provided that 'blackjacks, slungshots, billies, sandclubs, sandbags, and metal knuckles are hereby declared to be nuisances and shall be subject to confisca-

tion and summary destruction whenever found within this state.' It is evident to us that the effective prohibition of the criminal use of weapons of this sort depends upon the right to prohibit possession thereof, and that the law does not intend to and does not in fact make any exception of heirlooms, curios, or keepsakes of individuals. As to museum keepers we have already said we make no expression of opinion."

In People v. Wells, 68 Cal.App.2d 476, 480, 481, 156 P.2d 979, this court considered the validity of section 4502, supra, and held same to be constitutional and a reasonable police regulation enacted to protect inmates and officers of state prisons from the peril of assaults with dangerous weapons by armed prisoners; that the statute was adopted on the justifiable theory that there is greater danger of imprisoned felons becoming incorrigible and resorting to violence if they are permitted to carry deadly weapons upon their persons, and that the possession of such weapons by them is validly and wisely prohibited.

[2, 3] It is said in 2 Lewis' Sutherland Statutory Construction, 2d Ed., sec. 528, p. 981:

"A penal statute should receive a reasonable and common sense construction, and 'its force should not be frittered away by niceties and refinements at war with the practical administration of justice.' The principle of strict construction does not allow a court to make that an offense which is not such by legislative enactment; but this does not exclude the application of common sense to the terms made use of in an act in order to avoid an absurdity which the legislature ought not to be presumed to have intended."

Also see People v. Ventura Refining Co., 204 Cal. 286, 292, 268 P. 347, 283 P. 60; Sutter-Yuba Investment Co. v. Waste, 21 Cal.2d 781, 789, 136 P.2d 11.

[4, 5] As for appellant's contention that the trial court erred in excluding testimony offered to show that there had been a fight between him and Easter on March 11th at which time Easter made threats to kill appellant, and that appellant's possession of the sharpened file was for defense against an anticipated assault, the statute itself contains no exception and we cannot assume that same was intended by the legislature. In People v. Wells, supra, since the trial court had admitted evidence tending to show that the prisoner, Wells, was in possession of a knife for the purpose of defending himself against an anticipated attack by another prisoner who had attacked him, the admissibility of such evidence was not in question; but we said that the code section absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying on their persons, certain designated weapons; that the intention or purpose with which they are carried is not an element of the offense. Also see People v. Gonzales, 72 Cal.App. 626, 630, 237 P. 812, holding constitutional a statute which prohibited a person who had been convicted of a felony from owning or having possession of a pistol, revolver or other firearm capable of being concealed upon the person, and also holding that the intent with which such possession was had was not essential to the completion of the criminal act. It would seem to follow that, since self-defense as a defense would only tend to show lack of criminal intent, that where intent is not an element of the crime self-defense would not be a valid defense in a prosecution for its commission.

In State v. Gibson, 323 Mo. 369, 15 S.W. 2d 760, defendant was charged with carrying a concealed weapon, to wit, a revolving pistol, in violation of a statute which prohibited the carrying of concealed weapons. Defendant offered evidence that he was carrying the pistol because his life had been threatened by a person who had previously inflicted injury upon him. The court said that this would constitute no defense under the statute; and as offered in mitigation it was inadmissible since the weapon would have been as efficient for protection if carried openly and not concealed in violation of the statute.

In Slack v. State, 107 Tex.Cr.R. 263, 296 S.W. 309, appellant complained that the trial court had refused evidence attempting to justify defendant's illegal possession of a pistol on the ground that he was in fear of an attack. But the appellate court said that though the law had formerly recognized such a defense it had been amended so as to omit it; and the judgment of conviction was affirmed.

[6] Furthermore, it may be said that a prisoner is not deprived of the right of self-defense even though he may be prohibited from possessing the articles enumerated in the statute, since he may, if assaulted, defend himself by other means. Also this defendant might have sought protection

from an anticipated assault by informing the prison authorities, as he had ample time to do so after the altercation with Easter the previous day. The situation was not one where he was confronted with an emergency that might have justified his seizing one of the prohibited weapons in order to protect himself.

We find no error in the record in the case, and the judgment and order are therefore affirmed.

PEEK and THOMPSON, JJ., concur.



74 Cal.App.2d 31

GOODRICH v. CITY OF FRESNO et al.

JEFFORD v. SAME.

PRETZER v. SAME.

Civ. 3502

District Court of Appeal, Fourth District, California.

April 15, 1946.

Hearing Denied June 6, 1946.

1. Mandamus ⇐168(2)

In mandamus proceedings by city employees to compel city to reclassify them and to approve their demands for additional wages, burden was on employees.

2. Municipal corporations ⇐220(2)

An employee of city was not entitled to reclassification as a "dump truck driver" instead of a "refuse collector", and to require city to pay additional wages, on ground of discrimination with employees in private industry, where there was a showing that dump truck drivers who drove heavier trucks in heavy construction work received more than city employee, but there was no showing as to what refuse collectors, if any, made in private employment in city.

3. Municipal corporations ⇐220(2)

A city employee was not entitled to reclassification as a "journeyman machinist and welder" instead of merely a "machinist mechanic" as previously classified, and to additional wages, on ground of discrimination with employees in private industry, where it was shown that machinists in private employments received about same as city employees or less.

4. Municipal corporations ⇐220(2)

A city employee was not entitled to be reclassified as an "engineer" instead of as an "equipment operator" and for additional wages, on ground of discrimination with employees in private industry, where employee made $1.31 an hour during last fiscal year plus pension benefits, pay while sick, and pay while on vacation, pay on holidays, and employees in private industry who did similar but heavier work were paid $1.62 per hour, for actual working time without additional benefits.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Consolidated mandamus proceedings by W. D. Goodrich, by Norman Jefford, and by Adam Pretzer, petitioners, against the City of Fresno, etc., and others, respondents, to compel respondents to reclassify petitioners and to approve and pay their demands for additional wages. From a judgment denying the issuance of the writ of mandamus, the petitioners appeal.

Judgment affirmed.

Clarence E. Todd, of San Francisco, for appellants.

C. M. Ozias, Philip Conley, and Conley, Conley & Conley, all of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying, as to each of the petitioners, the issuance of a peremptory writ of mandate. In these actions, which were consolidated for trial, three employees of the city of Fresno sought to compel the respondents to reclassify them and to approve and pay their demands for additional wages. The actions are based on the theory that the respondents, through improper classification of the employees, have evaded and violated section 85 of the city charter, which reads:

"Sec. 85. Other Salaries and Wages Fixed by other officers or employees of the city, except where this charter provides that no salaries shall be paid, shall be fixed by the City Commission and may be readjusted by the City Commission whenever in

its judgment such readjustment is necessary; provided, however, that city employees skilled or unskilled shall be paid not less than the prevailing wage paid in private employment in said city in the trade in which such employees work, where there are workers in private employment in such trade, and the city shall not require its employees to work longer hours for the same wage than workers in private employment in said city work for such wage in the same trade."

Another section of the charter requires the civil service board to classify the employees of the city in accordance with the duties to be performed. This was done and the classifications thus made were used in fixing the wages and salaries paid. The petitioners contend that they were wrongfully and arbitrarily classified, as a result of which they have been receiving less than the prevailing wage paid in private employment in the city in the trades in which they are working.

Briefly stated, the petitions allege that the members of the civil service board have wrongfully and arbitrarily classified the employees in categories incorrectly referring to and describing the work done by them; that the city commission has, pursuant to such classification, wrongfully and arbitrarily fixed and paid wages which are substantially less than the prevailing wage paid in private employment within the city in the respective trades in which these workers are engaged; and that this has resulted in these employees being required to work longer hours for the same wage than workers in private employment. Goodrich alleges that he has been doing the work of a "teamster" but has been classified as a "refuse collector"; that his wage is $177.50 a month based on a 48-hour week; that under the prevailing wage he is entitled to receive $1.17 per hour for a 40-hour week, with time and one half for over time; and that there is now due to him the difference between said prevailing wage and the amount he has been actually paid. The allegations of the other petitions are substantially the same except for differences in classification, work claimed to be done and amounts of additional wages claimed to be due. Jefford sought to be reclassified as a "journeyman, machinist and welder" instead of as a "machinist, mechanic", and Pretzer to be reclassified as an "engineer" instead of an "equipment operator."

In their returns and answers the respondents denied that the petitioners have been wrongfully or arbitrarily classified; that they have not been properly paid in accordance with the charter provision; that the prevailing wage was as alleged in the petitions; that the petitioners were entitled to any further wage or compensation; and that the petitioners have been required to work longer hours for the same wage than workers in private employment. In the Goodrich case it was alleged that he was employed in October, 1934, as a "laborer" in the waste disposal department; that he was given civil service status in 1941; that in that year a revised classification of said employees was adopted after a full investigation and hearing and with an opportunity to the petitioners to be heard; that this petitioner's classification was then changed from "laborer" to "refuse collector"; that since that time he has been thus classified; that no classification as "teamster" exists in those made and adopted by the city; that there are no workers in private employment in the city engaged in the trade or employment of refuse collector; and that the wage now paid to the petitioner is $177.50 per month based on a 48-hour week, together with a bonus of $12.50 a month for the fiscal year 1943–44, and with a right to an annual vacation of fifteen days on full pay, sick leave and sick benefits on full pay, pension benefits and continuous employment by reason of civil service. In separate defenses, it was alleged that the petitioner's classification as refuse collector was made after full and careful consideration of the duties and requirements of the position and after a full and complete hearing; that the petitioner made no objection to said classification and has continued to work thereunder; that the total pay and benefits received by the petitioner exceed the prevailing wage paid in private employment in the city in similar trades or positions; that with the knowledge of the petitioner the city has each year prepared its budget in part upon the amount thus to be paid to the petitioner; and that the petitioner is estopped from making any further claims against the city in this behalf. Similar answers and returns were filed in the other two cases.

The court found in all respects in favor of the respondents. Among other things, it was found that it is not true that any of the employees have been wrongfully or arbitrarily classified and that it is not true

that any of the petitioners have been paid less than the prevailing wage in private employment, as referred to in the charter. With respect to each petitioner it was found that he was not entitled to receive a certain amount per hour and that there was nothing due him other than what had already been paid; that no demand had previously been made for a change in classification or for the payment of any additional amount; that it was not true that there was sufficient money in the hands of the respondents set apart for the payment of such demands; and that the allegations of most of the special defenses are true. The conclusions of law were to a similar effect. Judgment was entered accordingly and this appeal followed.

There is some discussion in the briefs as to whether the remedy of mandamus was available to the appellants in such a case as this. The respondents argue that it was not, citing certain cases where it has been held inapplicable in actions to collect salaries or wages but where reinstatement was not sought. It may be noted that there was some difference here in that a reclassification was sought. However, it is unnecessary to decide this question under our views with respect to the other points raised.

It may be conceded, as argued by the appellants, that section 85 of the Fresno charter is clear, definite and enforceable, that a prevailing wage statute should be liberally construed in favor of the worker, and that the city officials have no discretion or right to pay these employees less than the prevailing wage referred to in the charter provision. On the other hand, the city officials have a certain discretion in the matter of classifying city employees and assigning certain duties to them as required by another charter provision. The provisions of section 85 are directly related to the trade in which the employee is actually working and not merely to some trade in which he may happen to be skilled. In comparing wages paid in city service and in private employment a comparison of the work actually done is essential. And the highest-paid type of work within a trade may not be arbitrarily taken as the standard unless the work actually done by the city employee comes not only within the trade but within that type. Moreover, the charter provision refers to the prevailing wage paid in private employment and not to the prevailing rates of wages per hour. The monthly wage paid by the city cannot fairly be compared with hourly wages paid in private employment in the absence of all facts except the rate per hour where employment is on an hourly basis. No attempt was here made to prove that those engaged in the private employment relied on worked full time, what proportion of the time they did work, the average amount they earned in a month, or any other facts upon which any comparison could fairly be based.

[1] One of appellants' main contentions is that the prevailing wage provision of section 85 impliedly makes it the duty of the city commission to ascertain the exact amount of the prevailing wage in the corresponding trades in private employment within the city, and that no attempt was made to do so. The Fresno charter contains no provisions specifying the manner in which this fact is to be ascertained. It appears, however, that a considerable effort was made to fairly classify the employees of the city and to conform with the charter provision with respect to the prevailing wage. In 1940 an expert was employed and a rather extensive investigation was made as to the general facts with respect to classifications and wages. A description of the work in which they were engaged was secured from the employees of the city over their own signatures, letters were sent to them advising them of public hearings and inviting suggestions or criticisms with respect to their proposed classifications, letters were sent to union officials inviting them to be present at the hearings, and clasifications were adopted after full hearings and consideration of all the views expressed. There was also evidence of some effort on the part of the individual officials of the city to ascertain the wages prevailing in private employment, of some knowledge on their part in this connection, and of their endeavor to comply with this provision of the charter. It appears that in fixing these classifications the civil service board acted fairly, after notice and public hearings, and it cannot be said that any violation of the charter provision appears in this regard. Moreover, the essential question is whether or not the prevailing wage provision of the charter was complied with and not as to the manner in which the result was arrived at. The burden of proof was on the appellants and the controlling question here is whether or not the evidence sustains the findings and conclusions to the ef-

fect that the appellants have been paid the prevailing wage as required by the charter provision.

Aside from the failure of proof on the part of the appellants with respect to the total amounts paid per month in private employment under the hourly rate of wages for time actually worked, and aside from the benefits enjoyed by the city employees through civil service status and liberal pensions, with full pay whether they worked or not, with full pay on holidays when they do not work, with annual vacations on pay, with fifteen days sick leave each year on full pay and the right to cumulate this from year to year to a maximum of seventy-five days, and with full pay in the event of an industrial accident instead of the smaller amount allowed in industrial accident cases, we think the evidence, with respect to the amounts actually paid, supports the findings and judgment.

[2] The appellant Goodrich alleged in his petition that he is a "teamster," but testified that he is a "dump truck driver." He is classified and paid as a "refuse collector." He and another man collect garbage with a one and one-half ton Chevrolet truck, hauling eleven cubic yards of garbage when filled. These are not dump trucks but the contents are unloaded by a movable diaphram and are unloaded by other employees at the sanitary fill. A regular route is followed, picking up garbage at various homes and the loads are taken to the sanitary fill about three miles from the center of town. About three trips a day are made, there are frequent stops and a large part of the time of the men is spent in getting the garbage from the houses and emptying it into the truck. There is evidence that Goodrich received $190 per month and $200 per month, respectively, during the preceding two years. On an hourly basis this figured $.976 per hour and $1.027 per hour, respectively. If we disregard the testimony of witnesses as to the smaller wages paid, both on a monthly and hourly basis, by private employers in the city for delivering milk, for van and storage work, for general trucking work, for delivering ice, for handling freight, for delivering express and for driving passenger buses, all of which are objected to by appellants as dissimilar to the work here in question, the fact remains that there are no refuse collectors in private employment in the city. This appellant relies on the testimony of one witness to the effect that two rock and gravel companies, operating mostly without the city and in heavy construction work, employ actual "dump truck drivers" who are paid $1.17 per hour for operating trucks of eleven cubic yards capacity. However, these were real dump trucks used in heavy construction work, were operated and unloaded by the truck drivers themselves, and the evidence demonstrates that the work done by these truck drivers was entirely dissimilar to that done by Goodrich. Moreover, there was the tesimony of one of the employers of these dump truck drivers that the wages for such dump truck drivers, driving trucks of eleven cubic yards capacity, was 90¢ an hour and that the drivers were paid only for the hours in which they worked. The driving of a small truck as an incidental part of some more general employment does not necessarily establish the driver as working in the trade of a "truck driver," much less as being in the highest paid class of those working exclusively as truck drivers. It clearly appears that the appellant Goodrich has not brought himself within the special classification which he here claims (Leftridge v. City of Sacramento, 59 Cal.App.2d 516, 139 P.2d 112), and it cannot be held that the evidence is not sufficient to support the finding that he is not entitled to the relief asked.

[3] The petitioner Jefford, who is classified as a "machinist, mechanic," claims that he has been doing the work of a "journeyman, machinist and welder." As we understand his counsel there is no practical difference between these classifications. He worked in the fire department and was paid $200 per month in 1943 and $225 per month in 1944. If this was reduced to an hourly basis he was paid $1.226 per hour in 1943 and $1.283 per hour in 1944. There is evidence that he put in much of his time in making inspections and in caring for and repairing automotive equipment and repairing hydrants and the like. There is evidence that machinists in two industries in private employment received $200 a month and machinists in various other industries received from $1.05 to $1.15 per hour, and in the case of one employer $1.20 to $1.25 per hour. No discrimination appears here and the court's findings are sufficiently supported.

[4] The petitioner Pretzer, who was classified as an "equipment operator" seeks to be reclassified as an "engineer." He

works in the street department. For about ten months of the year he operates a light grader and during the other two months he is engaged in cleaning gutters, sweeping leaves or doing light repair jobs. At times he drives a truck or helps on a truck. The grader he uses is too light for heavy street work but is used in connection with oiling the streets and light grading. He was paid $205 a month in 1943, $220 in 1944 and at the time of the trial was receiving $230 a month. On an hourly basis, for the fiscal year 1943–44, he received $1.254 per hour and for 1944–45, $1.311 per hour. Petitioners introduced evidence that two men working for a private contracting firm, only a small part of whose work was done in Fresno and who operated all kinds of heavy road-making equipment, including rollers and bulldozers, were paid $1.62 per hour but were only paid for actual working time, with no vacation on pay. Not only was the type of work done by these men in private employment quite different and mostly outside of the city of Fresno, but there was no attempt to show the percentage of the time that the men in private employment worked or their average earnings during a month in order to furnish any fair comparison. So far as indicated by the record it would do this petitioner a great disservice to require him to be paid on the same basis as the two men in private employment, on whose testimony he relies. The evidence, as a whole, fairly sustains the court's findings.

The appellants complain that no findings were made as to the exact cash value of the extra benefits received by these city employees through continuous employment, pensions, pay while sick, pay while on vacation, pay on holidays and the like. While this value appears to be considerable, a finding thereon was unnecessary since the evidence is not sufficient to show the discrimination claimed even if this element is omitted from consideration.

Complaint is made that the court erred in sustaining an objection to the testimony of two witnesses. The objection was sustained on the ground that their testimony was not proper rebuttal and no request was made for leave to reopen petitioner's case and put the testimony in as a part thereof. Neither error nor prejudice appears.

It is next contended that the court failed to find upon a material issue in that it failed to find what was the amount of the prevailing wage in private employment in the city of Fresno in the trades in which the appellants were engaged. Complaint is also made of the fact that some of the findings with respect to the respective petitioners, in finding that the amounts paid to them were not less than the amount of the corresponding prevailing wage in private industry, referred also to the extra benefits each received as a city employee. Not only were these findings sufficient in themselves, but in another finding it was found that the compensation paid to each of the petitioners has been in conformity with the provisions of section 85 of the charter and that there is not due to any of them any sum of money whatsoever. The ultimate facts were found and the findings, as a whole, are sufficient to sustain the judgment.

It rather clearly appears that the appellants failed to meet the burden resting upon them to show a discrimination in the respect of which they complain, and that they failed to present the evidence which would be necessary for a fair comparison. While the evidence indicates that the city would save money by paying these employees on an hourly basis, it fails to show either a violation of the charter provision or that they would be as well off in private employment in either the same or a similar kind of work.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; CARTER, J., dissenting.

74 Cal.App.2d 15

GARTHOFNER v. EDMONDS.

Civ. 7235.

District Court of Appeal, Third District, California.

April 15, 1946.

1. Novation ⇐11

Complaint alleging joint and several oral promise of husband and wife to repay money loaned and wife's oral promise after husband's death to answer individually for such obligation did not state a cause of action against deceased wife's estate based upon a novation of the debt, since necessary elements of a novation were not alleged and no consideration appeared for wife's new promise to pay debt which she was already personally obligated to pay in full. Civ.Code, §§ 1530–1532.

2. Novation ⇐1

A "novation" is the substitution of a new obligation for an existing one and may be made by substitution of a new obligation between the same parties with intent to extinguish the old, by substitution of a new debtor in place of the old with intent to release the old debtor, or by substitution of a new creditor in place of the old, with intent to transfer rights of the old creditor to the new creditor. Civ.Code, §§ 1530–1532.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

3. Novation ⇐1

Novation is made by contract and is subject to all the rules, including necessity for a consideration, which apply to contracts in general. Civ.Code, § 1532.

4. Bills and notes ⇐120
Husband and wife ⇐154, 156

Where a married woman joins with husband in signing a note or incurring an obligation to pay a debt which they owe, the liability becomes joint and several and she may be legally bound to pay the entire debt. Civ.Code, §§ 158, 171.

5. Bills and notes ⇐120
Husband and wife ⇐156

Where a married woman having power to do so joins with her husband in making a note, she is personally liable thereon, both spouses being liable on the note jointly and severally and both being primarily liable. Civ.Code, §§ 158, 171.

6. Novation ⇐1

Wife's oral promise to personally assume and pay joint and several obligation of herself and husband was without consideration and did not constitute a "novation" of original obligation. Civ.Code, §§ 158, 171, 1530–1532.

7. Novation ⇐1

Wife's oral promise after husband's death to personally assume and pay joint and several obligation of husband and wife to repay money loaned to them was not a valid "novation" of original obligation, since it was not between all of the same parties to original obligation. Civ.Code, §§ 1530–1532.

8. Novation ⇐7

An essential element of every novation is a new contract to which all the parties concerned must agree, and in absence of such agreement or consent a novation cannot be effected. Civ.Code, §§ 1530, 1531.

9. Contracts ⇐214

An instrument made payable by its terms upon the occurrence of a specified event or condition is ordinarily payable upon the happening of the specified event, unless the happening of such event is within the control of maker of instrument in which case the debt may become due, after demand, within a reasonable time.

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Former opinion modified, and judgment below affirmed.

Prior opinion, 166 P.2d 60.

Harry W. Falk, of Eureka, for appellant.

Irwin T. Quinn, of Eureka, for respondent.

THOMPSON, Justice.

A rehearing was granted in this case to correct an error with respect to the nature of the original obligation upon which an alleged novation occurred. With that modification the opinion is approved as follows:

The plaintiff appealed from a judgment which was rendered pursuant to an order

sustaining a demurrer to the amended complaint without leave to amend the pleading. The complaint is founded on an alleged oral agreement of Amanda B. Carter to personally assume and pay a former joint and several oral obligation of herself and her deceased husband to pay plaintiff the sum of $495, for money which they had borrowed. The obligation is alleged to have been payable "on the very day (or soon thereafter) that J. F. Carter receives his thousand dollar inheritance, from William Carson's Will." It was also alleged that Mr. Carter "never did receive said inheritance." The trial court held that the alleged novation did not occur under section 1531 of the Civil Code, chiefly because there was no valid consideration for the new promise to pay the debt since Amanda B. Carter was originally obligated to pay the entire debt regardless of the alleged new promise. The demurrer to the amended complaint was therefore sustained without leave to amend.

The respondent contends that the amended complaint fails to allege a novation of the debt for the reason that it appears all of the parties to the original obligation did not consent to the novation, and because there was no valid consideration for the alleged new promise to pay the debt since the original obligation was a joint and several liability, and Mrs. Carter was already liable for the entire debt. It is also asserted that the debt has not matured and is not due because it was specifically made payable only when "J. F. Carter receives his thousand dollar inheritance, from William Carson's Will," and it is alleged he never did receive that inheritance.

The amended complaint alleges that J. F. and Amanda B. Carter were husband and wife, and that he died November 21, 1943; that during his lifetime, and in January, 1938, plaintiff loaned them $495, which they "jointly and severally orally promised to repay, with interest, on 'the very day (or soon thereafter) that J. F. Carter receives his thousand dollar inheritance from William Carson's Will;'" that he "never did receive said inheritance * * *; that after the death of J. F. Carter, * * * Amanda B. Carter orally promised to, solely and individually, answer for the said obligation;" that Amanda B. Carter died May 17, 1944, and upon proceedings duly had Ina Edmonds was appointed and qualified as the administratrix of her estate; that a claim for said sum of $495 and interest was presented to said administratrix and rejected.

[1] We are persuaded the amended complaint fails to state a valid cause of action against the estate of Amanda B. Carter, deceased, based upon an alleged novation of the debt, chiefly because the necessary elements constituting a novation are not alleged, and because it does not appear the alleged new oral promise of Amanda B. Carter to personally assume and pay the former joint and several obligation of herself and her husband was made for a valid consideration, since she was already obligated to personally pay the debt in full, regardless of the alleged new liability. It follows that the demurrer was properly sustained without leave to amend.

[2, 3] A novation is the substitution of a new obligation for an existing one. Civil Code, sec. 1530. Novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation. It may be made by the substitution of a new debtor in the place of the old one, with intent to release the latter, or by substitution of a new creditor in the place of the old one, with intent to transfer the rights of the latter to the former. Civil Code, sec. 1531. Novation is made by contract, and is subject to all the rules, including the necessity for a consideration, which apply to contracts in general. Civil Code, sec. 1532.

[4] This suit is not founded on the original oral agreement to pay the debt. It is alleged that the former obligation was cancelled, and that the new agreement was substituted on precisely the same terms upon consideration only that plaintiff would cancel the original joint and several obligation of "J. F. Carter and Amanda B. Carter, incurred in January, 1938, and accept the new promise of Amanda B. Carter as a substitute therefor." The alleged new obligation was not consented to by all of the same parties to the former agreement. Mr. Carter did not, and could not consent to the new contract for he was then dead. The new contract was not an agreement to substitute a new debtor, nor was it Mrs. Carter's agreement to pay the debt of another person. It was her contract to pay her own debt which she was already legally bound to pay in full by the terms of the original joint and several obligation. Mrs. Carter was authorized by statute to incur the original joint and sev-

eral obligation to pay the debt. Where a married woman joins with her husband in signing a note or in incurring an obligation to pay a debt which they owe, the liability becomes joint and several and she may be legally bound to pay the entire debt. McClintick v. Frame, 98 Cal.App. 338, 343, 276 P. 1033; Hammond Lumber Co. v. Danziger, 2 Cal.App.2d 197, 200, 37 P.2d 517; Alexander v. Bouton, 55 Cal. 15; Civil Code, secs. 158 and 171; 41 C.J.S., Husband and Wife, § 185 b, p. 664. Section 158 of the Civil Code provides that: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; * * *."

[5] The text in 41 Corpus Juris Secundum, Husband and Wife, § 185 b, supra, provides that: "In a jurisdiction in which the wife has power to make a note, * * a married woman who joins with her husband in making the note is personally liable thereon. In such case both spouses become liable on the note jointly and severally; and both are liable primarily."

[6] In the present case, since the wife was already under legal obligation to pay the entire debt, her subsequent oral agreement to personally assume and pay it was without consideration. Parrino v. Rallis, 116 Cal.App. 364, 2 P.2d 515; Tipton v. Tipton, 133 Cal.App. 500, 506, 24 P.2d 525; Marinovich v. Kilburn, 153 Cal. 638, 642, 96 P. 303; Rietz v. Hovden Food Products Corporation, 49 Cal.App.2d 376, 382, 121 P.2d 775; Gordon v. Green, 51 Cal.App. 765, 768, 197 P. 955. Contracts of novation are not different from other contracts. Civil Code, sec. 1531. They must be based on sufficient consideration to constitute a valid enforceable agreement. 39 Am.Jur. 267, § 22. It has been held that if the novation contains the promisor's agreement to pay the debt of a person other than the makers of the original contract, in consideration of the promisor's discharge from the original debt, no new consideration is required. Leslie v. Conway, 59 Cal. 442; 39 Am.Jur. 267, § 22. But in this case the promisor was not merely agreeing to pay the debt of another person. She was promising to pay her own debt for which she was already liable on the former joint and several obligation.

In the case of McClintick v. Frame, supra, under circumstances similar in principle to those of the present case, it was held that the failure of one of the spouses who had joined in a written contract to sell land, to consent to a subsequent oral agreement, was void under Section 1698 of the Civil Code, and that the new agreement did not constitute a novation because it was not acquiesced in by Catherine McClintick, one of the parties to the original written agreement. The judgment was reversed on that account. The court said [98 Cal.App. 338, 276 P. 1035]: "Respondents urge that the original contract was modified by the subsequent April agreement, and that new terms in the April agreement take the place of the terms in the February agreement, and therefore the old contract stands, with substitution of the new terms for the old terms that were by the new contract modified. Such claim amounts to a substitution of the individual obligation of W. P. Frame for the joint and several obligations of W. P. and Theodosia Frame, and amounts to a claim of novation. Civ.Code, § 1530. A novation contract is subject to all the rules concerning contracts in general. Civ.Code, § 1532. It would require a consideration from Theodosia Frame to support it, and, as the February agreement is in writing, a substitution could only be made by another agreement in writing or by an executed oral agreement. Civ.Code, § 1698. It would have to be joined in by all the parties to the original agreement. California Canning Peach Growers v. Downey, 76 Cal. App. 1, 243 P. 679. The April agreement, not being joined in by Catherine McClintick, can have no binding effect upon her."

[7, 8] We are of the opinion the amended complaint for the reason stated in the preceding case fails to allege facts constituting a valid novation. The alleged oral agreement to cancel the debt and to substitute a new obligation was not between all of "the same parties" to the original obligation. It is alleged that J. F. Carter, one of the obligors of the original debt was then dead. He did not and could not consent to the novation. Novation may be consummated by, (1) The substitution of a new obligation between the same parties, or (2) By the substitution of a new debtor in place of the old one, with intent to release the latter. Civil Code, sec. 1531. A novation is made by contract, and is subject to all the rules with relation to contracts in general. Civil Code, sec. 1532. Novation is a new contract to which "all

of the parties concerned agree." Colley v. Chowchilla National Bank, 200 Cal. 760, 770, 255 P. 188, 192, 52 A.L.R. 569; United States Gypsum Co. v. Snyder-Ashe Co., 139 Cal.App. 731, 733, 34 P.2d 767; California Canning Peach Growers v. Downey, 76 Cal.App. 1, 18, 243 P. 679; Young v. Benton, 21 Cal.App. 382, 384, 131 P. 1051; 39 Am.Jur. 262, § 17. In the authority last cited it is said: "It is a well-settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a novation cannot be effected."

It appears from the amended complaint that the obligation to pay the debt under the alleged new oral agreement may not have accrued for the reason that it was to be paid only when "J. F. Carter receives his thousand dollar inheritance, from William Carson's Will." It is affirmatively alleged that he "never did receive said inheritance." The amended complaint alleges that Amanda B. Carter orally agreed to personally assume and pay "said obligation as hereinbefore alleged." It was previously alleged that the debt was to be paid on "the very day (or soon thereafter) that J. F. Carter receives his thousand dollar inheritance, from William Carson's Will", and that he "never did receive said inheritance." The Civil Code, Section 3166, provides that: "Every negotiable instrument is payable at the time fixed."

[9] Ordinarily an instrument made payable by its terms upon the occurrence of a specified event or condition, such as when "the balance of the purchase price" of property is paid (Green v. Robertson, 64 Cal. 75, 28 P. 446), or when real estate "becomes the property of the heirs of the late George Hood" (Egilbert v. Hall, 44 Cal.App.2d 305, 112 P.2d 291, 292), the debt is payable upon the happening of the specified event. If the happening of the event or condition is within the control of the maker of the instrument the debt may become due, after demand, within a reasonable time. (8 Am.Jur. 27, § 281.) But in the present case the obligors had no control over the time of payment of J. F. Carter's legacy of $1,000 from the Estate of Carson. He inherited that sum of money by the terms of the will of Carson. The debt was made payable "on the very day" when that legacy was paid. That was a definite time when, according to the intention of the parties to the obligation, the debt was to mature. However, in view of what we have previously said regarding the invalidity of the alleged novation, it is unnecessary to determine whether or not the debt was payable on demand.

The case of Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 675, 48 A.L.R. 1308, cited by appellant on petition for rehearing in support of his contention that the death of J. F. Carter, one of the joint and several obligors, terminated his privity to the contract and obviated the necessity of the consent of his representatives to a novation under section 1531 of the Civil Code, is not in point. The question of novation was not involved in that case. It was a suit to quiet title to real property by the purchaser thereof upon probate sale against the holder of an unpaid outlawed mortgage for which no claim had been presented to the estate. The court properly held that the allowance of such an outlawed claim was absolutely prohibited by section 1499 of the Code of Civil Procedure, now section 708 of the Probate Code, and that, while a mortgagor could not ordinarily quiet title against an unpaid debt without first satisfying it, under the circumstances of that case, "the law intervened and absolutely severed all privity that may have theretofore existed," and that "the transaction has passed through the purging processes of the probate court," and "the subsequent renewal of a barred note may create a debt anew, but it does not renew, revive, nor continue the mortgage." The court further said: "In the instant case it must be kept in mind that we are dealing with the application of the statute of limitations to a probate sale and not with the general question as it affects the privities that exist ordinarily between mortgagors and mortgagees." Upon that principle it was held that the purchaser of the land at the probate sale thereof was entitled to quiet title against the outlawed mortgage, and the judgment was reversed. The Laughlin case has no application to the doctrine of novation or the requirements of section 1531 of the Civil Code with relation thereto. But even if the language of that opinion be deemed to be authority holding that by the death of a mortgagor all privity between the original parties thereto having terminated, the consent of the representatives of the deceased person becomes unnecessary to a valid novation of the debt, it is not conclusive in the present case, because there

was no consideration for the alleged new promise in this case.

For the reason that the court properly sustained the demurrer to the amended complaint for failure to allege facts sufficient to constitute a valid novation, the judgment against the plaintiff should be affirmed. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.



73 Cal.App.2d 913

PEOPLE v. BRIDGES et al.

Cr. 3954.

District Court of Appeal, Second District, Division 1, California.

April 11, 1946.

1. Criminal law ⇐511(4)

Defendant's possession of the stolen articles, his explanation as to their possession which jury disbelieved, and his failure to deny guilt when accused by officers, was sufficient corroboration of testimony of accomplice to sustain conviction of burglary. Pen.Code § 1111.

2. Criminal law ⇐511(2)

Corroborating evidence is sufficient if it, of itself, tends to connect defendant with the commission of the offense, although it is slight and entitled, when standing by itself, to but little consideration. Pen.Code, § 1111.

3. Criminal law ⇐407(1)

The failure to deny an accusatory statement is a circumstance proper to consider in connection with the issue of guilt.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Jack Justman Bridges and Michael Haddy were charged with the crime of burglary, and, from a judgment of conviction and order denying a motion for new trial, the defendant Michael Haddy appeals.

Affirmed.

Martin S. Ryan, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant and appellant was accused by information of the crime of burglary; nine counts were alleged. Found guilty by a jury of all counts, defendant appeals from the judgment and order denying a motion for a new trial.

It is urged on appeal that the evidence is insufficient to support the judgment and that the admission of certain evidence was prejudicial error. With regard to the first mentioned contention it is argued that the testimony of an accomplice, upon which the prosecution relies, is not sufficiently corroborated. Briefly, the record reveals that one Jack Justman who was jointly charged as a defendant, pleaded guilty on the day of trial and testified for the plaintiff. Property from four of the burglaries was found in possession of appellant at the time of the arrest. As to another count, evidence of the presence of a car at the scene of the burglary similar to the one appellant was in when arrested, was introduced. It also appears that a comprehensive statement made by Justman to the arresting officers was recorded in shorthand and reduced to writing. This statement was read to appellant by the officers, after which appellant was asked, "What do you think of it now, Mike?" to which appellant replied, "I have nothing to say, that is his statement." Appellant's explanation regarding the possession of the stolen articles was in evidence.

Defendant and appellant offered no affirmative defense at the trial.

[1] The corroboration was sufficient as a matter of law. The possession of the stolen articles in connection with some of the counts; the defendant's explanation as to their possession, if disbelieved, and the defendant's failure to deny guilt in such circumstances, amounted to sufficient corroboration. "The commission of the offense or the circumstances thereof", referred to in section 1111 of the Penal Code, was definitely established by other evidence.

[2] Corroborating evidence is sufficient if it, of itself tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when

standing by itself, to but little consideration. People v. McLean, 84 Cal. 480, 24 P. 32. See also People v. Yeager, 194 Cal. 452, 229 P. 40.

[3] With regard to the second alleged error above mentioned, appellant contends that the admission in evidence of certain testimony of police officer Healy was error. The testimony in question included the introduction in evidence of the statement of Justman hereinbefore referred to. Said statement was made by Justman shortly after the arrest of defendants and reduced to writing. It amounted to a complete confession and involved appellant in the alleged burglaries. It was then read to appellant in the presence of the officers and Justman whereupon appellant was asked, as stated above, "What do you think of this now, Mike?" to which inquiry appellant replied, "I have nothing to say, that is his statement." It is well settled that the failure to deny an accusatory statement is a circumstance proper to consider in connection with the issue of guilt. The jury was fully instructed as to the limitation for which such evidence may be considered.

There are no prejudicial errors in the record. The judgment and order are affirmed.

YORK, P. J., and WHITE, J., concur.



73 Cal.App.2d 971

SILVA v. LINNEMAN et al.

Civ. 7199.

District Court of Appeal, Third District, California.

April 13, 1946.

1. Joint adventures ⇐2

Contract whereby dairymen agreed to furnish milk cows and operate a dairy on premises owned by other contracting parties who agreed to supply water, hay, pasturage, and one-half of all concentrates that might be required to fully and amply feed and sustain the dairy cows, contemplated only the use of concentrates necessary for supplemental feeding of the cows after all natural grass and feed produced on ranch had been consumed, and contract did not obligate owners to pay any part of cost of concentrates in excess of such amount purchased by operator.

2. Joint adventures ⇐5(2)

Evidence sustained judgment that owners of ranch had fully paid operator of dairy thereon for one-half of entire cost of all hay, feed, and concentrates purchased which were required to feed and sustain dairy cows in accordance with contract for operation of dairy on the premises and that operator had purchased feed and concentrates that were not necessary for such purpose and hence was not entitled under contract to reimbursement from owners for half of the cost thereof.

3. Pleading ⇐327

Operator of dairy on ranch owned by defendants could not recover for expenditures incident to maintenance of dairy which defendants allegedly were obligated to pay under contract for operation of dairy, in absence of competent proof that operator made the specific expenditures alleged in bill of particulars furnished at defendants' request. Code Civ.Proc. § 454.

4. Pleading ⇐327

Bill of particulars furnished at defendants' request, and setting out specific expenditures incident to maintenance of dairy for which plaintiff sought reimbursement under written contract with defendants for operation of dairy on defendants' ranch, furnished no competent proof of alleged expenditures enumerated therein, even if bill of particulars was admissible. Code Civ.Proc. § 454

5. Pleading ⇐313

A bill of particulars merely amplifies the allegations of complaint, limiting plaintiff's evidence to the specific items therein, and it does not take the place of necessary evidence in proof of the alleged cause of action but requires proof of each item contained therein. Code Civ.Proc. § 454.

6. Account, action on ⇐7

An account can ordinarily be proved only by adducing evidence of the several items contained therein.

7. Account, action on ⇐7

Oral evidence by individuals possessing personal knowledge of the transactions is the best evidence of asserted expenditures

of an account, where it is not pleaded and relied upon as a stated account.

8. Estoppel ⇐112

An alleged estoppel in pais must ordinarily be pleaded with sufficient accuracy to disclose the facts relied upon.

9. Estoppel ⇐116

The party relying on an equitable estoppel has the burden of affirmatively proving all of the elements constituting the asserted estoppel.

10. Estoppel ⇐115

Operator of dairy under contract obligating owners of ranch to supply half of concentrates required to fully feed dairy cows to be supplied by operator could not recover against owners for expenditures made in purchasing concentrates in excess of amount contemplated under contract on theory that supplemental feeding resulted in increased production of butter fat, the proceeds from sale of which inured to benefit of owners and that owners having accepted benefits of such feeding of concentrates should be estopped from denying validity of expenditures therefor, where necessary pleadings and proof of essential elements of asserted estoppel were lacking.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Suit by Manuel V. Silva against L. M. Linneman and another to recover alleged balance due upon contract for expenses incurred incident to maintenance of a dairy enterprise. From a judgment that he take nothing, plaintiff appeals.

Judgment affirmed.

Sefton & Quattrin, by Seibert L. Sefton, all of San Francisco, for appellant.

H. K. Landram, of Merced, for respondent.

THOMPSON, Justice.

From a judgment that plaintiff take nothing in this suit to recover an alleged balance due upon contract for expenses incurred incident to the maintenance of a dairy enterprise, this appeal was perfected.

The complaint is couched in three counts. The first cause of action alleges that an unpaid balance of $2,250.38 is due plaintiff according to the terms of a contract attached to the complaint, for one-half of the purchase price of hay, feed and concentrates and for the expense incurred in testing cows incident to the operation of a dairy. The second cause is for the same amount alleged to be due plaintiff for money expended at the request and for the benefit of defendants. The third count is for an alleged balance due plaintiff for money collected by defendants from the United States Government as subsidies on sales of butterfat produced from the operation of the dairy.

The defendants denied the material allegations of the complaint. They demanded a bill of particulars under section 454 of the Code of Civil Procedure, which was furnished, a copy of which appears in the transcript. After trial the court adopted findings determining that defendants had fully performed the covenants of the agreement and that they did not owe plaintiff said sums demanded, or any sum whatever. Judgment was thereupon rendered against plaintiff to the effect that he take nothing by his action.

The defendants are husband and wife. They own a 208-acre dairy ranch, together with a dwelling house, barns and improvements thereon. They are not dairymen or farmers. June 3, 1941, they executed a written contract with plaintiff, an experienced dairyman, by the terms of which the latter agreed to furnish not less than sixty milk cows the first year, and one hundred and twenty cows thereafter, and to operate a dairy on the premises. Defendants agreed to supply the "water, hay, pasturage, and one-half of all concentrates * * * *that may be required* to fully and amply feed and sustain the dairy cows." Fifty acres of the land was first devoted to pasturage. In 1942 defendants produced ninety additional acres of alfalfa and thirty acres of clover for feeding the cattle. The following year they produced Sudan grass, vetch and clover and obtained therefrom four hundred tons of ensilage for use of the cattle. In 1943 they "doubled the Ladino clover to 100 acres and raised 70-80 acres of alfalfa in addition to some oats and vetch." Plaintiff's witness, Mr. Truttman, testified that "At one time there was as high as 120 cows of the plaintiff on the ranch," but that "during most of the time he had charge of the ranch, there was only about 100 cows belonging to Mr. Silva." He said that defendants had about twenty cows of their own, which were fed on the

premises. The defendants received 47½% of the proceeds from the dairy products.

[1] The chief controversy was over asserted exorbitant expenditures for concentrates, especially in summer months. Plaintiff alleged that he expended some $1,800 for feed and seed in September, 1943, and nearly $1,400 more in June and July of that year, together with an additional sum of $1,500 in February and March of the same year, as against a cost of about $800 for the same purpose for the entire preceding year, and only about $675 for the same purpose in 1941. In October, 1942, the defendants complained of the excessive cost of concentrates claimed to have been used, and it was agreed that the contract would be terminated October 13, 1943. Plaintiff's cattle were removed at that time. The defendant, Mr. Linneman, testified that he knew nothing about the use of concentrates, and that he objected to including in the contract the provision for paying for such feed, but that Silva then explained to him that concentrates were used only as supplementary feed for stock "during the winter months" and that it would cost "only a few cents a day." The contract therefore provided that defendants would pay for one-half of the concentrates "that may be required to fully and amply feed and sustain the dairy cows" for dairy purpose. Clearly the contract contemplated only the use of concentrates *necessary* for supplemental feeding of the stock after all natural grass and feed produced on the ranch had been consumed by the cattle.

The defendant, Mr. Linneman, testified that at all times there was sufficient green feed produced on the ranch to feed the stock. Harold Dye and Emory O'Banion, experienced dairymen, each testified that in his opinion the defendants' ranch produced sufficient green feed to adequately supply the dairy herd with necessary food, except, possibly, during the winter months. All witnesses appeared to agree that concentrates are customarily used as supplemental feed for dairy cattle only in the winter months when green feed is scarce.

[2] The court found that defendants had fully paid plaintiff one-half of the entire cost of all hay, feed and concentrates purchased "which were required to fully and amply feed and sustain the dairy cows," and that plaintiff had purchased "certain feed and concentrates *that were not required* or necessary" for that purpose.

We are of the opinion the evidence is adequate to support the findings and judgment. The contract does not contemplate an unlimited use of concentrates, but only so much as is necessary for adequate supplementary feeding of the dairy cows under the circumstances and conditions existing on the ranch. There is sufficient evidence to support the conclusion that the use of concentrates was required only during the winter months, and that plaintiff's demand includes an excessive amount of concentrates alleged to have been purchased in the years 1942 and 1943. The plaintiff failed to support his claim that defendants owe him any sum in addition to that which they actually contributed to expenses of the dairy business as provided by the contract, or otherwise.

[3] Moreover, the plaintiff failed to adduce competent proof of his allegations of a specific sum of the alleged expenditures contained in the complaint or in the bill of particulars which he furnished defendants at their request. It does not appear that the bill of particulars was offered or received in evidence, and no witness testified to plaintiff's alleged expenditure of any of said sums. There is evidence merely that defendants received a copy of that bill of particulars. It was dated November 18, 1941. It does appear that Mr. Linneman wrote a letter to Joseph A. Enos, plaintiff's manager of the dairy ranch, or his associate, dated February 1, 1943, in which he said: "I have been unable to answer your *letter of January 16, 1943,* concerning the operations at my ranch." That letter evidently had no reference to the bill of particulars. We have no means of knowing what was contained in plaintiff's letter referred to. But the defendant did specifically object to certain claims mentioned *in the letter,* and concluded by saying: "The extreme contrast between the cost of concentrates for this year, and the production for this year, compared to those for last, makes my position in this regard even clearer."

There is ample evidence that defendants did not admit the accuracy of plaintiff's demands in either the complaint or the bill of particulars. There is no competent evidence of the respective amounts alleged to have been expended by plaintiff for concentrates, or for any other purpose.

[4, 5] This is not a suit based on an alleged stated account or on an open book account. The bill of particulars furnishes

no competent proof of the alleged expenditures enumerated therein, even though we assume that it was received in evidence. A bill of particulars merely amplifies the allegations of the complaint, and it is deemed to constitute a part of that pleading. It is in the nature of a more specific allegation of the facts recited in the complaint, and requires proof of each item contained therein, just as a complaint does. It has the effect merely of limiting plaintiff's evidence to the specific items therein. It does not take the place of necessary evidence in proof of the alleged cause of action. Edelman v. McDonell, 126 Cal. 210, 213, 58 P. 528; Kurokawa v. Saroyan, 95 Cal.App. 772, 775, 273 P. 613; Abbott v. Limited Mutual Comp. Ins. Co., 30 Cal.App.2d 157, 85 P.2d 961; 21 Cal.Jur. 69, sec. 43; 8 A. L.R. 550, Note. It follows that, in this case, there is no competent proof that plaintiff expended the sums of money for hay, feed, concentrates or for testing the cows, which are alleged in the bill of particulars.

[6, 7] The only way that an account can ordinarily be proved is by adducing evidence of the several items contained therein. Oral evidence by individuals possessing personal knowledge of the transactions is the best evidence of the asserted expenditures of an account, where it is not pleaded and relied upon as a stated account. Cowdery v. McChesney, 124 Cal. 363, 57 P. 221.

[8-10] Finally, the appellant contends that, even if he did buy an excessive amount of concentrates, the supplemental feeding resulted in an increased amount of butterfat, the proceeds from sales of which inured to the benefit of the defendants, and that, having accepted the benefits of such use of concentrates, they are estopped from denying the validity of the transactions. Citing 10 Cal.Jur., p. 647. There is evidence that Mr. Linneman "received credits" for certain specified amounts of cash paid to defendants on account of the contract. An alleged estoppel in pais must ordinarily be pleaded with sufficient accuracy to disclose the facts relied upon. Producers Holding Co. v. Hill, 201 Cal. 204, 209, 256 P. 207; 10 Cal.Jur. 653, sec. 30. Moreover, the burden is on one who relies on an equitable estoppel to affirmatively prove all of the elements constituting the asserted estoppel. General Motors Acceptance Corporation v. Gandy, 200 Cal. 284, 295, 253 P. 137; 31 C.J.S., Estoppel, § 160, p. 454. The present case lacks both the necessary pleading and proof of the essential elements of the asserted estoppel.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



73 Cal.App.2d 901

PEOPLE v. EMBASSY REALTY ASSOCIATES, Inc., et al.

Civ. 15056.

District Court of Appeal, Second District, Division 1, California.

April 10, 1946.

Rehearing Denied April 29, 1946.

Hearing Denied June 3, 1946.

1. Licenses ⇐11(1)

The word "subdivision", as used in provision of Real Estate Act requiring owner of subdivision to notify real estate commissioner in writing of intention to sell or lease before lands are offered for sale or lease, refers to a division of a large tract of unimproved land or acreage into smaller lots or parcels, and does not refer to improved city lots. Business and Professions Code, §§ 11010, 11535.

See Words and Phrases, Permanent Edition, for all other definitions of "Subdivision".

2. Licenses ⇐11(1)

A bungalow court consisting of eight bungalows was not a "subdivision", within meaning of Real Estate Act so as to require owner of the court to procure permits from real estate commissioner before proceeding with its plan of placing tenants in possession of the bungalows under 99-year leases. Business and Professions Code, §§ 11010, 11535.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the People of the State of California against the Embassy Realty Associates, Inc., and others, for alleged violation of the State Subdivision Law and for injunctive relief. From a judgment enjoining the defendants from placing tenants in possession of eight bungalows of a

bungalow court under 99-year leases, the named defendant alone appeals.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (Wm. C. Wetherbee, of Los Angeles, of counsel), for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

This is an appeal by defendant Embassy Realty Associates, Inc., a corporation, from a judgment enjoining the defendants from placing tenants in possession of eight bungalows of a bungalow court under 99-year leases.

The complaint charged in substance that defendants were engaged in leasing or offering to lease subdivided lands situate in the State of California without giving notice to the Real Estate Commissioner, as required by section 11010 of the Business and Professions Code. The cause was tried upon stipulated facts of which the following is a brief summary:

The premises involved herein consist of a bungalow court containing ten separate bungalows, each approximately 28 x 28 feet, and two small garage units, all located within an area 105 feet in width and 176 feet in depth, in a residential district of the City of Los Angeles.

On April 21, 1944, Embassy Realty Associates, Inc., obtained title to said premises and on November 14, 1944, sold the same and transferred title thereto to the Norcourt Corporation which had been incorporated on September 29, 1944. On December 12, 1944, the Norcourt Corporation was owned exclusively by ten stockholders. Said Norcourt Corporation was organized and is now operated under a "share ownership plan" by the terms of which "said corporation has leased in writing to each of its ten stockholders one of said bungalows for a period of ninety-nine (99) years"; the garage space being similarly leased. The State Corporation Commissioner has issued a permit for the sale of stock under said plan, a copy of which forms part of the record herein.

By November 17, 1944, two of the stockholders had obtained possession under the plan, and on January 22, 1945, the Office of Price Administration authorized said corporation to take the necessary steps under local law to obtain possession of the remaining eight bungalows for its eight stockholders. "Said authorization has not been revoked or amended and is still in effect." Notices under local law have been served upon the tenants of the eight bungalows, terminating their tenancies not later than March 5, 1945; but none of said stockholders have obtained possession of the bungalows which he leased under said plan, because of the preliminary injunction which issued herein on March 6, 1945.

"V. That said bungalows have been in existence for at least twenty (20) years. That no deeds have ever been executed for any of said individual bungalows or for said garages. That no map has ever been filed under the Subdivision Map Act of the Business and Professions Code. That said stockholders have received ninety-nine year leases to the bungalow and garage space only on said premises, and that all the remaining area of said premises consisting of sidewalks, gardens and lawn, has been retained by the corporation free of demise or alienation.

"VI. That defendants have at no time notified the Commissioner of Real Estate in writing of said plan. That the entire correspondence relating to this matter between the defendants and the Real Estate Commissioner is attached hereto, marked Exhibits 'C–1' to 'C–6', inclusive, made a part hereof, and consists of six (6) letters.

"VII. That all stock in said Norcourt Corporation has been one hundred per cent (100%) subscribed by the aforesaid individual stockholders. That said plan is at present in full operation, subject only to the acquiring of possession of said eight (8) bungalows for the occupancy by said eight (8) stockholders as aforesaid."

It was also stipulated: "That there are innumerable bungalow courts in the State of California containing five or more bungalows, which bungalows are leased and are being constantly leased to tenants for various periods of time. That the owners of said premises have never registered under or adopted the procedure set forth under the regulations of California real estate law relating to subdivisions. That no proceedings have ever been taken against said owners under said law. That to the knowledge of the Real Estate Commissioner the plan referred to in this proceeding is the first such plan which has proceeded

this far, and that other plans not dissimilar have been presented to the Real Estate Commissioner and the Commissioner has notified the promoters thereof that said plan constituted a subdivision."

The trial court found in accordance with the stipulated facts, and also that "the method of disposal of the real property mentioned herein by the defendants and the 'share ownership plan' is a subterfuge to evade the provisions of sections 11000 and 11010 of the Business and Professions Code"; and made the following conclusions of law:

"I. That the method of disposing of the real property described herein constitutes an act of subdividing said property for the purpose of lease.

"II. That sections 11000 and 11010 of the Business and Professions Code relate to improved property as well as unimproved land.

"III. That the defendants in dividing said real property into five or more parcels for the purpose of lease, and having failed to notify the Real Estate Commissioner of the State of California in writing, pursuant to the provisions of section 11010 of the Business and Professions Code, have violated the terms thereof and the defendants and each of them should be restrained and enjoined from doing any act or acts in furtherance of the subdividing of said premises unless and until defendants comply with the provisions of Chapter 1, Part 2, Division IV of the Business and Professions Code."

Section 11010 of the Business and Professions Code reads as follows: "Notice of intention to sell subdivided lands. (When and by whom notice to be given.) Prior to the time when subdivided lands are to be offered for sale or lease, the owner, his agent or subdivider shall notify the commissioner in writing of his intention to sell such offering.

"(Contents.) The notice of intention shall contain the following information:

"(a) The name and address of the owner.

"(b) The name and address of the subdivider.

"(c) The legal description and area of lands.

"(d) A true statement of the condition of the title to the land, particularly including all encumbrances thereon.

"(e) A true statement of the terms and conditions on which it is intended to dispose of the land, together with copies of any contracts intended to be used.

"(f) A true statement of the provisions, if any, that have been made for public utilities in the proposed subdivision, including water, electricity, gas and telephone facilities.

"(g) Such other information as the owner, his agent, or subdivider, may desire to present."

Section 11000 of said code reads: "'Subdivided lands' and 'subdivision' refer to land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels."

Appellant here urges that the term "subdivision" as so defined, does not apply to bungalow courts, and that therefore the judgment is unsupported by the findings and against law. Further, he claims that the word "subdivision" as used in the quoted section, has been construed in the case of Cowell v. Clark, 37 Cal.App.2d 255, 258, 99 P.2d 594, 596, to mean "unimproved" property. The plaintiff in that case sought to assign a lease of land for oil purposes, by subdividing into eleven units the subject-matter of the said lease. The trial court sustained defendant Real Estate Commissioner's demurrer to plaintiff's complaint, and on appeal from the judgment of dismissal plaintiff contended "that he has not 'subdivided', that he is not a 'subdivider', and that the tracts he is attempting to lease are not 'subdivisions' within the meaning of said statute." The court held: "These contentions are not supported by the lexicographers nor by the clear wording of the statute. * * * Here the plaintiff was about to divide the lands, described in the lease to him, into eleven parcels and assign his lease pro tanto to each parcel. That act would be in direct violation of said section. Webster's New International Dictionary (2d Ed.) defines 'subdivide': 'To divide a tract of land into lots to sell before developing or improving them.' Such was the act of this plaintiff. See, also, 60 C.J. 670; Gill v. Saunders, 182 Ark. 453, 31 S.W.2d 748, 749; Kansas City v. Neal, 122 Mo. 232, 26 S.W. 695, 696. As said in the case last cited: '"Subdivision" means to divide into smaller parts the same thing or subject-matter * * *.'"

According to Webster's, supra, a subdivision of real estate is defined as: "An unimproved tract of land surveyed and divided into lots for purposes of sale. In some localities it is distinguished from a development upon which improvements are made before sale; in other localities, the terms are synonymous." The same work defines develop: "To convert from a tract of raw land into an area suitable for residential or business uses." Development: "A developed tract of land."

In the case of In re Sidebotham, 12 Cal.2d 434, 437, 85 P.2d 453, 455, in which the sections of the Real Estate Act, here under consideration, were held to be a valid exercise of the police power, the petitioner contended that section 20j of said Act (now section 11000, Business and Professions Code) "defining 'subdivision', is arbitrary and indefinite * * *." With reference thereto, the court stated: "We find no uncertainty in these terms. The legislature must necessarily choose some point at which the sale of parcels from a large tract gives rise to the possible evils which require regulation, and we cannot say that the determination of five lots is improper."

In City of Los Angeles v. Hughes, 202 Cal. 731, 735, 262 P. 737, 739, an action in eminent domain, the court stated: "Under all of the authorities, both in this state and elsewhere, the true basis for computing the market value of land sought to be condemned, in view of the evidence of its suitability for subdivision purposes, is its value as it stood on the date when, under the law, its value was to be determined, plus any increased value which it may have had in the market by reason of its suitability for subdivision into city lots."

[1] In view of the foregoing, it would appear that in referring to a subdivision, the courts of this state have had in mind the generally accepted meaning of the word, i. e., the division of a large tract of unimproved land or acreage into smaller lots or parcels. Subdivision (f) of section 11010, supra, requiring a true statement of what provision has been made for public utilities in a proposed subdivision, including water, electricity, gas and telephone facilities; and as well the definition of subdivision in section 11535 Business and Professions Code (Subdivision Map Act)—lend strength to such construction of the term by the courts. Respondent has not directed attention to any authority in which the term subdivision has been used in referring to improved city lots, such as the property here under consideration.

After appellant had obtained title to the bungalow court, and before the Norcourt Corporation had been incorporated, the appellant received the following letter from respondent Real Estate Commissioner, which contains a fair statement of the existing facts:

"In line with our recent conversation, we have discussed with other deputies in this Division the question as to whether or not your proposed plan of operation in connection with the court at 1031 to 1041½ North Normandie Avenue would constitute a subdivision. It is our understanding that you propose to organize a corporation, that you propose to sell stock in this corporation to individuals, that the stock ownership would then entitle the individual to lease one of these bungalows at a nominal rental for a long period of time. We further understand that no intention exists to actually subdivide the real estate as the title to all of the real estate will be held by the corporation.

"Based on this assumption, it is our opinion that your activities in selling stock in a corporation, as above outlined, would not constitute a subdivision under the definition of a subdivision as defined in the California Real Estate Law."

[2] It should not be overlooked that appellant received the sanction of the State Corporation Commissioner before proceeding with the execution of its plan heretofore outlined. In view of the conclusion reached by this court that the term subdivision, as used in the sections of the Real Estate Act hereinbefore cited, has no reference to improved city lots, it was not necessary for appellant to procure a permit from the State Real Estate Commissioner before proceeding with its plan.

For the reasons stated, the judgment is reversed.

DORAN, and WHITE, JJ., concur.

NELSON v. ABRAHAM.

Civ. 12878.

District Court of Appeal, First District, Division 1, California.

April 3, 1946.

Hearing Granted May 27, 1946.

1. Partnership ⇐53

In action for dissolution of alleged partnership and for an accounting, evidence sustained finding that a partnership did not exist.

2. Appeal and error ⇐1010(1)

Appellate court has no power to disturb finding supported by substantial credible evidence.

3. Appeal and error ⇐1012(1)

Appellate court has no power to substitute its view of the weight of the evidence for that of the trial court.

4. Joint adventures ⇐5(1)

Finding that plaintiff had no interest in business nor in and to any of assets of business was broad enough to negative existence of a joint adventure between plaintiff and defendant.

5. Appeal and error ⇐882(17)

In action for dissolution of alleged partnership and for an accounting and general relief, finding that plaintiff had no interest in business nor in and to any of assets of business was as broad or broader than the allegations of pleading, and plaintiff could not complain on appeal that findings were not more specific.

6. Partnership ⇐328(3)

In action for dissolution of alleged partnership and for accounting, finding that plaintiff was not entitled to any profit derived from operation and sale of business was not supported by evidence where defendant admitted that he agreed that plaintiff was entitled to one-third of net profits from operation of business.

7. Account ⇐3

Where, by contract, one of contractors is entitled to a share of profits of venture, he can compel the other contractor to account for any profits received.

8. Master and servant ⇐81

If an employee is entitled to a share of profits, he can compel his employer to account for any profits received, and such rule applies even though employee mistakenly alleges relationship to be that of partnership or joint adventure.

9. Master and servant ⇐81

Where plaintiff sought dissolution of alleged partnership and an accounting but defendant claimed that true relationship was that of employer and employee and that plaintiff was to be paid a salary and one-third of net profits, plaintiff was entitled to an accounting to determine profits, on sale of business.

10. Appeal and error ⇐989

On appeal from judgment for defendant based on findings supported by evidence, plaintiff's testimony must be disregarded.

11. Trial ⇐391

Where contract entitled employee to a salary and one-third of net profits from operation of business but when contract was entered into neither of the parties contemplated that there would be a sale of business, and extrinsic evidence was offered as to proper interpretation of contract, question whether employee was entitled to a share of net profits from sale of business was question of fact, and employee was entitled to a specific finding, interpreting the contract.

WARD, J., dissenting.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Julius Nelson against Isaac Abraham for dissolution of an alleged partnership, for an accounting, and for general relief. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion 162 P.2d 833.

Hardin, Rank, Meltzer & Fletcher, of Oakland, for appellant.

Raymond Salisbury and Joseph C. Prior, both of Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff, Julius Nelson, brought this action against defendant, Isaac Abraham, for the dissolution of an alleged partnership, for an accounting and for general relief. The trial court found that plaintiff had no

interest in the assets or profits of the business and on that ground entered its judgment for defendant and denied plaintiff any relief. From this judgment plaintiff appeals.

The facts are as follows: For many years the defendant had been engaged in the business of manufacturing and selling ice in Oakland under the firm name of Independent Ice Company. Plaintiff had been in the employ of defendant as a salesman for over six years. Defendant's Oakland business had been adversely affected by competition from certain San Francisco firms, and, in 1940, defendant began to plan some method of expansion. He finally determined to open a San Francisco branch. To this end he held several conferences with plaintiff, promising plaintiff that if he would work on the San Francisco end, he, the defendant, would "take care" of plaintiff. In the latter part of October, 1940, plaintiff and another salesman started two San Francisco ice routes, and shortly thereafter a San Francisco office was opened. During the early months of the venture the ice was manufactured and stored in Oakland, and the San Francisco delivery trucks picked the ice up at the Oakland plant. During these early months all moneys collected in the operation of the San Francisco branch were turned over to the Oakland office and accounts payable by the San Francisco office were paid out of the Oakland office. Plaintiff was paid a monthly salary by check from the Oakland office in the same amount—$185 per month—as he had received while working in Oakland.

[1, 2] The San Francisco venture, through the efforts of plaintiff, apparently was advantageous to defendant, and defendant determined to expand it. On September 1, 1941, he leased a lot in San Francisco and moved a building thereon which was thereafter used for storage and office purposes. Until about this time, although plaintiff had been promised that he would be taken "care of" if he would undertake to build up the San Francisco business, no definite arrangement had been agreed upon. Plaintiff admits that until September of 1941 he was a mere employee. It was his theory in the trial court, and it is his theory on this appeal, that at this time he and defendant entered into an oral agreement of partnership in reference to the San Francisco business whereby the interests of the partners were to be ⅔ to defendant and ⅓ to plaintiff. Plaintiff testified and produced evidence, which, if it had been believed by the trial court, would have amply supported a finding that after September 1, 1941, such a partnership existed. Defendant flatly contradicted plaintiff as to the nature of the relationship. He testified that at no time did plaintiff have any interest in the business or assets of the company—that the arrangement was that plaintiff should be an employee with a ⅓ interest in the profits from the San Francisco operation. The trial court has settled this conflict in favor of defendant. Whatever our views may be as to the weight of the evidence, there being substantial credible evidence to support the finding, we have no power to disturb the finding. It must be accepted as the fact that whatever the relationship of the parties was after September 1, 1941, it was not that of partners. Defendant admits, however, that plaintiff was something more than a mere salaried employee. Under the direct examination of his own counsel he testified as follows as to the relationship of the parties (R.T. p. 334): "Q. Did you ever have any talk at any time during the time that the business was being carried on in San Francisco as we have related from October 22, 1940, up until the time that the business was closed in 1942 * * * with Mr. Nelson regarding his participation in any of the profits, whether they were operating profits or what they may have been? A. Yes Sir.

"Q. You did have such a conversation? A. Yes.

"Q. When was it you first talked to him about it? A. It was around the month of August, August, 1941. * * *

"Q. Will you tell us in substance, that is, as near as you can recall, I realize you cannot recall the exact wording probably, what was said at that time by you and by he? A. Mr. Nelson came that morning about 9:00 o'clock * * * So he said, 'Isaac, can I see you outside on the sidewalk,' and I said 'Sure,' and we went out. He said, 'Now, before I go any further I would like to know what my part is going to be in this business.' I told him 'I will tell you just exactly what I am going to do with you; I will give one one-third of the net profits from the operation of the business.' I explained, 'If I made $3,000 net profits out of the San Francisco operation, $1,000 is yours.' I asked him if that was satisfactory, and he said, 'Yes.'

I told him, 'You understand now, you will not have any interest in the business whatsoever.' * * *

'Q. So on that occasion you told him you would give him one-third of the net profits received from the operation of the business? A. That is right.

"Q. Without any interest in the business itself? A. Yes, as long as he stays with me."

On cross-examination defendant testified as follows (R.T. p. 358): "A. As I said, Mr. Nelson came in that morning, I am sure it was about 9:00 o'clock. He told me he wanted to see me. I said 'Come right along; I want to see you.' He came up there and I came up there and he said, 'What is my part going to be in the business?' I said, 'Mr. Nelson, I told you in the beginning I will give you one-third of the net profits from the operation of the business. In other words, if I make $3,000 profit from the operation of the business, your share will be $1,000 and my profit will be 2,000; but remember you have no interest in the business. * * *

"Q. In other words, you told him 'As I always told you, you will have one-third of the net profits of the business?' A. That is right.

"Q. You said, 'Remember this, you won't have any part of the business; you will not own any part of the business, but you will have one-third of the net profits?' 'A. You will have one-third of the net profits of the operation of the business.'"

In admitting that the testimony given by him on his deposition to the effect that he had never discussed profits with plaintiff was untrue, defendant testified (p. 388): "I told him I would give him one-third out of the net profits of the San Francisco business. * * * Well, I am telling you right now, I told him I will give him one-third from the net profits of the San Francisco operation of the San Francisco business and further than that he has no interest in the business whatsoever * * *."

It is an admitted fact that after September 1, 1941, the method of carrying on the San Francisco business was drastically changed. Plaintiff thereafter assumed charge of the San Francisco business, and it was operated as a unit distinct from the Oakland business. Separate books were kept for the San Francisco business by the same bookkeeper who kept the Oakland books and who, in 1941, married plaintiff. A bank account was opened in San Francisco wherein plaintiff deposited all receipts from the San Francisco business. Either plaintiff or defendant could draw checks on this account, but the evidence shows that plaintiff alone signed the checks for the San Francisco end of the business. A retail sales tax permit was secured for the San Francisco business from the State Board of Equalization and it was signed by plaintiff and defendant as joint operators of the business. The San Francisco branch purchased its ice from the Oakland company, paying regular platform prices therefor, and the San Francisco branch assumed all hauling charges. This ice was billed to the San Francisco branch by the Oakland company in the same manner that all customers were billed. Plaintiff did the hiring and firing, fixed prices, handled credits and collections, and otherwise generally managed the San Francisco branch. He continued to draw his regular salary of $185 per month. It is an admitted fact that from September 1, 1941, to March 31, 1942, under the management of plaintiff, the San Francisco branch continued to expand and its volume of business materially increased. All of the physical assets of the company—the office building, furniture, trucks, ice equipment, capital, etc.—were furnished by defendant. Plaintiff furnished no part of the capital or the physical assets, but it is not denied that he devoted many extra hours of work beyond those of an ordinary employee to the management of this business.

The evidence of defendant shows that prior to March 31, 1942, the defendant, without informing plaintiff, commenced negotiations with the representatives of the Union Ice Company and the City Ice Company looking toward the sale of the San Francisco branch to these companies. This sale was consummated on March 31, 1942. Shortly prior thereto plaintiff learned of the negotiations. While defendant was meeting with the proposed purchasers at the office of the Union Ice Company in Oakland plaintiff entered and asserted he was the owner of a one-third interest in the business and entitled to sit in the meeting. The representatives of the two companies asked defendant if this was true, and defendant made no denial and acquiesced in plaintiff's presence for the balance of that meeting.

As the result of subsequent meetings at which plaintiff was not present, defendant

completed the sale on March 31, 1942. The defendant received $14,000 in cash, several ice routes in Oakland and an ice contract to run for five years with an option for an additional five years, as the price of the San Francisco branch.

On April 7, 1942, shortly after the sale was completed, plaintiff asked defendant for an accounting and defendant, according to his testimony, replied that the monthly operating reports of the San Francisco branch, which reports had been prepared by plaintiff's wife as the bookkeeper, showed a net operating loss of $2,090. This was admittedly computed by not including any profits from the sale of the business. Plaintiff and his wife testified that if only the $14,000 cash received on the sale were considered there was a $5,000 net profit of which plaintiff was entitled to one-third.

On this evidence the trial court found, so far as is pertinent here, that the parties were not partners; that plaintiff has no right, title or interest in and to the business, nor in and to any of the assets thereof; that "said plaintiff is not entitled to any of the assets of said business or any of the profits derived from the operation and sale of said business." The conclusions of law recite that the parties are not partners and that the "plaintiff does not have any right, title, or interest in and to" the San Francisco business "nor in and to any of the assets thereof or any of the profits derived from the operation of said business either as a copartner thereof or otherwise * * *." Judgment was entered accordingly denying plaintiff any relief by way of an accounting or otherwise.

The plaintiff devotes the major portion of his briefs to the contention that under the evidence the parties were partners or at least joint adventurers, and he makes much of the failure of the court to find expressly on whether or not the San Francisco project was a joint adventure. The parties exhaustively discuss the legal nature of a joint adventure.

[3-5] As to these contentions we are of the opinion, first, that the finding negativing the existence of a partnership is supported by substantial evidence. On that issue the evidence was sharply conflicting. This court has no power to substitute its view of the weight of the evidence for that of the trial court. In the second place, although the trial court did not in so many words negative the existence of a joint adventure, its findings are broad enough to negative such a relationship, and such finding is likewise supported. The court found that plaintiff had no interest in the business nor in and to any of the assets of the business. That finding is broad enough to negative the existence of a joint adventure in its technical sense. After all, the finding is as broad or broader than the allegations of the pleadings and the parties should not be permitted to complain, under such circumstances, that the findings are not more specific.

[6] But the determination that neither a partnership nor a joint adventure relationship existed is not determinative of this appeal. The trial court also found that plaintiff was not entitled to "any of the profits derived from the operation and sale of said business." That finding is not only totally unsupported by the evidence but it is directly contrary to defendant's own testimony heretofore quoted. Defendant admits that he agreed that plaintiff was entitled to "one-third of the net profits from the operation of the business." That is undisputed. The true relationship between these parties, according to defendant, was that of employer-employee, but plaintiff was to be paid by a salary and a share of the profits. The real question presented is whether such an employee is entitled to an accounting in order to ascertain whether there were any profits.

[7-9] On this question the law is settled. The right to an accounting is not limited to the partnership or joint adventurer relationships. Whatever the relationship of the parties may be, if, by contract, one of the contractors is entitled to a share of the profits of the venture, that person can compel the other contractor to account for any profits received. This duty to account arises whenever one party is in possession of profits in which another party is entitled to share. If an employee is entitled to a share of the profits he can compel his employer to account for any profits received, and this rule applies even though the employee mistakenly alleges the relationship to be that of partnership or joint adventurers. If this were not the law there would be no way to ascertain whether any profits had been made, or to ascertain the amount of such profits. The rule is well illustrated by the case of Coward v. Clanton, 122 Cal. 451, 55 P. 147. There the complaint, as in the instant case, averred a partnership for the purchase and sale of real estate, and

requested an accounting. The defendant denied such allegation, but admitted that he employed plaintiff as a broker to sell certain land under a contract by which, after expenses and costs were deducted, plaintiff was to receive as salary one-half of the net profits. It was held that plaintiff was entitled to an accounting. At page 453 of 122 Cal., at page 148 of 55 P. the court states: "The fact that the relation is wrongly averred to be that of partners is not material. If a case is stated which entitles the plaintiff to relief, it matters not that the contract which is correctly set out is wrongly called a contract of partnership. I do not understand the suggestion that the court has no jurisdiction to compel an accounting unless a partnership was created. If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done. [San Pedro] Lumber Co. v. Reynolds, 121 Cal. 74, 53 P. 410. Whether the facts would have given jurisdiction to a court of equity is of no consequence. We have no such courts, but our courts afford the remedies to which the facts may show the parties are entitled, whether legal or equitable."

The same rule was announced in Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877. There it was alleged that plaintiff was employed by defendant to solicit contracts for radio advertising; that she was to be paid a percentage of the sums paid by the advertisers secured by her; that she procured certain contracts; that an accounting was necessary. In holding that plaintiff, although but an employee, was entitled to an accounting, the court stated in 3 Cal.App.2d p. 460, 39 P.2d 879: "Under our system of pleading, a cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff. Whann v. Doell, 192 Cal. 680, 684, 221 P. 899. Ordinarily, no accounting is necessary between an employer and an employee. But where, as here, the payment is alleged to be in the form of a percentage of the moneys received by the employer, and the complaint alleged that the plaintiff did not know what moneys had been received through contracts procured by her, an accounting would be the only method of arriving at the amount due." See, also, Arbuckle v. Clifford F. Reid, Inc., 118 Cal. App. 272, 4 P.2d 978; Bernstein v. Sirotta, 213 Cal. 21, 1 P.2d 8; see annotation in 137 A.L.R. 6, where at pages 172–174 the cases on this point are collected and commented upon.

It seems obvious, therefore, that in the present case, since it is an admitted fact that plaintiff was employed under a profit sharing agreement, that he is entitled to an accounting to determine whether there were any profits, and, if so, to a determination of the amount of such profits. The trial court was apparently of the view that unless the parties were partners plaintiff was not entitled to an accounting, and its findings are based on that theory. That theory is not sound, and the judgment based thereon must be reversed.

[10] Although the parties, including defendant, spend the major portion of their briefs discussing the questions as to whether a partnership or joint adventure existed, the defendant recognizes and tacitly admits that the finding that the plaintiff was not entitled to any profits is unsupported by and contrary to the evidence, but at the oral argument, and to a certain extent in his briefs, he argues that the erroneous finding is not prejudicial because, so he contends, the uncontradicted evidence shows that there were no profits. That contention is not supported by the record. It is true that the evidence shows that from September, 1941, when the profit sharing agreement was entered into, until March 31, 1942, when defendant terminated the arrangement by selling the San Francisco branch, that branch, except for one month, took in less money that it paid out. Both parties testified to this fact, although they differ as to whether the monthly profit and loss statements, prepared by plaintiff's wife as bookkeeper, and which show a $2,090 net loss for this period, included all proper items. It is this evidence upon which defendant relies to support his contention that the uncontradicted evidence shows that there were no profits. The error in defendant's reasoning is that it assumes that, as a matter of law, the contract did not include any profits realized from the sale of the business. The contract that was entered into according to defendant's own testimony, and disregarding as we must plaintiff's testimony, was that plaintiff was to receive for his share, his salary, and "one-third of the net profits from the operation of the business. * * * If I made $3,000 net profits out of the San Francisco operation, $1,000 is yours. * * *

Without any interest in the business itself." Defendant also testified that he told plaintiff in fixing his rights: "* * * I told you in the beginning I will give you one-third of the net profits from the operation of the business. In other words, if I make $3,000 profit from the operation of the business, your share will be $1000 and my profit will be 2,000; but remember you have no interest in the business. * * *" In admitting certain statements in his deposition were untrue defendant defined plaintiff's rights. He testified: "I told him I would give him one-third out of the net profits of the San Francisco business." This is defendant's own testimony as to the terms of the contract. The question is, what does this contract mean? If it be assumed that the San Francisco branch took in less money than it paid out can it be said, as a matter of law, that there were no "net profits from the operation of the business" when the evidence shows, without contradiction, that a net profit was realized from the sale? It is quite apparent that this contract could reasonably mean one of two things, either the plaintiff's share was to be limited to a share of net profits, if any, shown by daily receipts and expenditures, or plaintiff was to be entitled to a share of all profits resulting from the operation of the business. While the ordinary meaning of net profits from operation may well be that it does not include profits realized from a sale, there is, of course, no legal reason why the parties cannot contract that such profits should be included. The circumstances here existing, as shown by the evidence most favorable to defendant, discloses that defendant wanted to open a new outlet. He had an employee whose services over six years had been entirely satisfactory. As an incentive to that employee he agreed that if plaintiff would operate the San Francisco branch and build it up, plaintiff would be entitled to one-third of the net profits from its operation. Defendant was to furnish all equipment and capital; plaintiff was to furnish his services. The uncontradicted evidence shows that through the sole efforts of plaintiff the San Francisco branch developed into a valuable adjunct to the Oakland business, so valuable, indeed, that competitors decided to buy the business. Plaintiff was to be entitled to one-third of the net profits realized from the operation of the business. When the parties entered into this contract neither contemplated that there would be a sale. Both contemplated, and at that time intended, that the San Francisco branch would be continued. What the rights of the parties should be in the event of a sale must rest upon inference. It is certainly a possible and reasonable inference that if the business should be sold defendant should first receive the amount paid for the physical assets turned over to the purchaser. That could explain defendant's insistence that plaintiff had no "interest in the business." Then if, after all proper expenses of operation were deducted, there was still a net profit, plaintiff was to be entitled to a one-third interest therein. It certainly can be reasonably argued that any such net profit resulted from the operation of the San Francisco branch. From what other source could the profit have been realized? It can be argued that it was because the San Francisco branch was in operation that defendant was able to sell it.

[11] Enough has been said to demonstrate that there are two possible reasonable interpretations of this contract. Because the contract was oral, and because considerable extrinsic evidence was offered to interpret it, the question of interpretation is one of fact and not one of law. The trial court has not passed upon this question of fact. It found that plaintiff was not entitled to "any of the profits derived from the operation and sale of said business," and it concluded that plaintiff has no right at all to "any of the profits derived from the operation of said business either as a copartner thereof or otherwise." It did not determine whether there were any profits of any kind, whether from operation or otherwise. Admittedly the plaintiff was entitled to a one-third interest in the "net profit" realized "from the operation" of the business. Admittedly the quoted finding and quoted conclusion are contrary to the evidence. The trial court did not attempt to define what was meant by the phrase "net profits from the operation of the business" for the simple reason that it found, contrary to the evidence, that plaintiff, in any event, was not entitled to any profit at all whether from "operation" or otherwise. The theory of the trial court as set forth in the findings was that because it found that there was no partnership it followed that plaintiff was not entitled to share in any profits of any kind. That is an erroneous theory. Under the circumstances both parties are entitled

to a specific finding interpreting the contract. If the court should find in plaintiff's favor on this issue, plaintiff is entitled to an accounting. If it should find in favor of defendant no accounting is necessary.

The judgment appealed from is reversed.

SCHOTTKY, Justice pro tem., concurs.

WARD, Justice (dissenting.)

I dissent. I agree that the determinative question on appeal concerns the interpretation of the contract between plaintiff and defendant. If plaintiff's interpretation of the contract must necessarily as a matter of law be accepted, then our system of jurisprudence gives him the adequate remedy of an accounting regardless of the legal attributes of a partnership or a joint venture. A re-examination of the record has convinced me that the finding that plaintiff is not a partner is broad enough to negative the existence of a joint venture relationship and is supported by the evidence. It is with that portion of the majority opinion which states that "The trial court was apparently of the view that unless the parties were partners plaintiff was not entitled to an accounting, and its findings are based on that theory," and the conclusion drawn therefrom that "The trial court has not passed" upon the "two possible reasonable interpretations of" the contract between the parties, that I disagree. In the face of the findings, there is no merit in the majority opinion's conclusion that the trial court passed only on the partnership issue and did not pass on the contract terms.

The pertinent findings of fact and conclusions of law read as follows: "That it is true that on or about the 31st day of March, 1942, said defendant was conducting a certain business in the City and County of San Francisco under the firm name and style of Independent Ice Company; that on or about said date, he sold all of the assets of said business and received therefor a valuable consideration; that on or about said date, he received the consideration for said sale and used the same solely and entirely for his own individual purposes; that it is not true that said business, conducted by him under the firm name and style of Independent Ice Company, was conducted as a copartnership business of which said copartnership, said plaintiff was a partner; that said plaintiff had no right, title, or interest in and to said partnership business nor in and to any of the assets thereof; that it is true that said defendant has at all times refused to account to said plaintiff or to turn over to said plaintiff any part or portion of any of the profits from the operation and sale of said business; that said plaintiff is not entitled to any of the assets of said business or any of the profits derived from the operation and sale of said business."

"As conclusions of law from the foregoing facts, the court finds that said plaintiff and said defendant were not at any of the times alleged in said complaint or at all copartners transacting business under and by virtue of any copartnership arrangement had or entered into between them, and that *said plaintiff does not have any right, title, or interest* in and to that certain business conducted in the City and County of San Francisco by plaintiff under the firm name and style of Independent Ice Company nor in and to any of the *assets* thereof or any of the profits derived from the operation of said business *either as a copartner* thereof *or otherwise* and that said defendant is entitled to judgment against plaintiff for his costs of court expended in the defense of said action, and judgment is hereby ordered to be entered accordingly." (Emphasis added).

It is true that the theory upon which the plaintiff rested his case was that there was a partnership between him and defendant and this fact explains the emphasis upon the negation of such relationship between the parties in the findings. However, even the majority opinion admits that the findings are broad enough to cover the absence of a joint adventure agreement. In concluding this, the majority opinion follows the well-recognized rules for construal of trial court findings to support the judgment. The findings—"that said plaintiff had no right, title, or interest in and to said partnership business nor in and to any of the assets thereof," and "that said plaintiff is not entitled to any of the assets of said business or any of the profits derived from the operation and sale of said business"—if broad enough to include a finding of the absence of a joint venture relationship, are also broad enough to include findings as to the terms of the contract between plaintiff and defendant as to shares in the business and its profits, if any.

This is not a case where the interpretation of the contract between plaintiff and defendant is solely a question of law to be determined by the appellate court without resort to the extrinsic evidence which the trial court had before it, from the four corners of a document. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. What the terms of the contract between defendant and plaintiff were was the basic issue before the court inasmuch as the contract was oral and defendant's and plaintiff's versions disagreed. When the contract is oral, and the inferences from the testimony relative to its scope may be conflicting, the conclusions of the trial court are binding if supported by substantial evidence. Brea v. McGlashan, 3 Cal.App.2d 454, 465, 39 P.2d 877; Estate of Rule, 25 Cal.2d 1, 17, 152 P.2d 1003, 155 A.L.R. 1319; Trowbridge v. Love, 58 Cal.App.2d 746, 750, 137 P.2d 890. The appellate court must accept the defendant's version of the contract terms as accepted and quoted in the majority opinion: "'If I made $3,000 net profits out of the San Francisco operation, $1,000 is yours * * * *without any interest in the business itself.*' Defendant also testified that he told plaintiff in fixing his rights: '* * * I told you in the beginning I will give you one-third of the net profits from the operation of the business. In other words, if I make $3,000 profit from the operation of the business, your share will be $1,000 and my profit will be 2,000; but remember you have no interest in the business * * *.'" (Emphasis added) The reasonable conclusion reached by the trial court from such language, as evidenced by the findings and conclusions of law, is that the employee would receive, as he did receive, his regular salary plus one-third of the net profits from the "operation" of the business "without any interest in the business itself." Plaintiff had accepted an interest in the "operation" but not in the "ownership" of the business. See Boradori v. Peterson, 86 Cal.App. 753, 261 P. 520. In brief, the trial court approved the defendant's interpretation that "net profits from the operation of the business" was not intended to be used in the sense of "capital gains," and that plaintiff was not to share in the capital losses of the business, and, in the light of the circumstances, it was not unreasonable to interpret the parties' language that the plaintiff was not entitled to share in the capital gains.

This leaves for consideration the sole question whether the finding that plaintiff "is not entitled to * * * any of the profits derived from the operation * * * of said business" necessitates a reversal in view of the uncontradicted testimony of defendant that plaintiff was to receive "one-third of the net profits from the operation of the business." In view of the record as summarized in the majority opinion, and of my view of the weight to be accorded the trial court's findings that plaintiff was not entitled to a share in the assets or in the profits from the sale of the business, this seemingly contradictory finding is readily explainable. The majority opinion states: "It is true that the evidence shows that from September, 1941, when the profit sharing agreement was entered into, until March 31, 1942, when defendant terminated the arrangement by selling the San Francisco branch, that branch, except for one month, took in less money than it paid out. Both parties testified to this fact, although they differ as to whether the monthly profit and loss statements, prepared by plaintiff's wife as bookkeeper, and which show a $2,090 net loss for this period, included all proper items." In view of this evidence this finding should be read as a finding that there were no profits to which plaintiff was entitled. If there is any doubt on this subject, for the purpose of obviating further proceedings this court could make its own finding. Code Civ.Proc. sec. 956a.

Further in support of the conclusion reached herein is the general principle that where a finding could only be adverse to the appellant, he cannot complain that more detailed findings were not made. On the record before the court, and the view it took of the contract terms, to have ordered an accounting would have been an idle act which the law does not require. Both parties knew there were no profits from the operation of the business, but only from the sale, which profits the trial court concluded were not within the terms of the contract between plaintiff and defendant. The result the majority opinion reaches permits the plaintiff to litigate twice just what were the terms of and the intent of the parties to the contract even though the basic issue is one of fact which the trial court has once determined adversely to appellant.

Under all the facts and circumstances of the case, in view of the rule that an ap-

pellate court should if possible construe the findings to support the judgment, Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 137 P.2d 441, I am unable to agree that the judgment should be reversed.



73 Cal.App.2d 910

STEVENS et al. v. MOSTACHETTI et al.

Civ. 15266.

District Court of Appeal, Second District, Division 2, California.

April 10, 1946.

Hearing Denied June 3, 1946.

1. Easements ⇐36(3)

In action to establish a right of way across defendant's land, evidence that plaintiff used the right of way for more than 35 years gave rise to a presumption that the use was under a claim of right and adverse, which was sufficient to sustain a finding that the use was hostile, adverse, and under claim of right.

2. Appeal and error ⇐837(11)

Evidence improperly admitted is not entitled to any weight and is to be given none in considering whether a finding of fact is sustained by the evidence, and such testimony must be disregarded on appeal.

3. Evidence ⇐317(18)

In action to establish right of way by prescription, testimony of witness that deceased owner had told witness that he had given plaintiffs permission to go through his ranch, until another road which had been washed out could be repaired, was hearsay and objectionable.

4. Easements ⇐36(3)

In action to establish a right of way across defendants' land, where the only evidence showing that use of the roadway by the plaintiff for more than 35 years was permissive only was hearsay and objectionable, court properly found that the use made by the plaintiff was hostile, adverse and under a claim of right.

5. Easements ⇐61(9½)

In action to establish a right of way across defendant's land, a finding that plaintiff had no plain, speedy, or adequate remedy at law, in that the easement and right of way was the only means of access to and from the plaintiff's property, was immaterial, since a right of way may be obtained by prescription over another's land even though there may be an alternate way of reaching the dominant tenant's property.

6. Easements ⇐36(3)

In action to establish a right of way across defendants' land, evidence by a surveyor that the average width of the roadway was 20 feet based on measurements from the middle of the road as it was traveled to both sides to amount of ground actually graded or altered from the way it was before there was a roadway, sustained a finding that plaintiff's right of way was over a strip of land 20 feet in width.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Ruth Sawyers Stevens and others against Dino Mostachetti and another, in which defendants are also cross-complainants, to establish a right of way across defendant's land. From a judgment in favor of plaintiff after trial before the court without a jury, defendants appeal.

Affirmed.

Alfred D. Haines and Schauer, Ryon & McMahon, all of Santa Barbara, for appellants.

W. P. Butcher, of Santa Barbara, for respondents.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiffs after trial before the court without a jury in an action to establish a right of way across defendants' land.

Defendants are owners of a ranch in Santa Barbara county known as the "Romo Ranch," which is situated westerly from and below a mountain ranch belonging to the plaintiffs and known as the "Sawyers Ranch." For more than thirty-five years plaintiffs have used a roadway across the Romo Ranch. The trial court gave judg-

ment in favor of plaintiffs for an easement and right of way across defendants' ranch.

Defendants urge reversal of the judgment on the following proposition:

There is not any substantial evidence to sustain the trial court's findings:

1) " * * that it is not true that the use made of said roadway by plaintiffs was permissive, but as a matter of fact said use made by the plaintiffs was hostile, adverse and under a claim of right";*

2) "That it is true that the plaintiffs have no plain, speedy or adequate remedy in law in that said easement and right of way is the only means of access to and from their said property"; and

*3) "That it is true that said easement and right of way which plaintiffs own is particularly located and described as follows: A certain twenty (20) foot strip of land extending from the southerly boundary line of the said real property of the plaintiffs over and upon the said real property of the defendants to the most northerly termination of Fairview Avenue. * * *"*

This proposition is untenable.

[1] 1) The record contains evidence that plaintiffs for more than thirty-five years have used the roadway across defendants' ranch. Such evidence gives rise to a presumption that the use was under a claim of right and adverse (Rose v. Peters, 59 Cal.App.2d 833, 835, 139 P.2d 983; Wallace v. Whitmore, 47 Cal.App.2d 369, 373, 117 P.2d 926), and such presumption is sufficient to sustain such a finding. Therefore the first finding questioned is sustained by the evidence.

[2-4] There is no merit in defendants' contention that the evidence disclosed a permissive use of the roadway, since the only evidence given on the subject of a permissive use was the testimony of the witness Charles Romo, who was permitted over objection that such testimony was hearsay to testify that his brother Ed Romo, who was dead at the time of the trial, had told him that he had given Sawyers permission to go through his ranch until another road which had been washed out could be repaired. Such testimony was hearsay evidence and objectionable; and under the rule that evidence improperly admitted is not entitled to any weight whatever and is to be given none in considering whether a finding of fact is sustained by the evidence, such testimony must be disregarded by us. (Hoult v. Baldwin, 78 Cal. 410, 414, 20 P. 864; Willmon v. Peck, 5 Cal.App. 665, 667, 91 P. 164.) Thus it appears that the record fails to contain any evidence which would have sustained a finding that plaintiffs' use of the road across defendants' land was permissive.

[5] 2) The second questioned finding was immaterial, since a right of way may be obtained by prescription over another's land even though there may be an alternate way of reaching the dominant tenant's property. (See 28 C.J.S. [1941], Easements, § 18 a, p. 663.)

[6] 3) A surveyor testified that the average width of the road across defendants' land was twenty feet, part of his testimony being as follows:

"Q. Will you tell the court how you arrive at that 20 foot area? A. Well, you establish or you take a point in the middle of the road as it is traveled and measure both sides to the amount of the ground that has been actually graded or altered from the way it was before there was a roadway.

"Q. That is a one-way road, is it not? A. Yes, of course that does not mean that the full width of that 20 feet is constantly traveled."

The foregoing testimony constitutes substantial evidence to sustain the trial court's finding that plaintiffs' right of way was over a strip of land twenty feet in width.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

73 Cal.App.2d 907

RUDDELL v. WARNE et al.

Civ. 15230.

District Court of Appeal, Second District, Division 2, California.

April 10, 1946.

1. Appeal and error ⇐82(5), 83

An order made under statute relating to proceedings on execution against a homestead is not a special order made after judgment, but is a special independent proceeding so as to be an appealable order. Civ.Code, § 1245 et seq.

2. Appeal and error ⇐80(3)

Generally, where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of an order, such order is "final", but, where anything further in the nature of judicial action on the part of the court is essential to the final determination of the rights of the parties, the order is "interlocutory".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order" and "Interlocutory Order".

3. Appeal and error ⇐77(1)

Where an order directing sale of homestead property was made in a special and independent proceeding, and no further judicial action upon the part of the court was necessary, and the only thing remaining to be done was for the sheriff or other proper officer to comply with the order, the order was "final" and appealable. Civ.Code, § 1245 et seq.

4. Homestead ⇐107

Under statute providing that a levy shall not bind any property for a longer period than one year from date of issuance of execution, an order directing sale of homestead property was void where order was not made within one year after issuance of writ of execution upon which order was predicated. Code Civ.Proc. § 688.

5. Appeal and error ⇐115

An appeal from order denying a motion for order denying sale of homestead following report of appraisers was dismissed, since such order was not appealable.

Appeal from Superior Court, Los Angeles County; Frank G. Swain and Samuel R. Blake, Judges.

Action by O. C. Ruddell against Walter E. Warne and another for injuries sustained in automobile accident, wherein a judgment was entered for plaintiff. From an order directing a sale of homestead property under original execution issued upon such judgment, the defendants appeal.

Order reversed, and appeal from order denying defendants' motion for order denying sale of homestead following report of appraiser dismissed.

Lloyd S. Nix and Henry F. Walker, both of Los Angeles, for appellants.

Romaine Hogan, of Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from an order of the trial court directing a sale of homesteaded property under a writ of execution issued upon a judgment in favor of plaintiff.[1]

There are also appeals from incidental orders made in connection with the foregoing order. Since our decision on the main appeal disposes of the questions involved on appeal from the other orders, it will not be essential to give consideration to them other than the views herein expressed.

The essential facts are these:

The writ of execution on the judgment which plaintiff had obtained against defendants was issued on *September 20, 1944* and the order directing the sale of the homesteaded property of defendants pursuant to the writ of execution was made on *October 5, 1945.*

There are two questions necessary for our determination:

First: *Is the order of the superior court directing a sale of homesteaded property an appealable order?*

This question must be answered in the affirmative and is governed by these pertinent rules:

[1] 1) Orders made pursuant to the provision of section 1245 et seq. of the Civil Code are not considered special orders made after judgment, but such an order is a special independent proceeding. (Brown v. Starr, 75 Cal. 163, 164 et seq., 16 P. 760.)

[1] For a prior phase of the instant case see Ruddell v. Warne, 68 Cal.App.2d 600, 157 P.2d 428.

[2] 2) It is a general rule that where no issue is left for future consideration except the fact of compliance or non-compliance with the terms of an order, such order is final; but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the order is interlocutory. (Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11.)

[3] Applying the foregoing rules to the facts in the instant case it appears that the order [2] under consideration was made in a special and independent proceeding and no further judicial action upon the part of the court was necessary. The only thing remaining to be done was for the sheriff or other proper officer to comply with the order. Therefore under rule two, supra, it was final and appealable. (Stockton S. & L. Bank v. Mello, 201 Cal. 194, 198, 256 P. 202.)

[4] Second: *Was the order directing the sale of homesteaded property void because it was not made within one year after the writ of execution upon which it was predicated had been issued?*

This question must also be answered in the affirmative. Section 688 of the Code of Civil Procedure provides in part as follows:

"* * * Until a levy, the property is not affected by the execution; *but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution,* except a levy on the interests or claims of heirs, devisees or legatees in or to assets of deceased persons remaining in the hands of executors or administrators, thereof prior to distribution and payment; * * *" (Italics added.)

The record discloses that the writ of execution was issued September 20, 1944, but that the order for the sale of homesteaded property was not made until more than one year later, to wit: October 5, 1945. Hence under the provisions of section 688 of the Code of Civil Procedure there was no valid writ of execution in effect at the time the order of sale of the property was made and therefore the order was void. (Jones v. Toland, 117 Cal.App. 481, 482, 4 P.2d 178; Anglo-California Nat. Bk. v. Kidd, 58 Cal. App.2d 651, 653 et seq., 137 P.2d 460; McAfee v. Reynolds, 130 Ind. 33, 39, 28 N.E. 423, 18 L.R.A. 211, 30 Am.St.Rep. 194.)

[5] The order directing the sale of homesteaded property is reversed. The appeal from the order denying defendants' "motion for order denying sale of homestead following report of appraisers" is dismissed since such order, as conceded by defendants, is non-appealable.

MOORE, P. J., concurs.

WILSON, J., did not participate in the foregoing opinion.

[2] The order reads thus:

"It is hereby ordered, that the Sheriff of the County of Los Angeles, State of California, or other proper officer, sell under execution, in the manner directed by law, the above described premises, and that no payment must be made at said sale unless it exceeds the sum of $5,000.00 cash, and if the sale is made $5,000.00 in cash must be paid to the defendant Walter E. Warne and to his wife, the homestead claimants, and that the balance be applied to the satisfaction of the execution."



73 Cal.App.2d 933

PEOPLE v. CARLSON.

No. 2379.

District Court of Appeal, First District, Division 1, California.

April 12, 1946.

1. Infants ⇐20

Corroboration of child's testimony was not essential to a conviction of committing lewd and lascivious acts upon a female child nine years old. Pen.Code, § 288; Welfare and Institutions Code, § 702.

2. Criminal law ⇐741(1), 742(1), 1160

The weight of evidence and credibility of witnesses are for jury, and when a verdict has been rendered, such questions rest with trial judge in passing on a motion for new trial.

3. Criminal law ⇐1160

A conviction approved by trial court will not be disturbed on appeal unless it obviously appears that testimony upon which conviction was had is, when considered with the undisputed facts, so in-

herently improbable as to be impossible of belief.

4. Criminal law ⇐1159(1)

To warrant rejection of statements given by witness who has been believed by the trial court, there must exist either a physical impossibility that they are true or their falsity must be apparent without resorting to inferences or deductions.

5. Infants ⇐20

Evidence sustained conviction of committing lewd and lascivious acts upon a female child nine years old, as against contention that prosecutrix' testimony was inherently impossible as a matter of law. Pen.Code, § 288; Welfare and Institutions Code, § 702.

6. Infants ⇐20

Facts that acts forming basis of prosecution on charge of committing lewd and lascivious acts upon a female child nine years old were of a revolting character did not prove that it was inherently improbable that defendant committed them. Pen.Code, § 288; Welfare and Institutions Code, § 702.

7. Criminal law ⇐1159(1)

A case does not fall within inherent improbability class merely because testimony discloses unusual circumstances.

8. Criminal law ⇐742(1)

In prosecution for committing lewd and lascivious acts upon a female child nine years old, alleged inconsistencies and contradictions developed on cross-examination of prosecutrix presented matters for consideration of jury in determining weight to be given to her testimony, and did not render her entire testimony unworthy of belief. Pen.Code, § 288; Welfare and Institutions Code, § 702.

9. Infants ⇐20

In prosecution for committing lewd and lascivious acts upon a female child nine years old, variances between testimony given by child at the trial and those given by her at the preliminary examination of themselves as matter of law did not render her entire story unbelievable. Pen. Code, § 288; Welfare and Institutions Code, § 702.

10. Criminal law ⇐1159(4)

Fact that at the time acts forming basis for prosecution for committing lewd and lascivious acts upon a female child nine years old were alleged to have been committed there were other persons in close proximity, did not justify reviewing court in declaring as matter of law that child's testimony was inherently unbelievable. Pen.Code, § 288; Welfare and Institutions Code, § 702.

11. Criminal law ⇐706

In prosecution for committing lewd and lascivious acts upon a female child nine years old, evidence failed to establish a conspiracy of assistant district attorney, juvenile court officer and prosecutrix' mother "to coach" the child and have her testify falsely to things that had not occurred, so as to render child's testimony unworthy of belief. Pen.Code, § 288; Welfare and Institutions Code, § 702.

12. Criminal law ⇐656(2)
Witnesses ⇐246(1)

Trial judge was not guilty of misconduct in interrupting cross-examination of nine year old prosecutrix in propounding certain questions to her, where record showed that such interruptions occurred only when it became obvious that child was bewildered and did not understand the questions, and especially where defendant did not make any assignments of misconduct during course of trial nor ask that any questions propounded by trial judge or answers given in response thereto be stricken out.

13. Criminal law ⇐1172(6)

The giving of an instruction on circumstantial evidence which correctly states the law, in a case resting on direct testimony, does not justify a reversal unless it definitely appears that defendant was actually prejudiced thereby.

14. Criminal law ⇐1172(6)

The giving of an instruction of circumstantial evidence did not constitute reversible error, even if there was no circumstantial evidence introduced, where no complaint was made that instruction did not correctly state the law, and no attempt was made to point out that instruction as given operated to defendant's detriment or disadvantage.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Melvin Carlson was convicted of committing lewd and lascivious acts upon and

with a female child nine years old, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant was found guilty by a jury of the crimes denounced by sections 288 of the Penal Code and 702 of the Welfare and Institutions Code. The substance of the charges made against him was that he had committed lewd and lascivious acts upon and with a female child nine years old. Motions for new trial and probation were denied; and this appeal was taken from the judgments of conviction and the order denying the motion for new trial.

[1] The prosecution rested its case mainly on the child's testimony; and the evidence introduced by the defendant consisted of his own testimony wherein he denied having committed any of the illegal acts of which he was accused. Although corroboration of the child's testimony was not essential to a conviction (People v. Spillard, 15 Cal.App.2d 649, 59 P.2d 887; People v. Quinn, 12 Cal.App.2d 752, 55 P.2d 1277; People v. Slaughter, 45 Cal. App.2d 724, 115 P.2d 30), the prosecution introduced evidence which substantiated her testimony on the point that the illegal acts charged had been committed; whereas the defendant's credibility as a witness was doubtless weakened by his admission on cross-examination that previously he had been convicted of the crime of perjury and had served a term therefor in the state prison. Defendant concedes that the evidence is conflicting, and he makes no claim that the child's testimony, if believed, is insufficient to sustain the convictions; but as first ground of appeal he contends that the verdicts of the jury should be nullified upon the ground that as a matter of law the child's testimony is inherently improbable. This contention is not sustainable.

At the time of the alleged commission of the offenses defendant was employed as an attendant at a gasoline service station located on the corner of 9th and Howard Streets in San Francisco. The station premises were divided into several separate service departments by walls or partitions, and off to one side but within the premises there was an automobile wash rack, adjoining which was a small room; and the door thereof opened off the rack. The walls of the room on three sides were built up to the ceiling, and the front wall was constructed of boards to a height of about six feet and above that was glass. Defendant's duties required him to take care of the automobile washing jobs and the room was used by him as a place to change his clothes. There was no furniture in the room, but it contained a large box, which defendant used as a seat and as a desk on which he made out his tags. The child lived on Natoma Street, between Eighth and Ninth Streets, a short distance from the service station. In going to and coming from school she usually walked through the station premises; and after school she often played with other neighborhood children in and about the station. In this way the defendant became friendly with her. On the morning in question the child started for school about 9 o'clock and while passing through the station stopped to watch the defendant at work. She testified that she had not been standing there long when he took her in to the small room, closed the door, sat her down on the box and committed the sordid acts complained of. A detailed description of them and the manner in which they were committed is unnecessary inasmuch as they were similar to those committed by the defendant upon and with a nine year old girl in the case of People v. Pollock, 61 Cal.App.2d 213, 142 P.2d 328; and it was there held that they constituted the crime denounced by section 288. See also People v. Lanham, 137 Cal.App. 737, 31 P.2d 410. Continuing, the child testified that after the defendant had committed these acts he gave her a small amount of money and some trinkets, and that she then proceeded on her way to school. When she arrived at the school the teacher asked her why she was late, and she told her teacher what had happened; whereupon the teacher immediately summoned a police officer. He took the child back to the service station, and in the presence of the defendant she showed the officer the room in which the acts were committed and identified the defendant as the man who committed them. The officer then took her directly to the office of the juvenile court doctor, who examined her private parts and found them to be in a condition brought about by the use of some external force. Furthermore, the child testified that on four or five previous occa-

sions the defendant had committed similar acts upon her in this same room, under like circumstances, and that on each of those occasions he had given her "a dime." Defendant admitted to the officer that the child stopped at the station that morning and that before she left he had given her ten cents, but he denied having been in the room with her. At the trial he admitted also that on several occasions he had given the child money; but he denied that he had ever committed any of the lewd acts charged against him. His explanation for having given her the money was that on each of those occasions the child had told him her mother had gone to work in the morning without leaving her any money with which to buy her school lunch. The child denied having made any such statements.

[2, 3] The law governing courts of appellate jurisdiction in the exercise of their authority to set aside jury verdicts, in cases involving sex crimes committed upon and with children, upon the ground that the testimony of the complaining witness therein is inherently improbable has been restated on many occasions. In the recent case of People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94, several of the earlier decisions dealing with the subject are reviewed and approved. One of the leading decisions so reviewed and approved was rendered in the case of People v. Von Perhacs, 20 Cal.App. 48, 127 P. 1048, 1049. There the court first pointed out that the argument made by an appellant in support of such a contention is necessarily directed against the weight of the evidence and the credibility of the prosecuting witness; that invariably the same argument has been advanced to the jury; and that presumably the jury has given it the consideration it deserves. The court then goes on to say: "The weight of the evidence and the credibility of the witnesses are in the first instance peculiarly within the province of the jury when deliberating upon the guilt or innocence of a defendant; and, once their verdict has been rendered, the determination of such questions rests solely with the trial judge in passing upon a motion for a new trial. His conclusion as to the sufficiency of the evidence to support the verdict will not be disturbed by this court save in those rare cases where it obviously appears that the testimony upon which the conviction was had is in and of itself, or when considered in conjunction with the undisputed facts of the case, so inherently improbable as to be impossible of belief, and therefore must be considered to be in effect no evidence at all." (Citing a long list of cases.)

Another of the earlier decisions so reviewed and approved was rendered in the case of People v. Lewis, 18 Cal.App. 359, 123 P. 232, 234. There the court first stated that it would seem almost incredible that the defendant could, in the midst of the surroundings disclosed by the evidence, have committed the series of illegal acts with the child (as she testified) over so long a period and no one observed an incriminating circumstance tending to corroborate her story; but continuing the court said: "We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. Cases have occurred —some are cited—where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury."

[4] Another case so reviewed with approval is People v. Kuches, 120 Cal. 566, 569, 52 P. 1002, 1003, wherein the court said: "By denying the motion for a new trial the learned judge of the court below has manifested his satisfaction with its sufficiency (the sufficiency of the evidence). His opportunity to form a correct conclusion upon the weight and effect of the evidence was far better than ours, and his conclusion cannot be disturbed." The court in the Jackson case also comments on some five other earlier cases, but it would seem quite unnecessary to repeat here what has been there said. Lately the Supreme Court was asked to set aside a verdict of guilty in a case based on section 288 of the Penal Code upon the ground that the testimony of the complaining witness was inherently improb-

able (People v. Huston, 21 Cal.2d 690, 134 P.2d 758, 759), and in refusing so to do the court in part said: "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions."

[5-7] Viewed in the light of the foregoing legal principles, the record in the present case fails to disclose any fact or circumstance which would justify this court in holding, as a matter of law, contrary to the conclusion reached by the jury and the trial judge, that testimony given by the child was and is inherently improbable. As was said in People v. Pollock, supra, in considering the facts of that case, there is nothing in the nature of the acts themselves, nor in the manner in which they were committed, which would demonstrate that it was physically impossible for the defendant to have committed them as claimed by the child, and the fact that they were of a revolting character does not prove that it was inherently improbable that the defendant committed them. People v. Wasenius, 113 Cal.App. 106, 297 P. 966. Moreover, the law is well settled that a case does not fall within the inherent improbability class merely because the testimony discloses unusual circumstances. People v. Huston, supra; People v. Collier, 111 Cal.App. 215, 295 P. 898.

[8, 9] The exhaustive cross-examination of the child developed several inconsistencies and contradictions which defendant contends render her entire testimony unworthy of belief; but clearly all of these were matters for the consideration of the jury in determining the weight to be given to her testimony. People v. Jackson, supra. Even testimony which is subject to justifiable suspicion does not justify a reversal of a judgment, for it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. People v. Huston, supra. Nor did the variances between the testimony given by the child at the trial and that given by her at the preliminary examination of themselves, as a matter of law, render her entire story unbelievable. People v. Schultz, 49 Cal.App.2d 38, 120 P.2d 893. As said in some of the decisions, very seldom does a record in a case of this type come before an appellate court that does not show some discrepancies or contradictions in the testimony of the complaining witness. Here the child did not deviate in any material respect from her original story as to the commission of the lewd acts by the defendant, nor as to the manner in which they were committed. If, therefore, the jurors believed her testimony in the main or if they believed only that portion bearing on the immediate circumstances establishing the commission of the lewd acts by the defendant, it was the province of the jury to base their verdict upon that particular portion of her testimony, although they might have viewed the child's statements pertaining to incidental matters with some reservations as to their accuracy. People v. Schultz, supra.

[10] It appears from the evidence that on this particular morning there were three other attendants working in different service departments of the station, and defendant argues that it is incredible that under such circumstances he would attempt to commit the acts charged in this nearby room. Substantially the same argument was advanced in situations somewhat similar to the one here present in People v. Huston, supra, and People v. Grant, 53 Cal.App.2d 286, 127 P.2d 567, and the courts there held in substance that the fact that at the time the acts were said to have been committed there were other persons in close proximity did not make it incredible that such a thing could happen, nor justify a reviewing court in declaring as a matter of law that the child's testimony is inherently unbelievable or even improbable.

[11] Defendant asserts that there was a conspiracy on the part of the assistant district attorney who prosecuted the case, a juvenile court officer (Mrs. Foley), and the child's mother, "to coach" the child and "have her testify falsely to things that had not occurred and acts that the defendant had not committed." Such assertion is based upon certain categorical answers given by the child in response to leading questions asked on cross-examination. An examination of the entire record shows, however, that when the child gave those answers she was evidently confused and did not understand the questions or the purport thereof. In this connection it appears that before going into court at the opening of the trial the child related to the persons named the manner in which the criminal acts were committed, and after having done so she was told by the court

officers that she should so state in court when questioned about the matter; and that at all times she should tell the truth. There were positive denials that any of the persons named had ever coached the child, and the record is entirely barren of any testimony tending to show that any of them had any motive for so doing. Admittedly none of them ever knew the defendant prior to his arrest, and there is not the slightest suggestion that any of them ever made any sort of a demand upon him either before or after his arrest. The members of the jury doubtless took into consideration all of the circumstances surrounding the charges of coaching, and as indicated by their verdicts of guilty they were satisfied that the charges were groundless. Incidentally it appears from the record that the child's intelligence test showed that she was somewhat below the average standard for a child her age, but it also appears that before she was permitted to testify she was thoroughly questioned by the trial judge as to her understanding of the oath she was about to take and that at no time during the trial did counsel for defendant challenge the child's competency or qualifications as a witness.

It should be stated also that the jury was fully and correctly instructed as to all elements of the doctrine of reasonable doubt, and as to its unrestricted right to pass upon the credibility of all witnesses and the weight to be given their testimony; furthermore, it was clearly and properly instructed that by reason of the fact that charges of the nature involved in this case can be easily made and often are not easy to disprove, that it was the duty of the jury to examine and treat with great care and caution "the testimony of this child." In view of the foregoing state of the record it becomes apparent that any interference with the conclusion reached by the jury on questions of fact would be wholly unwarranted.

[12] Defendant charges also that the trial judge was guilty of misconduct in unduly interrupting the cross-examination of the child and propounding certain questions to her which were improper. The record shows, however, that such interruptions occurred only when it became obvious that the child was bewildered and did not understand the questions; and that the sole reason the trial judge interrupted at all was to ascertain the truth. Considering the tender age of the child and the surrounding circumstances under which she testified, it cannot be successfully maintained that the trial judge was guilty of misconduct. Nearly all of the objections made to the trial judge's questions seem to be that they were argumentative, and it appears that in most instances when such objection was made the question was reframed. The other objections interposed were without merit. At no time during the course of the trial did counsel make any assignments of misconduct nor did he ask that any of the questions propounded by the trial judge or the answers given in response thereto be stricken out.

[13, 14] Defendant's final contention is that the court erred in giving an instruction on circumstantial evidence. This contention is based upon the assertion that no circumstantial evidence was introduced. The record does not support this assertion. While it is true that the question of defendant's guilt depended mainly upon direct evidence consisting of the child's testimony, there was some circumstantial evidence introduced of a corroborative nature. In any event it has been repeatedly held that the giving of an instruction on circumstantial evidence which correctly states the law, in a case resting on direct testimony, does not justify a reversal unless it clearly and definitely appears that in some way defendant was actually prejudiced thereby. People v. Soules, 41 Cal.App.2d 298, 106 P.2d 639; People v. Sing Chan, 64 Cal.App. 2d 167, 148 P.2d 81, citing other cases. Here no complaint is made that the instruction did not correctly state the law; nor has any attempt been made to point out, nor does the record show, that the instruction as given operated to defendant's detriment or disadvantage.

The judgments of conviction and the order denying the motion for new trial are and each of them is affirmed.

PETERS, P. J., and WARD, J., concur.

73 Cal.App.2d 752

MAYERS et ux. v. ALEXANDER.

Civ. 14958.

District Court of Appeal, Second District, Division 1, California.

March 30, 1946.

1. Appeal and error ⇐893(1), 931(1), 1012(1)

A cause may not be presented on appeal as if it were being tried de novo, but appellate tribunal must view evidence in light most favorable to respondent and not determine where preponderance of evidence lies.

2. Appeal and error ⇐989

When trial court's finding or judgment is attacked as not supported by evidence, reviewing court's power is limited to determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support finding or judgment.

3. Appeal and error ⇐931(1)

On appeal, all conflicts in evidence must be resolved in prevailing party's favor and all legitimate and reasonable inferences must be indulged to support trial court's finding or uphold its judgment, if possible.

4. Appeal and error ⇐996

When two or more inferences can reasonably be deduced from facts in evidence, reviewing court has no power to substitute its deductions for those of trier of facts.

5. Appeal and error ⇐1001(1)

Positive testimony of witness who is believed by trial court must be inherently improbable for appellate court to reject it.

6. Appeal and error ⇐994(3), 1012(1)

The fact that testimony discloses unusual circumstances does not justify review thereof by appellate court, which does not sit as jury to determine fact issues, witnesses' credibility, or weight of their testimony.

7. Specific performance ⇐121(10)

In spouses' action for specific performance of agreement by defendant executrices' testatrix to sell realty and furniture to plaintiffs, evidence supported finding that all negotiations between plaintiffs and testatrix were terminated by their mutual consent and that proposed sale was mutually and intentionally abandoned by them on testatrix' return to plaintiff husband and his acceptance and issuance of receipt for amount of his down payment on purchase price.

8. Alteration of instruments ⇐24(2)

Change in date of purchaser's receipt for amount of his down payment, returned by vendor before consummation of sale, from October 25th to October 18th, did not amount to material alteration required to be accounted for by vendor in purchaser's suit for specific performance of contract to sell realty. Civ.Code, § 1700; Code Civ. Proc. § 1982.

9. Specific performance ⇐117

Receipt of adequate consideration for contract by party thereto and justness and reasonableness of contract as to him must be pleaded and proved before specific performance thereof can be enforced against him. Civ.Code § 3391.

10. Evidence ⇐547

In action for specific performance of contract for sale of house and lot, conflict in defendant's expert witness' testimony as to separate market values of land and house and his testimony as to total value thereof, as result of error in mental calculation, went only to weight, not admissibility, of testimony.

11. Evidence ⇐543(3)

In action for specific performance of contract to sell realty, state inheritance tax appraiser, testifying that he had been in neighborhood of realty many times, made some maps thereof, checked nearby property sold, ascertained sale price thereof from former owner, determined market value of realty agreed to be sold as of date of contract by considering its market value at that date and "checking our records" on similar property, cost of reproduction and comparison of sales, was not disqualified to testify as expert concerning value of such realty because he did not see it in month during which contract was made.

12. Evidence ⇐546

Primarily, trial court must pass on expert witness' qualifications.

13. Appeal and error ⇐994(3)

The weight of qualified expert witness' testimony is matter for trier of facts.

14. Specific performance ⇐117

In action for specific performance of executory agreement to sell land, plaintiff must allege and prove adequacy of consideration therefor and that agreement is not unconscionable or inequitable as to other party.

15. Specific performance ⇐121(3)

In action for specific performance of contract to sell house and lot to plaintiff for $5,000, substantial testimony that they were worth $6,000 when contract was made supported finding and judgment for defendant on ground of inadequacy of consideration.

16. Evidence ⇐113(2), 215(1)

In action for specific performance of contract, made in August, 1943, for sale of house and lot to plaintiffs for $5,000, a card, showing that property was listed with real estate broker in August, 1942, for sale at such price, was properly excluded not only because of remoteness of the date but also because such a listing card was not a proper method by which to establish the value of the property.

17. Evidence ⇐113(8), 215(1)

In action for specific performance of contract to sell house and lot to plaintiffs, a card listing such property with realtor for sale at same cash price or higher price on terms just before execution of contract was admissible to show owner's valuation of property at such time, but trial court properly refused to permit realtor to testify that she sold property and took deposit thereon.

18. Evidence ⇐113(8)

Market value of realty cannot be established by evidence of particular sale.

19. Specific performance ⇐121(3)

In action for specific performance of contract to sell house and lot to plaintiffs, evidence was insufficient to sustain burden on plaintiffs to prove adequacy of consideration for contract.

20. Trial ⇐59(2)

The trial court has wide discretion in regulating order of proof on trial of case.

21. Appeal and error ⇐970(3), 1170(7)

Admission of evidence out of regular and accepted order furnishes ground for reversal of judgment only when abuse of trial court's discretion in regulating order of proof, with resulting prejudice to appellant, is clearly shown. Const. art. 6, § 4½.

22. Appeal and error ⇐964, 970(3), 1170(1, 7) Trial ⇐4, 59(2)

In action for specific performance of contract to sell realty, order, directing that affirmative defense of abandonment of contract and return of deposit be tried first and directing plaintiffs to go forward with their evidence in regular way after receiving some evidence on such defense in trial without jury, did not constitute abuse of discretion nor prejudice plaintiffs, in absence of showing that either party was prevented thereby from producing all available evidence or desired to or could obtain or present any further evidence. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Colin Mayers and wife against Beulah Alexander, as executrix of the estate of Lida M. Gertsen, deceased, for specific performance of an agreement to sell realty and furniture to plaintiffs. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Victor A. Berry, of Culver City, for appellants.

William R. Gallagher, of Los Angeles, for respondent.

WHITE, Justice.

This action was commenced by plaintiffs to specifically enforce an alleged agreement to sell certain real property, together with the furniture contained in the house upon said premises, located at 3830 Motor Avenue in the city of Los Angeles. From an adverse judgment plaintiffs prosecute this appeal.

The factual background which gave rise to this litigation, as reflected by the pleadings and the evidence adduced at the trial, may be thus epitomized: Plaintiffs and Lida M. Gertsen, now deceased, were next-door neighbors. During the summer of 1943 Mrs. Gertsen discussed the sale of the property with plaintiff Mr. Mayers. At that time the premises were occupied by Mr. and Mrs. Wm. Shirk as tenants of Mrs. Gertsen. On or about August 27,

1943, after an inspection of the premises and some conversation with Mrs. Gertsen, the plaintiff Mr. Mayers prepared on the typewriter an original and one copy of an agreement relating to the sale of the property, including some of the furnishings, the original of which document was signed by plaintiff Mr. Mayers and by Mrs. Gertsen. This agreement (received in evidence at the trial as plaintiffs' Exhibit 3) reads as follows:

"Preliminary agreement between Mrs. Gertsen and Mr. Mayers

"3830 Motor av to be purchased for the sum of $5000 inclusive of furniture, except for certain personal articles. Cash Payment to be $1500 (Fifteen hundred)

"Interest on balance of outstanding purchase price to be at 5% (five per cent)

"Minimum payment per calendar month to be $50 (dollars) This is to include interest and capital.

"Mr. Mayers however promises to pay $50 per month off on the capital as long as he is able to do so plus the interest

"Possession to be given on or about the 15th October

"Mrs. Gertsen will arrange to have the house guaranteed against termites, arrange clearance escrow, etc.

"1st payment November 1943."

Contemporaneously with the execution of this agreement Mr. Mayers gave to Mrs. Gertsen a check for $250, which he testified was "as a down payment." Some three or four days later, when Mrs. Gertsen advised plaintiff Mr. Mayers of her desire to have his wife's signature on the contract, Mr. Mayers prepared and delivered to Mrs. Gertsen another writing, signed by himself, his wife and Mrs. Gertsen. This memorandum agreement (introduced in evidence at the trial as plaintiffs' Exhibit 4) was as follows:

"Agreement for sale of real estate.

"We, Colin Mayers and Ida N. Mayers agree to purchase from Lida M. Gertsen, a widow, all of lot seven and the North Westerly twenty five feet of lot eight of the Fellows tract, as per map of said tract—book 10—page 92—Los Angeles records of maps for the sum of five thousand dollars.

"Payment to be as follows:

"$250 on the signing of this agreement

"1250 on Mrs. L. M. Gertsen giving possession of the property to the buyers; and thereafter:

"$50 per month—first payment to be the 1st of the month after a full month has elapsed from taking possession.

"Interest to be at the rate of 5% per annum, until the full balance of the purchase price has been paid."

Upon the execution of this agreement, according to the testimony of plaintiff Mr. Mayers, Mrs. Gertsen "told me she would go and see Mr. Nelson, a real estate man a few doors away from where she was living. * * * I told Mrs. Gertsen to go and see Mr. Nelson, have him to copy out the formal agreement from the memorandum we had all signed. * * *." On the day following, Mrs. Gertsen advised Mr. Mayers that she had seen Mr. Nelson and she exhibited to him two copies of an agreement prepared by Mr. Nelson. After reading the documents, plaintiff Mr. Mayers advised Mrs. Gertsen that there was one word contained in the agreement which he would like Mr. Nelson to explain and requested Mrs. Gertsen to accompany him to Nelson's office, which she did. Arriving there, Mrs. Gertsen and Mr. Mayers had a discussion with Mr. Nelson relative to the terms of the agreement which the latter had prepared. This document was entitled "Agreement for sale of real estate," under the terms of which plaintiffs agreed to purchase and Lida M. Gertsen agreed to sell the property here in question for the sum of $5,000, of which $1,500 was to be paid upon execution and delivery of the agreement, and the balance was to be paid in monthly installments of $50 with interest at the rate of five per cent per annum until the entire purchase price had been paid, the interest to be included in the aforesaid monthly payments. This instrument, dated September 2, 1943, was never signed by any of the parties named therein. Because other people were waiting in Mr. Nelson's office, plaintiff Mr. Mayers suggested that he, his wife and Mrs. Gertsen return at another time; whereupon they all departed. After leaving Mr. Nelson's office the parties had a discussion regarding some papers received by Mrs. Gertsen from the OPA relating to the time when possession of the property could be obtained by the Mayers. Mr. Mayers prepared a notice to quit dated September 1, 1943, addressed to the tenants in possession of Mrs. Gertsen's property, which instrument she signed, and the same was served upon the tenants. Subsequently, on October 14, another notice to quit was pre-

pared by Mr. Mayers, signed by Mrs. Gertsen, and served upon the tenants. According to the testimony of Mrs. Gertsen, read at the trial from her deposition, a few days prior to October 18, 1943, she told plaintiff Mr. Mayers that the OPA had advised her that in order to gain possession of the house she would be required to occupy the same herself, and that there would be a penalty if she sold the property before the expiration of six months after taking of such possession. She further testified that she told the Mayers "I couldn't sell because it was against the law"; that she would return the $250 paid on account of the transaction, which she did according to her testimony on October 18, 1943, at which time she received from plaintiff Mr. Mayers a receipt reading: "Received from Mrs. Lida M. Gertsen the sum of $250/00 Two Hundred fifty dollars. Colin Mayers. Oct. 18th 1943." Plaintiff Mr. Mayers admitted writing the receipt, except that he did not recall inserting "18th" therein.

Some days after the return of the $250, Mr. Mayers prepared a letter to the OPA, setting forth the condition of Mrs. Gertsen's health and asking if she could sell the property. Mrs. Gertsen signed this letter and it was forwarded to the OPA. When Mrs. Gertsen received a reply thereto, dated November 8, 1943, she exhibited the same to Mr. Mayers, telling him she would not sell because "the instructions of that paper are not to sell." She told him to read that portion of the letter which stated, "In any event, if sufficient proof that an illegal eviction of a tenant has occurred comes to the attention of this office, proper action will be taken." At that time, according to the testimony of Mrs. Gertsen, she stated to Mrs. Mayers, "You see, I can't sell the house because the law won't let me. I am not breaking the law for anybody."

The real property involved in this litigation has a frontage of 75 feet and is 150 feet in depth. It is improved with a seven-room dwelling, consisting of three bedrooms, a closed-in sun-room used as a bedroom, a living room, dining room, kitchen, and what was termed a "bath and a half." There was testimony that on August 27, 1943, the market value of the real property, consisting of the house and lot, was $6,000, and that the value of the furniture was $400.

[1-6] We shall first give consideration to appellants' contention that finding No. IV is unsupported by the evidence. The challenged finding reads as follows:

"That at or about the time the said two preliminary agreements, set forth in paragraph I hereof, were prepared, plaintiff Colin Mayers delivered to said Lida M. Gertsen the sum of $250.00; that on or about the 18th day of October, 1943, said Lida M. Gertsen returned to plaintiff Colin Mayers the said sum of $250.00 and said plaintiff Colin Mayers unqualifiedly accepted the same and issued to Lida M. Gertsen a receipt therefor; that said receipt is in words and figures as follows: (quoting receipt hereinabove set forth) * * *; that all negotiations between plaintiffs and said Lida M. Gertsen for the sale of said real property and furniture were thereupon terminated by mutual consent of plaintiffs and said Lida M. Gertsen and the proposed sale of said real property and furniture was thereupon mutually and intentionally abandoned by plaintiffs and said Lida M. Gertsen."

Even though it be conceded that the contents of the foregoing plaintiffs' Exhibits 2 and 3 fully met the definitely established requirements of a contract for the sale of real property as enunciated in O'Donnell v. Lutter, 68 Cal.App.2d 376, 381, 156 P.2d 958, obviously, if the court's finding that said contract was terminated by mutual consent of the parties thereto is supported by the evidence the judgment must be affirmed. In asserting the insufficiency of the evidence to support the questioned finding, appellants earnestly urge that said finding "is contrary to the weight of the evidence and that the preponderance of the evidence shows that the return of the deposit money was accepted by plaintiffs to be held in trust for Mrs. Gertsen." However, no rule is more firmly grounded in our law than the one which provides that a cause may not be presented on appeal as if the case were being tried de novo. The appellate tribunal must view the evidence in the light most favorable to the respondent and must not concern itself with determining where the preponderance of the evidence lies. A legion of authority supports the statement that when an attack is made upon a finding or judgment on the ground that it is not supported by the evidence, the power of the reviewing court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the challenged finding or the judgment ren-

dered. All conflicts in the evidence must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences indulged in to support the finding or uphold the judgment if possible. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trier of facts. Crawford v. So. Pac. Co., 3 Cal.2d 427, 45 P.2d 183. Before an appellate court can reject the positive testimony of a witness who is believed by the trial court, such testimony must be inherently improbable. Neither does the fact that the testimony may disclose circumstances which are unusual justify a review thereof by an appellate court, which does not sit as a jury to determine the issues of fact, the credibility of witnesses or the weight to be attached to their testimony.

[7] With these rules in mind, let us proceed to an analysis of the evidence as to mutual cancellation of whatever contract of sale existed between the parties. It is true, as contended by appellants, that they positively testified that upon the occasion of the return of the deposit money Mrs. Gertsen stated that she had been advised by her attorney that should she sell the property to the plaintiffs and evict the tenants occupying the same she "would go to prison"; that she said "she could not sleep at night"; that plaintiff Mr. Mayers stated to her, "If it is going to make it easier for you, if you want me to hold the check, I will hold it for you pending the time * * * if you want me to hold the money for you in trust I will willingly do so." However, plaintiff Mr. Mayers also testified that when the deposit money was returned to him Mrs. Gertsen asked for a receipt, and that he thereupon wrote out the receipt hereinbefore set forth. It is significant that the receipt contains no statement to the effect that the money was to be "held in trust." Then there is the positive testimony of Mrs. Gertsen, as follows:

"Q. What did you say? A. I said it was against the law to sell, and I returned the money.

"Q. But you just wanted him to hold it for you, didn't you? A. No, I didn't want him to hold it. I said, 'The deal is off because I couldn't sell the house.'

"Q. Did you tell him that, that the deal was off? A. Yes. I said I couldn't sell; I wanted to give him back his money."

Mrs. Gertsen also testified that at the time of the return of the deposit money plaintiff Mrs. Mayers "wanted to know if I would give her first chance if I had the right to sell the house," and I said "Yes, I would, and I would sell if I could find a place to live."

From the foregoing we would not be justified in holding that there was not sufficient legal evidence upon which the trial court could rely in determining that whatever negotiations were pending or whatever contract existed between the parties for the sale of the property "were thereupon terminated by mutual consent of the plaintiffs and said Lida M. Gertsen."

[8] Appellants, however, contend that the foregoing receipt was altered as to date, and that respondent failed to sustain the burden of proof of accounting for such alteration. Even though we assume that the day of the month was changed from the 25th to the 18th, this would not amount to a material alteration in the instrument because the date of the same is inconsequential. It is only when an instrument is altered in a part material to the question in dispute that such alteration must be accounted for. Civil Code Procedure, sec. 1982; Civil Code, sec. 1700.

[9] The court also found that the purchase price of $5,000 to be paid by plaintiffs for said property was not the fair, adequate and reasonable value of said property; that in the month of August, 1943, the real property was fairly and reasonably worth the sum of $6,000. Specific performance Civ.Code, § 1700; Code Civ. Proc. § 1982 cannot be enforced against a party "if he has not received an adequate consideration for the contract", and "if it is not, as to him, just and reasonable." Civ.Code, sec. 3391. The authorities are uniform in holding that the above requisite must be pleaded and proved before such relief can be awarded. Appellants assert that the finding against them on this issue is without evidentiary support. In this regard, defendant produced as a witness Eldred L. Meyer, a state inheritance tax appraiser. Plaintiffs stipulated to his qualifications. He testified that he was familiar with the property in question; that he made an appraisal of the same in October, 1944; that he checked the property 75 feet south of the premises in question and which had been sold. He testified that while he had never been in the house

prior to the time he made the appraisal, that he had been in the neighborhood many times prior thereto. He described the real property in detail as to frontage and depth, as well as the construction of the house, its plumbing and fixtures, all of which he testified were in good condition. When asked what in his opinion was the fair market value of the property involved in this action as of August, 1943, Mr. Meyer testified that it was $6,000 and that the value of the furniture contained in the house on the same date was $400. Contrary to appellants' contention, there was no evidence that the house was infested with termites.

[10] Appellants contend that this witness disqualified himself as an expert because of conflicting evidence given by him. In that regard, it appears that he testified, when breaking down the value of the house and the lot, that the market value of the land at the pertinent date was $1,500 and the house $3,500, making a total of only $5,000. When this was called to the attention of the witness by the court, he corrected this testimony, explaining that he had stated the values from memory in breaking them down. The original notes made by the witness at the time of his appraisal showed the value of the lot as $1,500 and the value of the improvements as $4,500, which would indicate that in placing the value of the house at $3,500 the witness merely erred in his mental calculations. In any event, the conflict went only to the weight and not to the admissibility of his testimony.

[11] Appellants' contention that the witness was disqualified because he did not see the property in August, 1943, is devoid of merit. Although, he was not upon the premises until October, 1944, he testified that he had been in the neighborhood many times. His position was that of state inheritance tax appraiser and appellants conceded his qualifications. The witness testified that he made some maps of the property; that he checked the property that was sold 75 feet to the south of the property in question; that he talked with the former owner of such property and ascertained the price at which it was sold. He further testified that he arrived at the market value of the property in question as of August, 1943, by taking into consideration the market value at that date and "checking our records on the similar properties, the cost of reproduction, and a comparison of sales"; that during the fourteen-month period from August, 1943, to October, 1944, there had been "very little change" in the market value of the property in the neighborhood here in question; that "houses have been in great demand and there was no trouble to dispose of a house of that type for $6,000."

[12, 13] Primarily, the trial court must pass upon the qualifications of an expert witness. As hereinbefore stated, appellants stipulated to the qualifications of the witness; the trial court held he was qualified, and the testimony shows that the witness was qualified to give his opinion as an expert on the value of the property here in question. And the weight to be given that testimony was a matter for the trier of facts. We find no error in the rulings of the court with reference to the admission of this evidence. People v. Willis, 30 Cal. App.2d 419, 423, 86 P.2d 670. The fact that the witness did not actually see the property in August, 1943, might affect the weight, but not the admissibility, of his testimony. Pann v. Barry, 118 Cal.App. 127, 130, 4 P.2d 791; Sacramento Suburban Fruit Lands Co. v. La Gue, 9 Cir., 40 F.2d 897, 899.

[14, 15] That in an action to enforce specific performance of an executory agreement for the sale of land the plaintiff must allege and prove adequacy of consideration and that the agreement is not as to the other party unconscionable or inequitable, is a well established rule of law. O'Hara v. Wattson, 172 Cal. 525, 535, 157 P. 608. In the instant case there was substantial testimony that the house and lot were worth $6,000, whereas the agreement was to purchase the same for $5,000. In Wilson v. White, 161 Cal. 453, 119 P. 895, the sum of $14,000 cash was held not to be a fair, just or adequate consideration for property worth $15,000, and in Haddock v. Knapp, 171 Cal. 59, 151 P. 1140, the sum of $1,800 was held to be an inadequate price for the conveyance of property worth $2,500.

[16] Appellants complain of the trial court's ruling refusing to admit into evidence plaintiffs' Exhibit 6 for identification. This exhibit was a card showing that the property in question was listed with a real estate broker in August, 1942, for sale at a price of $5,000. Defendant's objection was sustained by the court on the ground that the date of such listing was

"too remote." We perceive no error in the ruling, because in addition to the remoteness of the date, such a listing card was not a proper method by which to establish the value of the property.

[17-19] Appellants next contend that the court fell into error in excluding the testimony of Mariebell Allen, a realtor, that she had sold the property pursuant to a listing signed by Mrs. Gertsen offering the property for sale at $5,000 cash or $5,250 on terms; that the property was sold by the realtor in August, 1943, just prior to the making of the sales agreement with appellants, and that a deposit was received by the realtor on account of such sale. The trial court admitted the listing card and the evidence for the purpose of showing the value placed upon the property by the owner thereof in August, 1943, but refused to permit the witness to testify that she "sold the property and took a deposit on it in August, 1943." This ruling was not erroneous. Market value of property cannot be established by evidence of a particular sale. The issue before the court was the reasonable value of the property in August, 1943. As to that issue, when this witness was asked, "Well, do you know what the market value of the property was in August, 1943?" she replied, "I do not." This witness, and Y. C. A. Rodgers, a real estate broker, were the only witnesses called by plaintiffs to prove the value of the property and thereby show adequacy of consideration. When asked whether he was familiar with the market value of real estate in the vicinity of the property here under consideration, Mr. Rodgers replied, "Well, I am not an expert by any means." When the court inquired as to whether he knew the reasonable market value in August, 1943, the witness stated, "That would be very hard for me to say." Pressed for an answer, he finally stated, "I have an opinion, yes; I have an opinion that $5,000 was a good price for that property. * * * That is my opinion, but I am not—I am not an appraiser or an expert in value." It must therefore be held that plaintiffs failed to sustain the burden of proof cast upon them to show adequacy of consideration.

[20, 21] Finally, appellants urge that they were denied a fair trial because at the beginning of the proceedings the court directed that the issue raised by the defendant's first affirmative defense, which involved the question of abandonment and return of the deposit, be tried first, and after receiving some evidence on this defense, directed the plaintiffs to go forward with their evidence in the regular way. The cause was tried before the court without a jury. A wide discretion is vested in the trial court in regulating the order of proof in the trial of cases. It is only when there is a clear showing of an abuse of this discretion, resulting in prejudice to a party, that the admission of evidence out of the regular and accepted order will furnish grounds for reversal on appeal. In La Mar v. La Mar, 135 Cal.App. 693, 696, 28 P.2d 63, 64, the court said: "The questions of order of proof and the extent of permissible cross-examination are entirely procedural, and, unless a miscarriage of justice has resulted in the judgment rendered, such errors furnish no grounds for a reversal since the adoption of section 4½, article 6, of the Constitution."

[22] "The trial court is given a wide discretion in regulating the order of proof in the trial of cases. In the absence of a clear abuse of this discretion, and prejudice to the adverse party, the admission of evidence out of the regular order will furnish no ground for a reversal on appeal. (24 Cal.Jur. 764–766, and cases cited.)" While it is true that the court's action resulted in the defendant's evidence being produced in part first, it does not appear that either party was prevented by such order from producing all available evidence, or that either party desired to or could obtain or present any further or additional evidence than was offered. In the case here under consideration, neither abuse of discretion nor prejudice is shown. Appellants' contention that they were not afforded a fair trial cannot, therefore, be sustained. Minnich v. Minnich, 127 Cal. App. 1, 6, 15 P.2d 804; Caminetti v. Providence Mut. Life Ins. Ass'n, 62 Cal.App. 2d 945, 948, 146 P.2d 15; La Mar v. La Mar, supra, 135 Cal.App. page 696, 28 P.2d page 63.

The record is free from error; the evidence supports the findings and the findings support the judgment. It is therefore ordered that the judgment be affirmed.

YORK, P. J., and DORAN, J., concur.

73 Cal.App.2d 917

TAMALPAIS LAND & WATER CO. et al. v. NORTHWESTERN PAC. R. CO. et al.

Civ. 12955.

District Court of Appeal, First District, Division 1, California.

April 12, 1946.

Rehearing Denied May 11, 1946.

1. Trial ⇐142

A verdict may be directed for defendant only when, disregarding all conflicts in evidence, and after indulging in every legitimate inference that may be drawn from the evidence, there is no substantial evidence to support verdict for plaintiff.

2. Railroads ⇐82(3)

Where deeds, whether granting easements or fees subject to conditions, called for operation and maintenance of railroad "passenger service," service by bus by different corporation having no interest in lands over different right of way did not constitute substantial performance of deed provisions.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger Service".

3. Railroads ⇐82(3)

Where ultimate grantee of land for railroad right of way had no knowledge of any side agreement between grantor and original grantees regarding the kind of service to be rendered, ultimate grantee's obligations must be measured by provisions of deed which merely required grantees or their successors to maintain and operate a railroad over deeded lands.

4. Railroads ⇐82(6)

Deeds requiring grantees or their successors to maintain a railroad over deeded lands, whether conveying easements or fee titles subject to conditions subsequent, must be construed in favor of grantees or their successors, and grantor seeking to recover land on ground of breach of deed provisions had burden of showing violation of such provisions. Civ.Code, § 1069.

5. Railroads ⇐82(3)

Where deeds merely required grantees and their successors to maintain and operate a railroad over property conveyed without specifying the character, frequency, or type of railroad service to be rendered, operation of railroad on "on call" basis for freight purposes constituted a substantial compliance with provisions of deeds, precluding grantor from recovering the land and quieting title on theory of breach of such provisions.

6. Easements ⇐1

Where a deed is ambiguous as to whether it conveys a fee subject to condition subsequent or an easement, fact that no monetary consideration, or only a nominal monetary consideration was paid for the grant, is important in indicating that grant conveys an easement and not a limited fee.

7. Easements ⇐1

The question whether ambiguous deed conveys a fee subject to condition subsequent or an easement is one of intent to be gathered from language of conveyance and surrounding circumstances.

8. Deeds ⇐155

Generally, rules of construction require a much stricter interpretation against grantee of a condition subsequent involving a forfeiture than of an easement, but, even in case of a condition, it must be interpreted in light of deed as a whole in order to ascertain intention of the parties.

9. Railroads ⇐82(3)

If deed conveying land for railroad purposes conveyed a fee subject to condition subsequent, there could be partial violation and a partial reversion, but, if deed conveyed a mere easement, there could be a partial extinguishment of such easement.

10. Railroads ⇐82(5)

Under deed conveying property right to railroad, a partial abandonment extinguishes so much of the right as has been abandoned.

11. Railroads ⇐82(3)

Where railroad was constructed on land conveyed by deed with three tracks near passenger station, which were maintained for many years, and grantee construed the deed as obligating grantee to construct railroad to such point and grantee's successors by their own acts subdivided what otherwise was a grant of an entire area and tore out the tracks and used terminal area for a use not provided for in deed, deed was divisible, in determining whether there had been a partial abandonment of area not used for railroad purposes.

12. Abandonment ⇐6

Generally question whether there has been an abandonment is one of fact and not of law.

13. Railroads ⇐82(6)

In action to recover land conveyed by deed for purpose of maintaining a railroad by grantee which was to hold the land "for the uses and purposes aforesaid and none other and for so long as said railroad shall be so maintained and operated and no longer", which deed provided that if grantee ceased to maintain railroad land should revert to grantor, whether tearing up of tracks and leasing of station and area surrounding it to a bus company reserving to railroad one room used by station agent constituted a partial abandonment was for jury.

14. Pleading ⇐345(1)
Quieting title ⇐41

Where complaint in quiet title action was framed on theory that one or the other of plaintiffs owned property but that plaintiffs were not sure which one owned it, allegations were sufficient to avoid a judgment on pleadings or a general demurrer.

15. Trial ⇐178

Motion for directed verdict cannot serve the office of a special demurrer.

16. Railroads ⇐82(3)

If there was a partial abandonment of land conveyed for railroad purposes, grantee's successor, in grantor's action to recover and quiet title to land abandoned, could not prevail on theory that land was devoted to a public use.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the Tamalpais Land & Water Company and another against the Northwestern Pacific Railroad Company and others to recover and quiet title to real property. From a judgment rendered upon directed verdict in favor of defendants, plaintiffs appeal.

Reversed.

Sterling Carr and Louis J. Glicksberg, both of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Lawrence L. Howe, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs appeal from a judgment rendered upon a directed verdict in favor of defendants in an action brought by plaintiffs to recover and quiet title to certain real property in Mill Valley, Marin County.

[1] The rules applicable to the power of a trial court to direct a verdict are well settled and are not here in dispute. A verdict may be directed for defendant only when, disregarding all conflicts in the evidence, and after indulging in every legitimate inference that may be drawn from the evidence, there is no substantial evidence to support a verdict in favor of plaintiff. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; In re Estate of Sharon, 179 Cal. 447, 177 P. 283; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; United Air Services, Ltd., v. Sampson, 30 Cal.App.2d 135, 86 P.2d 366; Barthelmess v. Cavalier, 2 Cal.App.2d 477, 38 P.2d 484; Berger v. Lane, 190 Cal. 443, 213 P. 45.

Tested by these standards the evidence most favorable to plaintiffs shows that prior to October 23, 1893, the Tamalpais Land and Water Company, one of the plaintiffs, had become the owner of large tracts of land in and about Mill Valley. The corporation desired to subdivide these lands. At that time there was no railroad running to Mill Valley. On the above date the corporation deeded to North Pacific Coast Railroad Company certain real property, or rights in real property, for the purpose of maintaining and operating a railroad over said lands. In addition, the grantor paid the grantee somewhere between $20,000 and $30,000 to defray the cost of grading, and to otherwise finance in part the construction of the railroad into Mill Valley. This deed embraces the property used for a portion of the right-of-way on the Mill Valley branch line and also includes the property upon which the Mill Valley passenger station now stands.

In 1902 the North Pacific Coast Railroad Company conveyed the property or rights covered by this deed to the North Shore Railroad Company. In August, 1904, the Tamalpais Land and Water Company conveyed additional property or rights in property to the North Shore Railroad Company. This deed embraces property used as a site for a freight house, and is still used for that purpose.

In December, 1906, the Northwestern Pacific Railroad Company, one of the defendants, purchased these parcels of land

or rights included within these two recorded deeds from the North Shore Railroad Company.

The defendants constructed a branch line railroad leading to Mill Valley in part over the right-of-way covered by these deeds and built on said lands a passenger station and a freight house. It is admitted that until March, 1941, the defendants operated a daily passenger service to and from Mill Valley over this line, and also maintained a daily freight service (except for Sundays and holidays) over this line. It is also admitted that in March, 1941, the defendants, with Railroad Commission approval, completely dicontinued passenger service and that no passenger service of any kind has been operated since that date over the branch line and that none is contemplated. It is also admitted that since that date regularly scheduled freight service has also been discontinued. The evidence shows, however, that since that date and continuing to the date of trial, the defendants have maintained a freight service, on an "on call" basis over the line. This service is mainly for full carload lots and is used principally by three firms in Mill Valley. The evidence shows that in 1941 the defendants moved 135 cars over the branch line on their "on call" service; in 1942, 84 cars were so moved; in 1943, 155 cars, while in 1944, 102 such cars were moved over the line. Since 1941 in most cases less than carload lots have been handled by a trucking company wholly owned by the defendant Southern Pacific Company and known as Pacific Motor Transport Company. This freight was handled by the trucking concern for the account of the railroad company and was moved under the latter's billing and tariffs. Such freight, of course, moves over the public highways.

In September, 1940, shortly before passenger service was discontinued, the Northwestern Pacific leased to the Pacific Greyhound Company, an independent corporation, the greater portion of its Mill Valley passenger station building, reserving to the railroad a small portion of the building for the use of its station agent, and also leased to the Greyhound a portion of the grounds adjacent to the station and included within the 1893 deed for a parking place for the busses. This lease was for a period of 30 days, subject to renewal thereafter for 30 days' terms, but not to exceed an aggregate of five years. The lease contains a provision that it might be canceled upon 30 days' notice and a provision that the lessor reserves the right to use the leased premises in common with the lessee for railroad and station puposes. The Greyhound has occupied the area in question under such lease since 1941 and was in possession thereunder at the time of trial. The railroad, as already pointed out, reserved one room in the leased station which has been continuously occupied by a station agent employed by it. This station agent furnishes information to the public with respect to rail fares, train connections and tariffs; makes pullman reservations and sells inter-line rail passenger tickets; receives freight claims; receives and executes requests for furnishing of cars to the shipping public in Mill Valley; and originates and receives company telephone calls including train orders. Also included within this area is an underground conduit containing telephone wires and no longer used telegraph wires, the telephone wires forming part of the telephone communications system of the railroad company.

The railroad passenger station, as already pointed out, was constructed at the end of the branch line on an irregularly shaped parcel of land covered by the 1893 deed, and adjoining Throckmorton-Blythedale Avenues. As originally constructed there were three separate tracks leading to the vicinity of the passenger station and ending there. In 1941 and 1942 the defendants retired and tore up a portion of these tracks. The defendants admit in their briefs that the evidence shows that they tore up about 100 feet of track from the ends of two of these lines and over 400 feet from the end of the other track. Plaintiffs' evidence was that somewhat a larger amount of track was torn up. The result is that the passenger station at the end of the line is now cut off from immediate rail connection. The freight house, which is located some distance from the passenger station, still adjoins the existing rails. At the end of the line there is an irregularly shaped area, all included within the 1893 deed, over which the rails do not run, but on which the station is still located, and under a portion of which the underground conduit still runs. This area approximates 200 feet by 180 feet or a little larger but is not square, and in this area there are no rails, and defendants do not contend that there is any intent to ever have rails cross this area.

The complaint is entitled "Complaint to Quiet Title and for Recovery of Real Property." At the trial and in their opening briefs it was the theory of the plaintiffs that the two deeds involved conveyed the fees subject to conditions subsequent and that such conditions having been violated the fees revert. In their reply brief it is urged that the deeds conveyed an easement for railroad purposes, which easement has terminated by reason of nonuser.

The deeds in question are somewhat lengthy documents. The 1893 deed provides that the Tamalpais Land and Water Company "for and in consideration of the acceptance of this conveyance" by the North Pacific Coast Railroad Company "subject to the reservations and provisos and upon the conditions hereinafter mentioned and expressed and for other good and sufficient considerations has granted and by these presents does grant unto the said party of the second part * * * but upon and subject to the said reservations provisos and conditions and for the uses and purposes hereinafter designated and stipulated and none other" the lands covered by the deed, "for the maintenance and operation of a Railroad upon and over said lands in conjunction and connection with the main line of said party of the second part * * * To Have and to Hold * * * for the uses and purposes aforesaid and none other and for so long as said railroad shall be so maintained and operated and no longer." It is further provided that if the grantee or its successors "should at any time fail or cease to maintain and operate said railroad as hereinbefore stipulated then it will at once on demand surrender and deliver up the possession of said land and every part thereof to the party of the first part or its assigns."

The 1904 deed provides that the grantor "in consideration of the covenants on the part of the said party of the second part hereinafter contained, subject to the reservations and provisos and upon the conditions hereinafter mentioned and expressed, and for other good and sufficient considerations has granted, and by these presents does grant" to the grantee and its successors "but upon and subject to the reservations and conditions and for the uses and purposes hereinafter designated and stipulated, and none other, and while devoted to those uses and purposes" certain described real property. "The sole uses and purposes for which the said parcels of land are hereby conveyed are as follows, to wit: For the maintenance and operation of a railroad upon and over said lands, in conjunction with the main line of said party of the second part, and for the construction and maintenance of a freight shed or sheds or other terminal facilities for railroad purposes * * *. To have and to hold, * * * for the uses and purposes aforesaid and none other, and for so long as a railroad shall be maintained and operated thereon * * * and no longer."

The plaintiffs produced some evidence that the original grant was for the main purpose of securing passenger rail service to Mill Valley. Their evidence was very weak on this issue and they entirely failed to prove that the Northwestern Pacific Railroad Company, the successor of the original grantees, had any notice of any oral or other understanding between the grantor and grantees other than the deeds themselves.

It is the theory of the plaintiffs that whether or not the operation of the intermittent freight service constituted an abandonment was a question of fact that should have been submitted to the jury. Further, plaintiffs contend that, even if the operation of the intermittent freight service does constitute a compliance with the deeds, the evidence was sufficient to go to the jury on the question as to whether there was an abandonment of a part of the granted lands at the end of the line where the rails have been torn up.

The trial court was of the view that as long as the intermittent freight service was admittedly maintained there was a compliance with the deeds, and further, was apparently of the view that service by busses was substantial performance of the conditions contained in the deeds. However, the exact theory of the trial court in directing the verdict is by no means clear. After the argument on the motion for a directed verdict the trial court stated:

"I think that the purposes that the contracting parties had in mind are being carried out, not quite in the same way as they were set out then, but at that time it was the only way known, and the grantor of the—the Tamalpais Land and Water Company wished to sub-divide a lot of property and make a town site there and induce people to come and give them transportation, and the only way known then was railroad transportation. In that situation there is insufficient breach of the

condition subsequent to warrant forfeiture * * *.

"Mr. Carr: * * * I will be correct, Your Honor, in presuming the basis of Your Honor's ruling is you find the operation of the Greyhound is sufficient operation under the covenants in the deed which—

"The Court: I don't make that holding as a matter of law, but I feel it is an element to be considered and that the railroad company was aware that the passengers were being carried, which was the object in view of the contracting parties forty or fifty years ago."

[2-4] If the trial court was of the view that, even if the deeds, whether granting easements or fees subject to conditions, called for the operation and maintenance of passenger service, that then service by bus over a different right-of-way constituted substantial performance of the provisions in the deeds, it was clearly in error. When land is conveyed to a railroad, whether by way of a debased fee or by way of easement, for the purpose of operating a railroad over the lands it certainly is not substantial performance of the deed provisions to abandon the railroad and to substitute service by a different corporation that has no interest in the lands over a different right-of-way. The respondents do not attempt to sustain any such theory. It is their contention that the discontinuance of the passenger service did not constitute a breach of any of the provisions of the deeds. With this contention we agree. The two deeds do not specify the character, frequency or type of railroad service to be rendered. So far as the terms of the deeds are concerned they simply require the grantees and their successors to maintain and operate a railroad over and across the property conveyed. Whatever understandings or agreements the original grantor-grantees may have had beyond what was set forth in the deeds are not here relevant. The Northwestern Pacific Railroad Company was not the original grantee, was not a party to any side agreement, and, so far as the record shows, had no knowledge of any such agreement. So far as the record shows it purchased the rights of the original grantees without notice of any side agreement. Its obligations must be measured by the provisions of the deeds. Those deeds merely required the grantees or their successors to maintain and operate a railroad upon or over the deeded lands. Whether the deeds conveyed easements or fee titles subject to conditions subsequent is immaterial on this phase of the case. In either event the deeds must be construed in favor of the grantees or their successors. § 1069, Civil Code. The burden rested on the plaintiff to show a violation of the deed provisions. This burden was not sustained. While the intermittent freight service now operating may not have been what the original parties had in mind, these parties reduced their agreements to writing, and in those writings required only that the grantees maintain and operate a railroad over the granted lands. A railroad is being so maintained. In Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 P. 295, the conveyance was in fee "for railroad purposes only," and if not so used the lands to revert. The original grantee erected a railroad and operated daily freight and passenger service. Thereafter the Southern Pacific purchased the deeded lands and operated only intermittent gravel trains over the line. It was held that no reversion took place. At page 19 of 130 Cal., at page 296 of 62 P. the Court used the following language, which is equally applicable to the present case: "Upon the fact thus stipulated it must be held that a breach of the condition named in the grant has not been shown. The terms of that condition do not limit or define the extent of the use or the character or frequency of the trains that are to be operated over the land, and it cannot be maintained as a proposition of law that the running of gravel trains as aforesaid is not a use of the land for railroad purposes."

Plaintiffs place considerable reliance on the case of Rosecrans v. Pacific Elec. Ry. Co., 21 Cal.2d 602, 134 P.2d 245, in support of their contention that whether the defendants have abandoned the railroad for railroad purposes as provided in the deeds was a question of fact that should have been submitted to the jury. The Rosecrans case, under the facts there involved, so held and so held correctly. But in that case the deed contained detailed and positive conditions imposing upon the grantee and its successors the duty to operate not less than 18 daily local passenger trains in each direction over the line, with specific directions set forth in the deed for the reception and discharge of passengers at indicated points. The grantee gave such service for 32 years and then completely abandoned all service over

the road. The grantor contended a reversion had taken place. The trial court sustained a demurrer to the grantor's complaint, evidently on the theory that 32 years of compliance as a matter of law constituted either literal or substantial compliance with the provisions of the deed. The Supreme Court properly held that the deed expressly required perpetual passenger service and that therefore the complaint stated a cause of action.

[5] That case has no application to the facts of the instant case where the obligation was to maintain and operate a railroad, without specification of the extent, kind or quality of service. The Rosecrans case undoubtedly supports the view that the obligation assumed by the acceptance of the deeds in the instant case was to operate a railroad, perpetually, over the granted lands, but the Rosecrans case does not help in determining what the extent of the assumed obligation was. Applying the identical rules of construction set forth at length in the Rosecrans case it must be held in the instant case that the grantees and their successor merely agreed to use the lands for the maintenance and operation of a railroad thereon. As long as the defendants continue to use the lands in good faith for railroad purposes they have complied with the requirements of the deeds. The evidence of plaintiffs having shown that the railroad was operated on an "on call" basis for freight purposes to a substantial degree the defendants were entitled to a directed verdict on this issue.

But the determination that the intermittent freight service here shown to exist, as a matter of law, shows compliance with the deed provisions, does not settle all of the issues in this case. As already pointed out, the grantees and their successors constructed the railroad over the granted lands and operated the same for many years. A passenger station was constructed at the end of the line on land included within the 1893 deed. Over the course of time three separate tracks were constructed that led to this passenger station and ended there. When passenger service was discontinued the railroad retired and tore up a portion of their tracks so that the passenger station is now completely cut off from any immediate rail connection. There is a substantial area at the end of the line over which no rails at all run, but on part of which the station still stands. It is this station and the area surrounding it that have been leased to the Greyhound as a bus station and for bus parking purposes, reserving to the railroad one room used by it for a station agent who renders the services heretofore described. The plaintiffs contend that even if the intermittent freight service constitutes a compliance with the deeds (and we have held it does) that this area is not used at all, and as to it there has been a partial abandonment. We are of the opinion that this contention presents a fact question that should have been submitted to the jury.

[6] The plaintiffs contend that the 1893 deed conveyed an easement and not a fee subject to a condition subsequent. There is considerable merit in this contention. In the first place it is an admitted fact that the grantees of these deeds paid nothing for the conveyance, in fact, the grantor paid the grantees between $20,000 and $30,000 to help defray the cost of the construction of the railroad. This is a matter of considerable importance in construing a deed. If a deed is ambiguous as to whether it conveys a fee subject to a condition subsequent or an easement, the cases are quite uniform that the fact no monetary consideration, or only a nominal monetary consideration was paid for the grant is a factor of considerable importance indicating that the grant conveys an easement and not a limited fee. Rogers v. Pitchford, 181 Ga. 845, 184 S.E. 623; Noel Estate v. Kansas City Southern & Gulf Ry. Co., 187 La. 717, 175 So. 468; Hodges v. Owings, 178 Md. 300, 13 A.2d 338; see also, Restatement of Property (Servitudes), § 471, comment f.

[7] The question is obviously one of intent to be gathered from the language of the conveyance and the surrounding circumstances. The problem is exhaustively discussed in an annotation in 132 A.L.R. 142 entitled "Deed to railroad company as conveying fee or easement," where many cases are collected and commented upon. Cases are there collected to show that even where a deed contains language that is normally used in connection with a grant of a fee, and contains a reversionary clause, it will nevertheless be construed as granting an easement and not a fee if the deed clearly indicates that the purpose of the grant was to convey the property for railroad purposes only. Particularly is this so if no monetary consideration has been paid for the conveyance. Many of the cases contain granting clauses much

broader than the deed here involved. See Barlow v. Chicago, Rock Island and Pacific Railroad Company, 29 Iowa 276; Barton v. Jarvis, 218 Ky. 239, 291 S.W. 38; Laurel County v. Howard, 189 Ky. 221, 224 S.W. 762; Noel Estate v. Kansas City Southern & Gulf Ry. Co., 187 La. 717, 175 So. 468; Clevenger v. Chicago, M. & St. P. Ry. Co., Mo., 210 S.W. 867; St. Louis-San Francisco Ry. Co. v. White, 199 Ark. 56, 132 S.W.2d 807; Keokuk County v. Reinier, 227 Iowa 499, 288 N.W. 676; Chicago Great Western R. Co. v. Zahner, 145 Minn. 312, 177 N.W. 350; see comment on these cases 132 A.L.R. 159-163; for comment on cases holding designation of purpose of conveyance alone not controlling, see 132 A.L.R. 163-168.

[8] The present deed is not clear as to the nature of the estate granted. It grants to the named grantee and its successors certain described lands subject to certain provisos and conditions "for the uses and purposes hereinafter designated and stipulated and none other." Those uses and purposes are "for the maintenance and operation of a Railroad upon and over said lands." The deed provides that the grantee is to have and to hold said lands "for the uses and purposes aforesaid and none other and for so long as said railroad shall be so maintained and operated and no longer." It is then provided that if the grantee "fail or cease to maintain and operate said railroad as hereinbefore stipulated then it will at once on demand surrender and deliver up the possession of said land" to the grantor. This language is far more indicative of an intent to grant an easement for the designated purposes than it is to grant a fee subject to a condition subsequent. When the further facts are considered that not only was no monetary consideration paid for the conveyance but that the grantor paid a large sum to the grantee to defray in part the cost of construction, the conclusion seems almost inescapable that the parties intended to convey an easement and not a limited fee. We do not find it necessary to decide, however, at least as a matter of law, whether the 1893 deed conveyed an easement or a conditional fee. While it is true that the rules of construction require a much stricter interpretation against the grantee of a condition subsequent involving a forfeiture than of an easement, the true rule, as pointed out in Rosecrans v. Pacific Elec. Ry. Co., 21 Cal.2d 602, 606, 134 P.2d 245, 247, is that even in the case of a condition it must be interpreted "in the light of the deed as a whole in order to ascertain the intention of the parties."

[9, 10] If the 1893 deed conveyed a fee subject to a condition subsequent, in a proper case there can be a partial violation and a partial reversion. On the other hand, if it conveyed a mere easement, the law is well settled that there can be a partial extinguishment of such easement. See Restatement of Property (Servitudes), Chapter 41, p. 3060, Introductory Note. There are many cases where the courts have held, in reference to deeds conveying property rights to a railroad, that a partial abandonment extinguishes so much of the right as has been abandoned. See 28 C.J.S., Easements, § 58, p. 722; Jones on Easements, p. 682, § 852; Louisville and Nashville Railroad Company v. Covington, 2 Bush, Ky., 526; Mobile, J. & K. C. R. Co. v. Kamper, 88 Miss. 817, 41 So. 513. One of the most interesting and best reasoned cases on this subject is Atlantic Coast Line R. Co. v. Sweat, 177 Ga. 698, 171 S.E. 123. In that case certain lands were conveyed to the railroad for the construction of a railroad thereon, the grantee to retain the lands for so long as it or its "successors and assigns, shall maintain and use said road; but to revert to the said party of the first part whenever said road shall be abandoned." In the amended complaint it was alleged that the railroad had constructed the road and thereafter abandoned a portion. The court held that the plaintiff could recover the portion abandoned even though the balance was being used for railroad purposes. The court stated at page 713 of 177 Ga., at page 130 of 171 S.E.: "While upon a technical construction of the contract it might be considered as entire and not divisible, so that the railroad company would not lose its claim to any part of the right of way so long as it maintained and used substantially all of it, yet, when there was a definite and positive nonuser by the railroad company of a particular segment of the right of way formerly occupied by it, the company itself is responsible for the severance, and will not be heard to say that the contract is indivisible. An entire contract may be apportioned in some cases."

There is nothing in any of the cases cited by defendants that suggests, far less compels, a contrary view. The case of

Reclamation District v. Van Loben Sels, 145 Cal. 181, 78 P. 638, cited apparently to support the contention that, as a matter of law, the tearing up of the tracks at the terminal did not constitute a partial abandonment, supports no such theory. In that case there was a change in the nature of the use. The land had been conveyed for reclamation purposes. The trial court found as a fact that the new uses were reclamation purposes within the meaning of the deed. The Supreme Court held the finding was supported. The case, in fact, supports the theory of this opinion that the basic question involved is one of fact and not of law. The other cases cited on this point are equally inapplicable.

[11] The defendants argue that the only obligation assumed by them was to operate and to maintain a railroad on the conveyed property, and that they were not required, under penalty of forfeiture, to physically occupy and actively use every square foot of the premises as a roadbed or in the operation of the railroad. It is therefore contended that the tearing up of the terminal tracks near the passenger station did not amount to an abandonment of that area for railroad purposes. It is, of course, true that the grantee or its successor was not required to use every square foot of the conveyed area for a roadbed or other railroad purposes. But the fallacy in the defendants' arguments is that here the parties over a period of more than 40 years have construed the nature of the obligation assumed by the grantee. The road was constructed with three tracks leading to Throckmorton-Blythedale Avenues. Those tracks were maintained for many years. The parties, and particularly the grantee, construed the deed as obligating it to construct the railroad to that point. Now the defendants, by their own acts, have subdivided what otherwise was a grant of an entire area. See Dickson v. St. Louis & K. R. Co., 168 Mo. 90, 67 S.W. 642 for a case emphasizing the importance of practical construction in such cases. It is the defendants who have torn up the tracks and are now using the terminal area for a use not provided for in the deed. Under such circumstances the contract is clearly divisible and has been made so by the acts of defendants.

[12, 13] If there had been a complete abandonment of the terminal area we would have no hesitancy in holding that that area should revert to the grantor as a matter of law under the theory of the above cited cases. But, as already pointed out, although the area, including the station, has been leased to the Greyhound, the defendants have retained one room in the station for its station agent, and have an underground conduit, containing telephone wires, running underneath a portion of the area. The defendants contend that these functions are railroad purposes, and that, as a matter of law, they constitute a compliance with the provisions of the deed. The problem is not so simple. While the maintenance of a station agent and a telephone line are undoubtedly railroad purposes, the deed here involved did not convey the lands for any and all railroad purposes independent of the operation of a rail line. It conveyed the lands for certain purposes and "none other," namely, "for the maintenance and operation of a Railroad upon and over said lands" and "for so long as said railroad shall be so maintained and operated and no longer." While the maintenance of the station agent and the underground wire were undoubtedly proper uses as incidents to the passenger and freight lines as long as those lines were so used, when the passenger service was discontinued and the tracks torn up, the question immediately becomes pertinent as to whether such uses, independent of the passenger service and disconnected from the freight tracks, falls within the meaning of the deed. That is a question of fact to be determined from the face of the deed, and from the surrounding circumstances including what the parties have done under the deed. It is a general rule that the question of whether there has or has not been an abandonment is one of fact and not of law. Slater v. Shell Oil Company, 39 Cal.App.2d 535, 103 P.2d 1043; Utt v. Frey, 106 Cal. 392, 39 P. 807; Turner v. Markham, 155 Cal. 562, 102 P. 272; Daman v. Hunt, 47 Cal.App. 274, 191 P. 376. That rule has particular force here. It certainly is a question of fact and not of law as to whether this terminal area is being used for purposes provided for in the deeds. For this reason it was error of a most serious and prejudicial nature to direct a verdict on this issue. The cause must be reversed to permit this issue to be decided as a fact.

[14, 15] Defendants contend that this is an action to quiet title and that there is no positive allegation that either of the

plaintiffs have an interest in the property. The complaint was framed on the theory that one or the other plaintiff owned the property but that plaintiffs were not sure which one owned it. The complaint alleges that plaintiff Tamalpais Land and Water Company was the owner of the properties described in the 1893 and 1904 deeds, and in those years conveyed them to the named grantees by deeds reserving certain described rights in the grantor. It is then alleged that in 1908 plaintiff Tamalpais Land and Water Company conveyed to Ralston L. White certain real property rights; that Ralston has died and Ruth B. White is his executrix; that Ruth B. White is uncertain as to the extent of the grant and does not know whether it includes any of the reversionary rights contained in the 1893 and 1904 deeds; that for this reason both plaintiffs are joined so that on the trial the rights of the parties may be determined. These allegations, while not as clear as might be desired, are sufficient to avoid a judgment on the pleadings or a general demurrer. The motion for a directed verdict certainly cannot serve the office of a special demurrer.

[16] It is also contended that plaintiffs have no cause of action to recover possession of the reversionary interest, but at most an action for damages, because, so it is contended, the land is devoted to a public use. That is a matter of defense that will depend on the evidence. It certainly cannot be held, as a matter of law, that the grantee or its successor in interest is devoting the terminal land to a public use. If it should be found as a fact that a partial abandonment has occurred, the successor in interest cannot prevail on such a defense.

The judgment appealed from is reversed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

On Petition for Rehearing.

PETERS, Presiding Justice.

The sole point made by respondents in their petition for rehearing is that this court failed to pass on their contention that the evidence failed to show that the plaintiffs or either of them owned the rights here involved. As already pointed out in the opinion, the theory of the complaint was that either the Tamalpais Land and Water Company, or Ruth B. White, as executrix of the will of Ralston L. White, owned the interests involved. The opinion holds that the pleading is sufficient. The evidence sustains the allegations of the pleading. There was introduced into evidence as plaintiffs' Exhibit 3 a deed executed in 1908 from the corporate defendant to Ralston L. White. Plaintiffs are in doubt as to whether that deed conveyed the interests here involved. If it did, the estate of Ralston L. White owns the interests; if it did not the corporate defendant owns them. The trial court has not passed on that issue and was not called upon to pass upon it on the motion for a directed verdict. It is for the trial court, in the first instance, to interpret the deed in question. The evidence was sufficient to avoid a directed verdict.

The petition for rehearing is denied.

CALIFORNIA REPORTER

168 PACIFIC REPORTER

SECOND SERIES

27 Cal.2d 866

Ex parte RALPH.

Cr. 4689.

Supreme Court of California.

April 2, 1946.

1. Criminal law ⇐987

Orders in the form of judgment purporting to resentence defendant to state prison, following his rejection by the Youth Authority, were in effect merely orders of commitment after judgment and sentence, previously pronounced, to the appropriate penal institution, and did not constitute a "judgment" within statute requiring that defendant be personally present when judgment is pronounced against him. Pen.Code, § 1193.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

2. Criminal law ⇐999(1)
Infants ⇐69

The judgment of conviction and sentence constitute the basis for commitment either to prison or to the Youth Authority. Welfare and Institutions Code, § 1731.5; Pen.Code, § 1202a.

3. Infants ⇐69

Commitment to the Youth Authority can be only tentative, discretion to accept or reject a defendant being vested in the Authority.

4. Criminal law ⇐987

Where Supreme Court reversed judgment of commitment to the state prison and remanded cause with directions to grant defendant's motion for certification to the Youth Authority and Youth Authority thereafter rejected defendant, the original sentences could properly be carried out, and trial court's orders were to be regarded as merely commitments pursuant to previously pronounced sentences, not requiring defendant's presence at time they were made. Pen.Code, § 1193.

5. Infants ⇐69

The statute contemplates that sentence be pronounced prior to tentative commitment of a defendant to the Youth Authority, that, should the defendant be rejected by the Youth Authority, such sentence should be executed as originally pronounced, and that pronouncement of a new sentence is unnecessary. Welfare and Institutions Code, § 1731.5.

6. Criminal law ⇐1023(11, 12)

Where defendant appealed from judgment of conviction and sentence to state prison, and Supreme Court reversed judgment of conviction to state prison and remanded cause to trial court with directions to grant defendant's motion for certification to the Youth Authority, which thereafter rejected defendant, the subsequent orders of court committing defendant to state prison were neither judgments of conviction nor judicial orders made after judgment from which an appeal might be taken. Welfare and Institutions Code, §§ 1700, 1731.5, 1739; Pen.Code, § 1237.

7. Habeas corpus ⇐109

A defendant, seeking writ of habeas corpus on ground that trial court was without authority to re-sentence him in his absence and that as result of such procedure he was denied a right of appeal, would not be entitled to release from custody even should Supreme Court uphold his contentions, but would be entitled only to remand for resentence with possible consequent loss of credit for time already served. Pen. Code, §§ 1489, 1493.

Habeas corpus proceeding by Edsel G. Ralph.

Writ discharged and defendant remanded to custody.

Edsel G. Ralph, in pro. per., and Roy Daily, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., Frank Richards and David K. Lener, Deputy

Attys. Gen., and Fred N. Howser, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for respondent.

SCHAUER, Justice.

Edsel G. Ralph, petitioner herein, in two consolidated cases pleaded guilty to charges of committing robbery while armed with a deadly weapon. Thereupon the court "Upon a statement of facts and by stipulation of counsel" found the crimes to be robberies of the first degree; denied defendant's application for probation as well as his motion, made under the provisions of the Youth Authority Act (Welfare and Institutions Code, §§ 1700–1783), to be certified to the Youth Authority pursuant to the terms of section 1731.5 of the act; arraigned defendant for judgment; pronounced judgment; sentenced defendant to imprisonment in the state prison for the term prescribed by law (Pen.Code, § 1168) and committed him to the custody of the prison warden. From the judgment of conviction and sentence against him defendant appealed, advancing as his sole contention that the trial court erred in refusing to commit him to the Youth Authority and in committing him directly to the custody of the warden of the State prison. He did not attack the judgment adjudicating his guilt of the charges of robbery and that the offenses were robberies of the first degree, or the sentence to imprisonment for the indeterminate term prescribed by law, except as such sentence specifically prescribed incarceration in the state prison in the custody of the warden instead of commitment to the custody of the Youth Authority. In other words, his whole contention on the appeal related not to the legality of the judgment of conviction or to the sentence of imprisonment as such but only to the identity of the penal authority into whose custody he should be committed. On the judgment and sentence to imprisonment he sought commitment to the custody of the Youth Authority instead of to the warden of the prison. This court, concluding that a liberal interpretation of the Youth Authority Act, as intended by the Legislature (Welfare and Institutions Code, § 1700), required that defendant's contention be sustained, on July 21, 1944, reversed the judgment *of commitment to the state prison* only and remanded the cause to the trial court, with directions to grant defendant's motion for certification to the Youth Authority.

In making the mentioned order we specifically pointed out that "The conclusion that these defendants are entitled to be *certified to* the Authority obviously does not mean that the Authority must accept them or that they are entitled to remain under it. Those are questions which the administrators of the act must determine, in the exercise of a sound discretion, and unless they are satisfied as to each defendant that he 'can be materially benefited' by the procedure and that for his 'care and maintenance there exists * * * proper and adequate facilities' (Welfare and Institutions Code, § 1731.5), it will be their duty to return such defendant to the superior court or to take such other action as under the circumstances may be proper, *to the end that he shall be committed to the proper penal institution.*" (Italics added.) People v. Ralph (1944), 24 Cal.2d 575, 583, 150 P.2d 401, 405.

Thereafter, on October 16, 1944, the trial court made the following order: "And in the case of People against Ralph * * * it appearing that * * * defendant * * * [was] sentenced to San Quentin penitentiary by this Court on March 31, 1943, and * * * [is] now [an] inmate of San Quentin * * * and it appearing proper for the Court now to make its order referring this case to the Youth Authority, I do so make said order and refer the case to the Youth Authority. I see no reason to bring * * * defendant back down here from San Quentin penitentiary at the public expense at this time. I will make that order in * * * [his] absence." The above quoted order obviously, and properly, does not purport to vacate the judgment of conviction or sentences previously pronounced or to alter them in any respect excepting as defendant had been denied commitment to the Youth Authority. On October 23, 1944, the Youth Authority, pursuant to the discretion vested in it (see above quotation from People v. Ralph) rejected the defendant. Subsequently, on November 9, 1944, in each of the two cases the trial court, in defendant's absence, entered new orders in the form of judgments purporting to resentence defendant to the state prison and in which it was stated that "It is further ordered that the defendant remain in the custody of the warden of San Quentin State Penitentiary." Defendant has since been transferred to the State Prison at Folsom.

[1] In this habeas corpus proceeding defendant contends that the court was without authority to *resentence* him in his absence, and that as the result of such procedure he was denied a right to appeal "from the judgments and orders thus imposed." In support of his contentions defendant relies upon the following provisions of section 1193 of the Penal Code: "Judgment upon persons convicted of the commission of crime shall be pronounced according to the provisions of this section, as follows: 1. If the conviction be for a felony, the defendant must be personally present when judgment is pronounced against him * * *." We are of the view, however, that petitioner had already had and exercised his right to appeal from the judgment of conviction (Pen.Code, § 1237) and that the trial court's orders of November 9, 1944, following rejection of defendant by the Youth Authority are, under the circumstances shown, in effect merely orders of commitment of defendant after judgment and sentence, to the appropriate penal or correctional institution, do not constitute judgments within the meaning of section 1193 of the Penal Code, and could properly be made in defendant's absence.

[2] Subdivision (a) of section 1739 of the Welfare and Institutions Code (a part of chapter 1, entitled "The Youth Authority") provides that: "The right of a person who has been convicted of a public offense to a new trial or to an appeal from the judgment *of conviction* shall not be affected by anything in this chapter." (Italics added.) As indicated above, defendant did appeal from the judgments of conviction of the charges to which he had pleaded guilty. Although the scope of the appeal authorized an attack upon all proceedings theretofore had, the sole point urged by defendant was, as above suggested, that he was entitled to be committed to the Youth Authority and, in effect, that the sentences to the state prison should be executed only if the Youth Authority rejected him. This court sustained defendant and granted him the full relief which he sought. However, in so doing, we did not reverse the judgments of conviction or the sentences to imprisonment for the term prescribed by law, but only the commitments to the state prison; i. e., only those portions of the judgments which committed defendant directly to the state prison and thereby operated to deny his motion for tentative commitment to the Youth Authority. (It is to be noted that commitment to the Youth Authority, even if the defendant is accepted by such authority, does not mean that the person so committed is relieved from restraint. Committing a defendant to the Youth Authority places him in its custody. It may permit him his liberty under supervision or it may order his confinement. (Welfare and Institutions Code, § 1766; see, also, §§ 1753, 1755 and 1780–1783.) He is in the hands of a different administrative board and the duration and conditions of his restraint may be different from what would obtain if he were committed directly to a state prison but the fact remains that it is the judgment of conviction and sentence which constitute the basis for commitment either to prison (formerly in the custody of the warden, now in the custody of the Director of Corrections (Pen.Code, § 1202a, Stats. 1945, ch. 91, § 1)) or to the Youth Authority (Welfare and Institutions Code, § 1731.5).

[3, 4] As clearly shown in the hereinabove quoted excerpt from our opinion, commitment to the Youth Authority can be only tentative, discretion to accept or reject a defendant being vested in the Authority. The effect of our decision upon the appeal was merely to tentatively suspend commitment of the defendant to the state prison dependent upon action by the Youth Authority. Following rejection of defendant by such Authority, the original sentences could properly be carried out, and the trial court's orders of November 9, 1944, are to be regarded as merely commitments to prison made pursuant to the previously pronounced sentences. Such commitments do not constitute new or different judgments or sentences against defendant and consequently his presence was not required at the time they were made. (Cf. In re Wilson (1927), 202 Cal. 341, 260 P. 542; People v. Lenon (1889), 79 Cal. 625, 631, 632, 21 P. 967; People v. Sourisseau (1944), 62 Cal.App.2d 917, 927, 928, 145 P.2d 916.)

This view is supported by the provisions of section 1731.5 of the Welfare and Institutions Code, which specify that the court shall commit to the Youth Authority (subject to its acceptance or rejection) one convicted of a public offense, who *"Is not sentenced* to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine" (italics added),

and who qualifies in other enumerated respects not material here. An interpretation of these provisions as contemplating that a defendant should be committed to the Youth Authority prior to the pronouncement of the appropriate sentence would indicate that any otherwise qualified convicted person who, prior to the pronouncement of sentence against him, requested commitment to the Youth Authority must be so committed. We have previously expressed ourselves as of the opinion that such an interpretation was not intended by the Legislature. (See People v. Ralph (1944), supra, 24 Cal.2d 575, 581, 582, 150 P.2d 401.) The interpretation now suggested by petitioner would require the commitment to the Youth Authority of those obviously intended by the Legislature to be excepted; i. e., those who, following conviction, are subject to being "sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine."

[5] In our opinion rendered on the appeal of this petitioner (at pages 581 and 582 of 24 Cal.2d at page 404 of 150 P.2d) we noted that the motion for commitment to the Youth Authority was actually made before any sentence had been pronounced but we renounced that fact as material to our conclusion, expressly assumed that the sentences had been pronounced at the time the motion was made, and held "that in literal actuality these defendants had not been sentenced to *life imprisonment.*" Furthermore, we adopted the argument made on behalf of the defendants that "They are sentenced to the term prescribed by law * * *." Our judgment did not disturb that sentence. On the contrary we relied upon it as a basis for directing (as did the defendant in seeking) commitment of the defendant to the Youth Authority. We set aside only the commitment to the state prison; i. e., commitment to the custody of the warden of the prison as distinguished from the custody of the Youth Authority. We are satisfied that a proper interpretation of the pertinent statutory provisions contemplates that sentence be pronounced prior to tentative commitment of a defendant to the Youth Authority; that should the defendant be rejected by the Youth Authority such sentence be executed as originally pronounced; and that pronouncement of a new sentence is unnecessary, superfluous, constitutes only an order of commitment to a different custodian and has not the stature of a judgment within the meaning of section 1193 of the Penal Code.

In accord, analogically, with our conclusion on this matter is In re Spagnoli (1924), 193 Cal. 472, 473, 225 P. 274, 275; which was decided upon facts occurring prior to the 1923 amendment of section 1193 of the Penal Code to expressly provide that following affirmance on appeal of a judgment imposing the death penalty, sentence may be reimposed upon the defendant in his absence by complying with certain specified procedural steps. In that case defendant was convicted of first degree murder and judgment was pronounced imposing the death penalty. On appeal, this court affirmed the judgment. After the going down of the remittitur the trial court, following the procedure prescribed in the amended section, "reimposed sentence" upon the defendant in his absence. On defendant's subsequent habeas corpus petition in which he challenged such procedure, this court stated, "The prisoner was present in court at the time of the pronouncement of judgment herein. The reimposition of sentence does not constitute the pronouncement or rendition of a judgment. The original judgment herein became final and conclusive upon its affirmance by this court. The reimposition of sentence upon the going down of the *remittitur* amounted, in effect, to nothing more than the fixing of a date for carrying into execution of that judgment." (See, also, People v. Sloper (1926), 198 Cal. 601, 607, 246 P. 802.) Likewise, in the instant case the trial court's orders of November 9, 1944, amounted to nothing more than orders of commitment to a proper custodian upon the original judgments and sentences.

[6] So far as concerns defendant's contention that he was unlawfully deprived of a right to appeal from the orders of November 9, 1944, it is sufficient to observe that, as already pointed out, he has had his appeal from the judgments of conviction rendered against him (and the sentences upon which he relied) and gained the point there made and that under the circumstances shown here the commitment orders constitute neither judgments of conviction nor judicial orders made after judgment from which an appeal may be taken. (Pen.Code, § 1237; People v. Flannelly (1900), 128 Cal. 83, 94, 60 P. 670; People v. Sourisseau (1944), supra, 62 Cal.App.2d 917, 928, 145 P.2d 916; cf. 4 Cal.Jur. 10-

Yr.Supp., 904, § 508; cf. Welfare and Institutions Code, § 1739; Ex parte Herrera (1943), 23 Cal.2d 206, 214, 143 P.2d 345.)

[7] It may be noted that even should we uphold defendant's contentions presented on this habeas corpus proceeding he would not be entitled to be released from custody but only to be remanded for resentence (see Pen.Code, §§ 1489, 1493; 13 Cal.Jur. 281, § 56, and authorities there cited) with possible consequent loss of credit for time already served.

For the reasons above stated the writ is discharged and defendant is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concurred.



27 Cal.2d 840

LORD v. GARLAND, Director of the Motor Vehicle Department, et al.

L. A. 18931.

Supreme Court of California, in Bank.

April 2, 1946.

1. Pleading ⇐106(2)

The plea of another action pending between same parties is dilatory in nature and is not favored and may be made only when face of complaint shows that causes of action and issues in the two actions are substantially the same. Code Civ.Proc. § 430.

2. Abatement and revival ⇐17

Where, for all that appears in complaint, prior suit does not involve the entire cause of action presented by complaint in later litigation, plea in abatement of another suit pending should be raised by answer rather than by demurrer. Code Civ. Proc. § 430.

3. Abatement and revival ⇐8(1)

A plea in abatement of another action pending may be maintained only where claim sued on in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication.

4. Judgment ⇐585(5)

The rule of res judicata extends only to facts and conditions as they existed at time judgment was rendered, or at time issues in first action were made, and to legal rights and relations of parties as fixed by facts determined by that judgment.

5. Judgment ⇐585(5)

Where facts or conditions intervene between filing of first and second suit, furnishing a new basis for claims and defenses of the respective parties, issues are no longer the same and the former judgment cannot be pleaded in bar of the second suit.

6. Abatement and revival ⇐17

Where, during pendency of suit to enjoin enforcement of the Caravan Act against plaintiff, he instituted the present action for declaratory relief, injunction, and recovery of deposit, but complaint in present action did not disclose whether all matters sued on were adjudicated in former suit nor whether such matters were actually and necessarily included therein or necessary thereto or whether other facts or conditions intervened before commencement of second action, objection on ground of another suit pending should have been raised by answer rather than by demurrer. Gen.Laws, Act 5136; Code Civ.Proc. § 430.

7. Abatement and revival ⇐17

A demurrer to entire complaint that another action was pending was not applicable to second count of complaint which made no reference to the former action. Code Civ.Proc. § 430.

8. Pleading ⇐216(2)

In ruling upon a demurrer, averments of one count cannot be amplified by allegations of another separately stated cause of action in the same pleading unless the latter are included by special reference or otherwise in the portion of complaint under attack.

9. Pleading ⇐204(2)

A demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection.

10. Judgment ⇐570(12)

Judgment dismissing a prior action for want of prosecution is not one on the merits and it does not bar a subsequent action on the same cause. Code Civ.Proc. §§ 583, 597.

11. Judgment ⇐196

The word "answer", as used in statute providing that when an answer pleads a prior action pending and defense of another action pending is sustained an interlocutory judgment shall be entered, includes a demurrer. Code Civ.Proc. § 597.

See Words and Phrases, Permanent Edition, for all other definitions of "Answer".

12. Judgment⇐196

An interlocutory judgment should be entered where a plea in abatement of another action pending is presented by demurrer and the defense is sustained. Code Civ.Proc. § 597.

13. Pleading ⇐111

The purpose of an interlocutory judgment where defense of another action pending is sustained is to permit trial court to retain jurisdiction over the subsequent action so that, when a final determination is had in prior pending action, court will be empowered to determine issues in the subsequent action. Code Civ.Proc. § 597.

14. Judgment ⇐948(3)

Where defense of another action pending is presented, if judgment on merits is rendered in suit first commenced, party asserting plea in abatement should be granted leave to amend to plead the res judicata effect of judgment in bar of the subsequent action. Code Civ.Proc. § 597.

15. Pleading ⇐111

Where defense of prior action pending is presented but prior action is not determined on merits, trial court should hear and decide rights of parties in accordance with issues presented by pleading in the second action. Code Civ.Proc. § 597.

16. Pleading ⇐111, 223

The only relief to which a litigant is entitled upon a plea, either by demurrer or answer, that a prior action between the same parties is pending and undetermined, is judgment that second action abate. Code Civ.Proc. § 597.

17. Pleading ⇐223, 225(2)

Order sustaining a demurrer to complaint without leave to amend, if based on plea of prior action pending, was erroneous, and, where none of other grounds of demurrer justified ruling, the withholding of leave to amend was an abuse of discretion, in view of fact that the prior action was dismissed for want of prosecution. Code Civ.Proc. §§ 583, 597.

18. Action ⇐6

One invoking remedy of declaratory relief must allege facts from which court may determine that an actual controversy relating to legal rights and duties of the respective parties exist. Code Civ.Proc. § 1060.

19. Action ⇐6

Complaint, seeking a determination of constitutionality of the Caravan Act and a declaration of rights of parties to money deposited under stipulation and order in prior litigation, stated a cause of action for declaratory relief. Gen.Laws Act 5136; Code Civ.Proc. § 1060.

20. Action ⇐6

Declaratory relief may be refused in discretion of court if it appears that determination is not necessary or proper at time and under all the circumstances. Code Civ.Proc. § 1061.

21. Action ⇐6

Where facts pleaded by plaintiff seeking a declaratory judgment would justify court in applying rule that remedy may be refused in discretion of trial court if it appears that determination is not necessary or proper at time and under circumstances, court may sustain a general demurrer to the complaint. Code Civ. Proc. §§ 1060, 1061.

22. Action ⇐6

Statute permitting trial court to refuse to render a declaratory judgment does not apply where, on facts stated, plaintiff is entitled to some relief in connection with the matter which occasioned the controversy. Code Civ.Proc. § 1061.

23. Action ⇐6

Action for declaratory relief may be invoked to test the constitutionality of a statute. Code Civ.Proc. § 1060.

24. Action ⇐6

Where plaintiff, who had instituted suit to enjoin enforcement of Caravan Act,

pursuant to stipulation and court order paid fees imposed by act to Motor Vehicle Department on condition that, if act should be declared unconstitutional, deposit would be returned to plaintiff and thereafter plaintiff instituted action for declaration of rights to money deposited, and for a determination of constitutionality of the Caravan Act, trial court would have abused its discretion if it had sustained general demurrer on ground that remedy of declaratory judgment was not necessary or proper. Gen.Laws Act 5136; Code Civ.Proc. §§ 1060, 1061.

25. States ⇐191(1)

Declaratory relief is an available remedy against the state. Code Civ.Proc. § 1060.

26. Injunction ⇐118(4)

Where plaintiff, who had instituted suit to enjoin enforcement of Caravan Act, pursuant to stipulation and court order paid fees imposed by act to Motor Vehicle Department on condition that if act should be declared unconstitutional, deposit would be returned to plaintiff, and thereafter plaintiff instituted action to enjoin state officials from disposing of deposited funds prior to adjudication on merits, the complaint did not state cause of action for injunctive relief because of failure to allege facts tending to show that irreparable injury would result if funds were converted by state officials prior to an adjudication on issue of constitutionality. Gen. Laws Act 5136.

27. Pleading ⇐204(2), 207

Where not all of a count is subject to demurrer, the objection must be directed to particular portion of it which fails to meet the law's requirement and a general demurrer to a count should be overruled if, upon any theory, it states a cause of action.

28. Pleading ⇐225(2)

A special demurrer should not be sustained without leave to amend if the deficiencies of complaint can be corrected by amendment.

29. Injunction ⇐120

Where complaint seeking injunctive relief against enforcement of Caravan Act alleged that application of the statutory requirements to plaintiff's particular method of doing business violated provisions of the federal and state constitutions and that act contained no provision whereby plaintiff could recover from state any money paid to Motor Vehicle Department as taxes, the complaint was sufficiently clear to apprise defendants of issues which they were required to meet and special demurrer that complaint was uncertain, ambiguous and unintelligible in certain particulars should have been overruled. Gen. Laws Act 5136.

30. States ⇐208

Where plaintiff instituted suit to enjoin enforcement of Caravan Act and pursuant to stipulation and court order paid to Motor Vehicle Department fees imposed by act on condition that, if act should be declared unconstitutional, deposit would be returned, count of subsequent complaint seeking the money judgment for amount of deposit stated a cause of action and was not demurrable. Gen.Laws Act 5136.

31. Action ⇐45(1)

Where plaintiff, who had instituted suit to enjoin enforcement of Caravan Act, pursuant to stipulation and court order paid fees imposed by act to Motor Vehicle Department on condition that if act should be declared unconstitutional amount deposited would be returned, and plaintiff filed subsequent complaint seeking declaration of rights, determination of constitutionality of act, injunctive relief on ground of unconstitutionality of act, and money judgment for amount deposited, the complaint in the second action was not demurrable on ground of improper joinder of causes of action. Gen.Laws Act 5136; Code Civ.Proc. § 427.

32. Pleading ⇐225(2)

A demurrer on ground of improper joinder of causes of action in the same complaint should not be sustained without leave to amend when it appears that the defect can be cured by amendment. Code Civ.Proc. § 427.

33. Appeal and error ⇐863

An order sustaining a demurrer to complaint must be considered in light of circumstances as they existed at time the demurrer was filed.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Harry A. Lord against Gordon H. Garland, as Director of the Motor Ve-

hicle Department, etc., and others for declaratory relief, injunction, and to recover a deposit. From a judgment of dismissal, plaintiff appeals.

Reversed with directions.

Prior opinion 153 P.2d 761.

See also Lord v. Superior Court of Los Angeles County, 168 P.2d 14.

Warren E. Libby, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Soon after the Caravan Act, Stats. 1937, p. 2253, Deering's Gen. Laws, 1937, Act 5136, went into effect, Harry A. Lord sued to enjoin the director and other officers of the Motor Vehicle Department from enforcing its provisions as to him. While that suit was pending, he brought the present action "for declaratory relief, injunction and recovery of deposit." The director and the registrar of the Motor Vehicle Department then in office were named as defendants. Their demurrer to the complaint was sustained without leave to amend, and the principal question presented upon Lord's appeal from the judgment subsequently entered concerns the plea of abatement relied upon by the respondents as justification for the dismissal of the action.

The Caravan Act imposes a fee of $15 upon each automobile driven upon the state highways under specified circumstances. Pursuant to a stipulation in the first suit and an order of the court based thereon, Lord paid to the Motor Vehicle Department the fees imposed by the statute upon the condition that, if the statute should finally be declared unconstitutional in that action or otherwise, the amount deposited should be returned to him, but in the event of a contrary determination, the department might retain the fund, which now amounts to over $88,000. As the suit was not brought to trial within five years, it was dismissed upon that ground, Code of Civ. Proc., § 583, and the judgment has become final. Lord v. Ingels, 64 Cal.App.2d 559, 149 P.2d 72.

The present action was filed during the pendency of the appeal in the first suit. The complaint is in three counts. The first is for a declaration of the rights of the parties to the money deposited under the stipulation and order in the prior litigation, a determination of the constitutionality of the Caravan Act, and an order enjoining the state officials, as trustees, from disposing of the fund created pursuant to the stipulation prior to an adjudication upon the merits. More specifically, it is alleged that, for more than seven years, Lord has been, and at the time of the filing of the complaint was, engaged in the business of caravaning automobiles from various eastern states into California. The vehicles so caravaned are owned by dealers and distributors doing business in California. Lord acts as the transporter for these distributors and dealers and is paid by them a flat price, which includes all taxes and license fees levied, and his net compensation for the caravaning depends upon the amount of taxes required to be paid.

Other allegations of this count are that it is a suit in equity to enjoin the enforcement of the Caravan Act, which statute violates specified sections of the state and of the federal Constitution. The caravaner's responsibility for a vehicle brought into the state ceases upon delivery to the distributor or dealer who owns it. Lord has been advised by the director and registrar of the Motor Vehicle Department that they will enforce the provisions of the Caravan Act and that he will have to pay the taxes required by the statute.

The complaint then pleads the commencement of the former action and the issuance of the preliminary injunction by which the enforcement of the statute was stayed. The text of the stipulation in that action, and also of the order based upon it which authorized the deposit of fees in lieu of a bond, is included in the facts stated by Lord.

When the prior action was dismissed, the complaint continues, the order made no provision for the disposition of the special fund which amounts to $88,282.50, but the court expressly reserved continuing jurisdiction until the final disposition of the money. In the former suit no determination was made in regard to the constitutionality of the statute, and although the special fund is subject to the jurisdiction and order of the court, the officers of the Motor Vehicle Department, notwithstanding the unconstitutionality of the Caravan Act, threaten to transfer the money on deposit and apply it to the payment of taxes as soon as the judgment of dismissal in the former action becomes final, which will be

prior to any adjudication upon the question of constitutionality and contrary to the provisions of the order and stipulation.

Lord also pleads in this count that because of the claim to the money on deposit, an actual controversy exists between him and the state officers relating to the legal rights and duties of the respective parties. The proper interpretation of the stipulation and of the order made thereon, he asserts, is that the special fund must be maintained inviolate pending the determination of the rights of the parties in this action. Under these circumstances, he concludes, the court should grant declaratory relief as to the rights of the parties, make its decision upon the question of the constitutionality of the statute under the second cause of action of the complaint, and render judgment for the disposition of the deposit accordingly.

The second count of the complaint includes by reference, the prior allegations relating to the manner in which Lord conducts his business and the requirement of the officers of the Motor Vehicle Department that he pay the fees fixed by the statute. It is also alleged that the Caravan Act is unconstitutional upon certain grounds specifically enumerated in the first count.

In more detail, Lord pleads that the Caravan Act levies a tax upon each and every automobile driven upon any highway of the State of California for the purpose of offering it for sale and excepts from the operation of the law each automobile transported wholly within certain zones. All of the caravaning from eastern states done by Lord in California is exclusively within a single zone as defined by the act, although occasionally he caravans between two zones as defined in the statute and from points within the state to points outside of California. The officers charged with the enforcement of the legislation have informed Lord that they will continue to require of him a special permit as to each and all of the vehicles which he shall in the future caravan into the state. There is no provision of law whereby he may recover from these officers, or from the state, any sum or sums paid or to be paid. He has no plain, speedy or adequate remedy at law, this count concludes, and unless the court enjoins the enforcement of the statute, he will suffer irreparable damage.

The third count pleads by reference, all of the allegations of the first count, except those dealing with the controversy concerning the stipulation and order. The relief asked in this count is for judgment in the amount of $88,282.50.

The respondents demurred "to the whole complaint," pleading "that there is another action pending between the same parties for the same cause," and that several causes of action are improperly united, namely, those stated in counts one and two of the complaint. As additional grounds for demurrer, they alleged that the first and third counts state insufficient facts to constitute a cause of action, and that the second count is ambiguous, unintelligible, and uncertain.

The record does not indicate the basis for the ruling of the trial court sustaining the demurrer without leave to amend, or that any ground for demurrer was abandoned. In support of his contention that the order was improper, the appellant argues that although the plea in abatement was directed to the "whole complaint," it is not well taken against count two as the allegations concerning the prior suit appear only in counts one and three; that the litigation first commenced did not involve the identical parties and causes of action, and as the demurrer upon the ground of the prior action was directed to the entire pleading, without specifying any particular count, and is not sustainable against at least two of the causes of action, it should have been overruled. Concerning the charge that the first and second counts of the complaint are improperly united, Lord justifies their inclusion in the same complaint upon the ground that by each of them he seeks equitable relief in regard to "Claims arising out of the same transaction, or transactions connected with the same subject of action" as allowed by section 427, subdivision 8, of the Code of Civil Procedure.

The general demurrer to the first cause of action according to Lord, was argued only upon the erroneous premise that declaratory relief cannot be had against the state, and that directed to the third cause of action should also have been overruled, he insists, for the sole objection urged against it was that, as it differs only from the first cause of action in the relief asked, it is subject to the same ruling made upon the first count. Finally, says Lord, the demurrer should not have been sustained without leave to amend upon any ground, and assuming that the trial court did not err in its determination concerning the plea in abatement, it should have limited its ruling to an interlocutory judgment suspend-

ing the action until final determination of the prior cause.

Considering the demurrer to the complaint as a whole, the respondents take the position that Lord is now suing upon the same facts to obtain the same relief which he asked in the prior litigation against the same parties. The same controversy is the basis of the present action, according to the attorney general. Before final judgment in the first action, any further litigation was unnecessary and vexatious; now, Lord may bring a new action attacking the constitutionality of the Caravan Act. Also, in support of the judgment, the respondents maintain that because, in the first suit brought by Lord, the court eventually must order a disposition of the money held by the Motor Vehicle Department, the general demurrer to the first cause of action was properly sustained without leave to amend. The facts alleged in that count, the argument continues, do not show a legal obligation arising under the circumstances specified in section 1060 of the Code of Civil Procedure, hence there is no justiciable dispute between the parties.

Turning to the second cause of action, Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001, in which the constitutionality of the Caravan Act was upheld, is relied upon to support the ruling of the trial court. The last count of the complaint is said to have the same infirmities as the first cause of action. The respondents argue that at the time the demurrer was sustained, Lord was attacking the stipulation and order in a case which was then pending, and so far as the disposition of the money is concerned, neither count states a cause of action. Finally, the causes of action now separately stated are not of the kind which may be joined under any provision of section 427 of the Code of Civil Procedure.

[1, 2] Under section 430 of the Code of Civil Procedure the pendency of another action between the same parties for the same cause is made a ground for demurrer. The plea is dilatory in its nature and is not favored. It may be made only when the face of the complaint shows that the causes of action and the issues in the two suits are substantially the same. Knapp v. Knapp, 15 Cal.2d 237, 243, 100 P.2d 759; O'Hara v. Grand Lodge I.O.G.T., 213 Cal. 131, 144, 2 P.2d 21; Conner v. Bank of Bakersfield, 174 Cal. 400, 402, 163 P. 353; National Auto. Ins. Co. v. Winter, 58 Cal. App.2d 11, 16, 136 P.2d 22; Burnand v. Irigoyen, 56 Cal.App.2d 624, 631, 133 P.2d 3; Warner v. Roadshow Attractions Co., 56 Cal.App.2d 1, 7, 132 P.2d 35. Where, for all that appears in the complaint, the prior suit does not involve the entire cause of action presented by the complaint in the later litigation, the plea of abatement should be raised by answer rather than by demurrer. Conner v. Bank of Bakersfield, supra, 174 Cal. at page 403, 163 P. 353; National Auto. Ins. Co. v. Winter, supra, 58 Cal.App.2d at page 16, 136 P.2d 22.

[3] As a test for determining whether the causes of action are the same or different, it is the universal rule that a plea in abatement may be maintained only where the claim sued upon in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication. Baker v. Eilers Music Co., 175 Cal. 652, 655, 166 P. 1006; McCormick v. Gross, 135 Cal. 302, 305, 67 P. 766. "While it is true that as a general rule a judgment is a bar as res judicata not only as to a subsequent action on the same matter actually determined, but also as to all issues that might have been litigated as incident to or essentially connected with the subject matter of the litigation and every matter coming within its legitimate purview * * *, it is also true that that only is adjudged in a former judgment which appears upon its face to have been adjudged or which was actually and necessarily included therein or necessary thereto. * * * And when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue." Stark v. Coker, 20 Cal.2d 839, 842, 129 P.2d 390, 392. Other recognized exceptions to this rule "include a situation wherein it has appeared that the questioned issue in the subsequent action was neither germane to nor essentially connected with the actual issues that were raised in the former action, even though, with propriety such issues might have been presented therein. * * * Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action." Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 631, 81 P.2d 944, 949; see, also, City of San Diego v. California Water & Tel. Co., 71 Cal.App.2d 261, 276, 162 P.2d 684.

[4, 5] And the rule of res judicata extends only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment. When other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action. Bank of America, etc., Ass'n v. McLaughlin, 22 Cal.App.2d 411, 415, 71 P.2d 291, 72 P.2d 554.

[6-9] Applying the foregoing rules to Lord's complaint in the present case, it does not appear upon the face of that pleading whether all matters now sued upon were adjudged in the former action, nor whether such matters were actually and necessarily included therein or necessary thereto. Neither does it appear whether other facts or conditions intervened before the commencement of the second suit. For these reasons, at least, the objection upon the ground of another action pending should have been raised by answer rather than by demurrer. Also, the demurrer to the entire complaint that another action was pending is not applicable to the second count of the complaint which makes no reference to the former action. In ruling upon a demurrer, the averments of one count cannot be amplified by the allegations of another separately stated cause of action in the same pleading unless the latter are included by special reference or otherwise in the portion of the complaint under attack (see Hopkins v. Contra Costa County, 106 Cal. 566, 570, 39 P. 933; Bidwell v. Babcock, 87 Cal. 29, 33, 25 P. 752; Baldwin v. Ellis, 68 Cal. 495, 496, 9 P. 652; Haskell v. Haskell, 54 Cal. 262, 265), and a demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection. Brandt v. Brandt, 178 Cal. 548, 550, 174 P. 55; Jensen v. Dorr, 159 Cal. 742, 745, 116 P. 553; Armstrong v. Adams, 102 Cal.App. 677, 681, 283 P. 871; Wakeman v. Green, 98 Cal. App. 50, 52, 276 P. 387.

[10] But assuming that the ruling upon this point was correct, the court should not have denied leave to amend. The judgment dismissing the prior action for want of prosecution is not one upon the merits (Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950; Bell v. Solomons, 162 Cal. 105, 121 P. 377; Matteson v. Klump, 100 Cal.App. 64, 279 P. 669) and it does not bar a subsequent action upon the same cause. Gonsalves v. Bank of America, 16 Cal.2d 169, 105 P.2d 118; Goddard v. Security Title Ins. & Guar. Co., 14 Cal.2d 47, 92 P.2d 804. Section 597 of the Code of Civil Procedure, as amended in 1939, provides that when an answer pleads a prior action pending, or any other defense constituting a ground of abatement, such special defense shall first be heard, "and where the defense of another action pending is sustained (and no other special defense is sustained) an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of such other action, and the plaintiff may appeal from such interlocutory judgment. * * *"

[11, 12] The word "answer," as used in the other sections of the Code of Civil Procedure, has been construed as broad enough to include a demurrer. For example, in Evans v. Superior Court, 14 Cal.App.2d 743, 59 P.2d 159, it was held that the provisions of section 581a, which authorize the dismissal of an action where no answer is filed and plaintiff fails to have judgment entered within three years after service of summons, must be construed as including a demurrer. The courts also concluded that the filing of a demurrer prevented the entry of a judgment when section 585 of the Code of Civil Procedure provided that, if no answer had been filed within the time specified in the summons, the clerk must enter the defendant's default and immediately enter judgment for the amount demanded. Fletcher v. Maginnis, 136 Cal. 362, 68 P. 1015; Oliphant v. Whitney, 34 Cal. 25, 26; Davidson v. Graham, 25 Cal. App. 484, 144 P. 147. By analogy, at least, the word "answer" as used in section 597 of the Code of Civil Procedure is broad enough to include demurrer and an interlocutory judgment should also be entered where the plea in abatement is presented by demurrer. See: 1 Cal.Jur. 37 and cases there collected.

[13-15] The purpose of the interlocutory judgment under circumstances such as are shown in the present case is to permit the trial court to retain jurisdiction over the subsequent action so that when a final determination is had in the prior pending action the court will be empowered to de-

termine the issues in the subsequent suit. If a judgment upon the merits is rendered in the suit first commenced, the party asserting the plea in abatement should be granted leave to amend to plead the res judicata effect of the judgment in bar of the subsequent action. But if, as in the present case, the prior litigation is not determined upon the merits, the trial court should hear and decide the rights of the parties in accordance with the issues presented by the pleadings in the second action.

[16, 17] The appellant relies upon a number of decisions which turned upon the defense of another action pending, but in none of them was there a judgment of dismissal, which followed an order sustaining a demurrer without leave to amend, affirmed upon appeal. The only relief to which a litigant is entitled upon the plea, by either demurrer or answer, that a prior action between the same parties is pending and undetermined is the judgment specified by section 597, Code of Civil Procedure, that the second action abate. The order, if based upon that plea, was therefore erroneous and if none of the other grounds of demurrer justifies the ruling, it was an abuse of discretion to withhold leave to amend.

[18-22] Considering the general demurrer to the first count from the standpoint of the sufficiency of the pleading to state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure, one invoking that remedy must allege facts from which the court may determine that an actual controversy relating to legal rights and duties of the respective parties exists. City of Alturas v. Gloster, 16 Cal. 2d 46, 48, 104 P.2d 810; Frasch v. London & Lancashire F. Ins. Co., 213 Cal. 219, 225, 2 P.2d 147; American Tel. & Tel. Co. v. California Bank, 59 Cal.App.2d 46, 51, 138 P.2d 49. Lord's allegations comply with this requirement; they state a cause of action for such relief and would support a declaratory judgment. The remedy however, may be refused in the discretion of the trial court if it appears that the determination is not necessary or proper at the time and under all the circumstances. Code Civ.Proc. § 1061. Where the facts pleaded by the plaintiff would justify a trial court in applying that rule, it has been held that the court may sustain a general demurrer to the complaint. Moss v. Moss, 20 Cal.2d 640, 642, 128 P.2d 526, 141 A.L.R. 1422; Simpson v. Security First Nat. Bank, 71 Cal.App.2d 154, 158, 162 P.2d 494. However, it is equally true that section 1061 of the Code of Civil Procedure, which allows the trial court to refuse to render a declaratory judgment, does not apply where, upon the facts stated, the plaintiff is entitled to some relief in connection with the matter which occasioned the controversy. Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 277 P. 487; Phelps v. Loop, 53 Cal.App.2d 541, 128 P.2d 63; Zimmer v. Gorelnik, 42 Cal.App.2d 440, 109 P.2d 34.

[23-25] As grounds for sustaining the general demurrer to the first count, the attorney general contends that the facts presented do not give rise to a present controversy and that section 1060 of the Code of Civil Procedure does not authorize the bringing of an action for declaratory relief against the state or its governmental agencies. However, considering all of the circumstances as they existed at the time the complaint was filed and in view of the fact that the action for declaratory relief may be invoked to test the constitutionality of a statute, the trial court would have abused its discretion if it had sustained the general demurrer to the first cause of action upon the ground that the remedy was not necessary or proper. And, contrary to the statement of the attorney general, declaratory relief is an available remedy against the state. Hoyt v. Board of Civil Service Com'rs, 21 Cal.2d 399, 132 P.2d 804.

[26, 27] However, Lord does not state a cause of action for injunctive relief in the first count because no facts are alleged tending to show that irreparable injury will result if the funds are converted by the respondents prior to an adjudication upon the issue of constitutionality. McKay Jewelers, Inc., v. Bowron, 19 Cal.2d 595, 598, 122 P.2d 543, 139 A.L.R. 1188; Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 98, 53 P.2d 188; see: 14 Cal.Jur. 261. Conceding that an injunction is ancillary to other relief sought, he has not pleaded any equitable grounds essential to the invocation of the remedy. Sunset Scavenger Corp. v. Oddou, supra, 11 Cal.App.2d at page 98, 53 P.2d 188. But where not all of a count is subject to demurrer, the objection must be directed to the particular portion of it which fails to meet the law's requirements, and a general demurrer to a

count should be overruled if, upon any theory, it states a cause of action. Johnson v. Clark, 7 Cal.2d 529, 536, 61 P.2d 767.

In count two Lord seeks injunctive relief against the enforcement of the Caravan Act upon the ground of asserted unconstitutionality. The Supreme Court of the United States has upheld the Caravan Act under the federal Constitution as written (Clark v. Paul Gray, Inc., supra), but Lord alleges that the application of the statutory requirements to his particular method of doing business violates the provisions of the federal and also of the state Constitution. Unlike the first count, it is here alleged that there is no provision of law whereby the appellant may recover from the respondents or from the State of California any money paid to the Motor Vehicle Department as taxes. To this count of the complaint the respondents demurred only upon the ground that it is uncertain, ambiguous and unintelligible, in certain enumerated particulars.

[28, 29] The attorney general recognizes the rule that a special demurrer should not be sustained without leave to amend if the deficiencies of a complaint can be corrected by amendment. But because of the decision in Clark v. Paul Gray, Inc., supra, and for other reasons, he asserts, it is patent that Lord cannot amend the second count so as to present a good cause of action to test the constitutionality of the Caravan Act. The objections raised by special demurrer do not go to the failure to allege sufficient facts (Callahan v. Broderick, 124 Cal. 80, 83, 56 P. 782; see: Bancroft's Code Pleading, vol. 1, p. 347) and as the allegations of Lord's complaint are sufficiently clear to apprise the defendants of the issues which they are to meet, the special demurrer should have been overruled. People v. Lim, 18 Cal.2d 872, 882, 118 P.2d 472; Jacobson v. Oakland Meat, etc., Co., 161 Cal. 425, 433, 119 P. 653, Ann.Cas.1913B, 1194.

[30] As the third count of the complaint is for a money judgment and is grounded upon the facts pleaded in the first count, which states a cause of action, the demurrer to it was not well taken.

[31] Concerning other aspects of the complaint, the demurrer upon the ground that several causes of action have been improperly united is based upon the proposition that the first and second counts do not arise out of the same transaction or transactions connected with the subject of the action. Code Civ.Proc. § 427. But certainly every transaction of the plaintiff, including the stipulation and order thereon, is connected with the constitutionality of the Caravan Act; and the validity of that statute is the question principally at issue in each count of the complaint. See: Carter v. Turner, 90 Cal.App. 193, 265 P. 870; Blodgett v. Trumbull, 83 Cal.App. 566, 257 P. 199; Boulden v. Thompson, 21 Cal.App. 279, 131 P. 765.

[32] Moreover, a demurrer upon the ground of improper joinder of causes of action in the same complaint should not be sustained without leave to amend when it appears that the defect can be cured by amendment. See: Ehlen v. Burrows, 51 Cal.App.2d 141, 144, 124 P.2d 82; 21 Cal. Jur. 119-122.

[33] It should be kept clearly in mind that at the time of the filing of the plea of another action pending and the ruling upon it, the appeal from the judgment dismissing the suit first commenced had not been decided. Although that judgment has now been affirmed, the order sustaining the demurrer to the complaint in the present litigation must be considered in the light of the circumstances as they existed at the time the plea was filed. However, if the state officials hereafter object to the further prosecution of the present action upon the ground that the first suit is still pending for a limited purpose, the question will arise whether the motion now pending in Lord v. Superior Court, 168 P.2d 14, for an order disposing of the fund allows the trial of issues sufficiently broad to justify a further plea in abatement.

The judgment is reversed with directions to the trial court to overrule the demurrer and to allow the respondents to answer.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

27 Cal.2d 855

LORD v. SUPERIOR COURT OF LOS ANGELES COUNTY.

S. F. 17150.

Supreme Court of California, in Bank.

April 2, 1946.

1. Prohibition ⇐3(1)

A writ of prohibition may issue where a lower tribunal acts without or in excess of its jurisdiction, and there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc. §§ 1102, 1103.

2. Dismissal and nonsuit ⇐80

After an action has been dismissed for want of prosecution, the court is without jurisdiction to hear or determine any motion unrelated to the dismissal of the action, but a court is not divested of jurisdiction for all purposes after the dismissal of action. Code Civ.Proc. § 583.

3. Dismissal and nonsuit ⇐80

Where plaintiff instituted suit to enjoin enforcement of Caravan Act and pursuant to stipulation and court order paid to Motor Vehicle Department fees imposed by act on condition that if act should be declared unconstitutional amount deposited would be returned, dismissal of suit for want of prosecution did not deprive court of jurisdiction to dispose of amount deposited, especially in view of provision of order reserving continuing jurisdiction over disposition of moneys deposited. Gen. Laws Act 5136; Code Civ.Proc. § 583.

4. Dismissal and nonsuit ⇐80

After dismissal of action for want of prosecution, court has power to determine disposition of funds held in custodia legis, after notice to all parties interested. Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⇐80
Prohibition ⇐10(2)

Where plaintiff instituted suit to enjoin enforcement of the Caravan Act and pursuant to stipulation and court order paid to Motor Vehicle Department fees imposed by act on condition that if act should be declared unconstitutional amount deposited would be returned, after dismissal of action for want of prosecution, court had jurisdiction to determine rights of parties to the deposited money and writ of prohibition would not be granted. Gen.Laws Act 5136; Code Civ.Proc. §§ 583, 1102, 1103.

Prohibition proceeding by Harry A. Lord against the Superior Court of Los Angeles County to prevent the respondent from making any present disposition of a fund.

Writ denied.

Warren E. Libby, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

By this original proceeding in prohibition, Harry A. Lord is endeavoring to prevent any present disposition of the fund which is the basis of the controversy in Lord v. Garland, Cal.Sup., 168 P.2d 5.

Lord sued the director and registrar of the Motor Vehicle Department to avoid the payment of fees required by the Caravan Act, Stats. 1937, p. 2253, Deering's Gen.Laws, 1937, Act 5136, upon the ground that the statute is unconstitutional. Lord v. Ingels, 64 Cal.App.2d 559, 149 P.2d 72. In connection with his suit he obtained a preliminary injunction, and furnished the required undertaking, Code Civ.Proc. § 529, the amount of which he had to increase from time to time as he brought more automobiles into the state. To avoid the inconvenience and expense of filing additional undertakings in support of the injunction, he found it expedient to deposit, in lieu of a bond, the amount of the tax required by the statute under attack.

Thereafter, upon stipulation, the preliminary injunction was, by order of the court, dissolved, the surety released from liability, and a second order made enjoining the defendants from enforcing the statute upon condition that Lord pay into a special fund to be established by the Motor Vehicle Department $15 for each car caravaned by him to California. By this order, which was based upon the stipulation, the respondent court reserved "continuing jurisdiction until final disposition of said moneys. * * *" The pertinent provisions of the stipulation upon which the order was made provided that, "all sums which are so paid shall be retained by * * * [the department] * * * in a special fund pending the final determination in this proceeding on appeal or otherwise of the constitutionality of the * * *" Caravan Act; that in the event the statute "shall be determined to be un-

constitutional the sums so paid * * * shall be returned upon application to" Lord, "and in the event that the said statute shall be determined to be constitutional the said sums * * * shall be retained by the Department. * * *" Five years later, the respondent court granted a motion to dismiss the action, pursuant to the provisions of section 583 of the Code of Civil Procedure and without reserving expressly any jurisdiction over said special fund. The judgment of dismissal, subsequently entered, is now final. Lord v. Ingels, supra.

Lord asserts that the superior court is about to make an order, upon motion of the defendants, for the payment to the state of more than $88,000 which he deposited in the special fund while the injunction was in force. Upon his petition, this court issued an alternative writ of prohibition and the question presented for decision concerns the jurisdiction of the superior court to determine the motion and to dispose of the money held by the Motor Vehicle Department.

The petitioner contends that the effect of the final judgment of dismissal in Lord v. Ingels, supra, was to completely deprive the superior court of all jurisdiction to hear any motion unrelated to the judgment, and the motion now pending is of that kind. The petitioner also declares that the court will be exceeding its jurisdiction in two particulars if it disposes of the fund because, (1) the court granting an injunction has no power upon its dissolution to assess damages resulting from the wrongful issuance of the writ; and (2) the court's power to dispose of the fund is limited by the stipulation of the parties that the fund is to be retained by the department until there has been a final determination of the constitutionality of the Caravan Act, supra.

[1-4] A writ of prohibition may issue where a lower tribunal acts without or in excess of its jurisdiction, and there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103. After an action has been dismissed under Code of Civil Procedure, section 583, the court is without jurisdiction to hear or determine any motion unrelated to the dismissal of the action. Cruse v. Superior Court, 102 Cal. App. 290, 283 P. 73; see, Swortfiguer v. White, 141 Cal. 576, 75 P. 172; Modoc Land, etc., Co. v. Superior Court, 128 Cal. 255, 60 P. 848; White v. Superior Court, 126 Cal. 245, 58 P. 450; Cooper v. Gordon, 125 Cal. 296, 57 P. 1006; Davis v. Hart, 123 Cal. 384, 55 P. 1060; Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470; People v. Southern Pac. R. Co., 17 Cal.App.2d 257, 61 P.2d 1184; King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268; Pearson v. Superior Court, 122 Cal.App. 571, 10 P.2d 489; Sauer v. Superior Court, 74 Cal.App. 580, 241 P. 570; 9 Cal.Jur. 534; 27 C.J.S., Dismissal and Nonsuit, § 77, p. 261. However, this general rule is subject to exceptions and a court is not divested of jurisdiction for all purposes after the dismissal of an action. See, King v. Superior Court, supra; Davis v. Superior Court, 184 Cal. 691, 195 P. 390; Cooper v. Gordon, supra; Cruse v. Superior Court, supra; 27 C.J.S., Dismissal and Nonsuit, § 77, p. 261. Thereafter the court has the power to determine the disposition of funds held in custodia legis after notice to all parties interested. In re Shyvers, D.C., 33 F.Supp. 643; see, Agricultural Bond & C. Corp. v. Courtenay F. Co-op. Ass'n, 66 N.D. 122, 262 N.W. 453; Union Bank & Tr. Co. v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442; Higgins v. Keyes, 5 Cal.App. 482, 90 P. 972; Anderson v. Ferguson, 56 Idaho 554, 57 P.2d 325. Furthermore, in the present case the court by its own order reserved continuing jurisdiction over disposition of all moneys in a special fund, and no final judgment with respect to that phase of the case having been entered at the time of the dismissal of the action, the court retained jurisdiction to complete the matter. See, McAdoo v. Sayre, 145 Cal. 344, 78 P. 874; Becker v. Munkelt, 27 Cal. App.2d 761, 81 P.2d 1041; County of Los Angeles v. Industrial Acc. Comm., 76 Cal. App. 639, 245 P. 796; 14 Am.Jur. 373; 15 C.J. 810; 21 C.J.S., Courts, § 86, p. 134.

[5] A further question for decision is whether the respondent court will be acting in excess of its jurisdiction if it orders the funds delivered to the state. This court has said, "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari."

Redlands, etc., Sch. Dist. v. Superior Court, 20 Cal.2d 348, 358, 359, 125 P.2d 490, 496, quoting Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291, 109 P.2d 942, 132 A.L.R. 715; See, Fortenbury v. Superior Court, 16 Cal.2d 405, 407, 106 P.2d 411. Here the petitioner is asking this court, upon prohibition, to decide who is entitled to the fund held in custodia legis. Although by the dismissal of the action there is only the narrow issue concerning the disposition of the money open for decision, the court has jurisdiction to determine the rights of the parties under the stipulation and order. Consistent with the exercise of that jurisdiction, the court might require that the fund be retained by the Motor Vehicle Department as a special deposit, subject to judicial order, until there is a final determination of the issue of constitutionality in the second suit brought by Lord. It might also require the Motor Vehicle Department to pay the money into court to await the decision of that suit. See: United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211. This court must assume that within the limited field left by the dismissal of the action, the court will fully protect the rights of the parties under the stipulation and order.

The alternative writ of prohibition is discharged and a peremptory writ is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



27 Cal.2d 873

NELSON v. DEAN, Director, Department of Finance, etc., et al.

Sac. 5761.

Supreme Court of California.

April 4, 1946.

1. States ⇐67

The State Personnel Board, by enforcing and amending rule relating to sick leave for state civil service employees, sufficiently established it as a rule of the board, though board did not formally adopt the rule. Gen.Laws, Act 1404, § 151.

2. States ⇐67

Under the statute providing that civil service employees shall be entitled to 12 days of sick leave with pay and that State Personnel Board shall provide for additional sick leave, board's rule defining "sick leave" as absence from duty of employee because of certain reasons including attendance on a member of his immediate family seriously ill, was valid and within authority of the board to adopt. Gen.Laws, Act 1404, § 151; Code Civ. Proc. § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Sick Leave".

3. Statutes ⇐119

The construction of a statute by officials charged with its administration must be given great weight.

4. Officers ⇐103

Administrative boards and officers are vested with a high discretion in working out their problems, and an abuse of that discretion must appear very clearly before the courts will interfere.

5. Constitutional law ⇐62

The Legislature may, after declaring a legislative policy and fixing a primary standard, confer on executive or administrative officers the power to fill up details by prescribing administrative rules to promote purposes of the legislation and carry it into effect, without violating the constitutional inhibition against delegating legislative functions.

6. States ⇐67

Rule of the State Personnel Board defining sick leave as absence from duty of an employee in the state civil service from duty because of illness or injury, exposure to contagious disease, attendance on a member of his immediate family seriously ill, and requiring care or attendance of such employee, or death in immediate family, is reasonable and valid and authorized by the Civil Service Act. Gen. Laws, Act 1404, § 151; Code Civ.Proc. § 16; Const. art. 24, §§ 2, 3, 5, adopted in 1934.

7. States ⇐67

The code section providing that, so far as consistent with laws, the head of each department may adopt such rules as may be necessary to govern the activities of the department, did not prevent the

State Personnel Board from adopting a rule defining sick leave for state civil service employees, since that section could not limit the power otherwise conferred on the board by the Constitution and Civil Service Act. Pol.Code, § 350; Gen.Laws, Act 1404, § 151; Code Civ.Proc. § 16. Const. art. 24, §§ 2, 3, 5, adopted in 1934.

Original mandamus proceeding by R. S. Nelson, petitioner, against James S. Dean, as director, Department of Finance, etc., and the Controller of the State of California, to compel allowance of petitioner's request for sick leave with pay for those days when the petitioner was necessarily absent from his regularly assigned duties in the Department of Finance in order to care for his critically ill wife.

Peremptory writ of mandate issued as prayed.

James H. Phillips, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioner, a civil service employee of the state of California, seeks mandate to compel allowance of sick leave with pay for three days, July 18, 19, and 20, 1945, when he was necessarily absent from his regularly assigned duties in the Department of Finance in order to care for his critically ill wife. He had at the time of such absence accumulated to his credit 59 days of unused sick leave. He duly filed with the Department of Finance his request for sick leave with pay. On October 18, 1945, the State Personnel Board approved such request. The Department of Finance refuses to allow petitioner such sick leave with pay and has deducted $13.07 from petitioner's salary for one fourth of July 18 and all of July 19 and 20, 1945, and has charged the remaining three fourths of July 18 against petitioner's earned vacation time. Respondents, the Director of Finance and the Controller of the State of California, have demurred generally to the petition for writ of mandate and by stipulation the issues have been submitted for final adjudication without the issuance of an alternative writ.

At the time of petitioner's absence in July, 1945, rule 191 (formerly rule 14a) of the State Personnel Board, as amended December 28, 1943, provided that state civil service employees were entitled to twelve days of sick leave with pay for a calendar year of service, cumulative from year to year to a total of one hundred working days, and that "*Sick leave is hereby defined to mean the absence from duty of an* officer or *employee because of his* illness or injury, exposure to contagious disease, *attendance upon a member of his immediate family seriously ill and requiring the care or attendance of such* officer or *employee,* or death in the immediate family of the officer or employee. * * *" (Italics added.) (Cal.Admin.Code [printed March 22, 1945], tit. 2, div. 1, ch. 1, art. 14.)

Respondents take the position that rule 191, insofar as it attempts to define sick leave to include necessary absence to attend an ill member of the immediate family of an employee, is invalid. We have concluded that rule 191, and, therefore, petitioner's cause for sick leave with pay, are valid.

The provisions of rule 191 here material are the same as were those of rule 14a of the Civil Service Commission adopted June 30, 1932, and effective July 1, 1932. Rule 14a was from time to time amended by the Civil Service Commission and its successor, the State Personnel Board, and was in 1945 renumbered rule 191, but at all times since June 30, 1932, the material (italicized) language of the definition of sick leave has remained unchanged. And, petitioner alleges, "during the entire period since said rule 14a became effective on July 1, 1932, the former Civil Service Commission and the State Personnel Board have uniformly approved such sick leave with pay; * * * during all of said time it has been the uniform administrative practice of all departments affected by said rule 14a to allow such sick leave with pay." Respondents argue that such long-continued, uniform administrative practice is of no significance because, under the civil service laws and article XXIV of the Constitution of this state (in material part hereinafter quoted), the adoption and enforcement of the controverted definition of sick leave are and at all times have been beyond the power of the Civil Service Commission and the State Personnel Board. They rely upon the well-established propositions that "An administrative officer may not make a rule

or regulation that alters or enlarges the terms of a legislative enactment. [Citations.] Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations.]" (Whitcomb Hotel, Inc., v. California Emp. Comm. (1944), 24 Cal.2d 753, 757–758, 151 P.2d 233, 236, 155 A.L.R. 405.)

The pertinent statutory and constitutional provisions, and respondents' contentions as to the effect of each, are as follows:

(1) On June 30, 1932, when the Civil Service Commission adopted its rule 14a, there was no mention of sick leave in the State Civil Service Act (Stats.1913, ch. 590, p. 1035, as amended; Deering's Gen. Laws, 1931, Act 1400). The commission had only the general power to "Enforce the provisions of this act and prescribe, and enforce suitable rules and regulations for carrying the same into effect" (id., § 5, subd. Third), and the power to classify and grade positions "to the end that like salaries shall be paid for like duties" (id., § 5, subd. First). Under the 1913 act, respondents contend, the commission had no power to make any rule concerning sick leave.

(2) On November 6, 1934, article XXIV of the California Constitution, an initiative measure, was adopted. Article XXIV (§§ 2, 3) provided for a State Personnel Board to administer and enforce, and to succeed to all powers and duties of other state officers and agencies under, the 1913 Civil Service Act, as amended. It further provided (§ 5, subd.(c)) that "The rules, regulations, [etc.] * * * heretofore *lawfully adopted* by the State officer or agency heretofore administering said laws [relating to civil service] are continued in force and upon the effective date hereof the same shall become the rules, regulations, [etc.] * * * of the board herein created subject to change by said board in the exercise of its powers herein conferred or as may be hereafter provided by law." (Italics added.) In 1937 the 1913 Civil Service Act was repealed and a new State Civil Service Act (Stats.1937, ch. 753, p. 2085; Deering's Gen.Laws, 1937, Act 1404) was enacted. (This is the act which was in force when the instant controversy arose.) Section 244 of the 1937 act provided, "All rules and regulations and orders pertaining to civil service heretofore *in effect* are continued in force until and unless amended or repealed as provided by this act." (Italics added.) Respondents contend that, since on their view rule 14a was not "lawfully adopted," it was not "continued in force" in 1934 by article XXIV of the Constitution, and was not "in effect" and "continued in force" by section 244 of the 1937 Civil Service Act.

(3) In addition to giving the State Personnel Board general rule-making power (§ 35, subd.(a)), power to "establish and adjust salary ranges * * * on the principle that like salaries shall be paid for comparable duties" (§ 70), and power "In order to secure substantial justice and equality among employees in the State civil service * * * [to] provide by rule for days, hours and conditions of work" (§ 154), the 1937 State Civil Service Act, for the first time in the history of our state civil service laws, contained a provision as to sick leave (§ 151, hereinafter quoted in material part). Respondents contend that the term "sick leave," as used in the 1937 act, has a well and generally understood meaning, namely, leave granted to one who is himself ill, and that such meaning cannot be enlarged by purported definition or construction by the State Personnel Board.

(4) At all times here concerned section 350 of the Political Code has provided that "So far as consistent with law the head of each department [the appointing power] may adopt such rules and regulations as may be necessary, to govern the activities of the department." Under this section, respondents urge, the power to grant and regulate sick leave remained with the heads of the respective departments as a matter necessary to the government of the activities of such departments.

We are of the view, for reasons hereinafter elucidated, that rule 191 was valid and operative during all times material to this controversy and, hence, that it is unnecessary to determine whether rule 14a was "lawfully adopted" in 1932, or "continued in force" in 1934 by the constitutional amendment or in 1937 by the provisions of section 244 of the act of that year.

Section 151 of the 1937 act[1] provided that employees shall be entitled to twelve

[1] Section 151 was amended (Stats.1939, ch. 898, § 10, p. 2509; Stats.1943, ch. 20, § 3, p. 137, and ch. 395, § 3, p. 1913) in respects not here material and since July,

days of sick leave with pay for a calendar year of service (rule 14a had so provided since 1932) "on the submission of satisfactory proof thereof as provided by rule of the board" and that "The board shall, by rule, provide for the granting of additional sick leave, with or without pay, or with reduced pay, or for accumulation of sick leave."

It appears that the Legislature by its enactment of the 1937 State Civil Service Act, regardless of the provisions of section 244, indicated its approval of the prior practice of the Civil Service Commission and of the State Personnel Board in allowing sick leave with pay, for the Legislature in section 151 adopted in material part the board's long-standing provision as to amount of sick leave and stated that the board should (as it had done) enact rules providing for accumulation of sick leave and allowance of additional sick leave. Further indicating legislative approval of the previous administrative practice was the statement of the purposes of the 1937 act (§ 1, subd.(c)), which included provision for a "comprehensive personnel system" wherein "The rights and interests of the State civil service employee are given consideration in so far as consistent with the best interests of the State" and "A high morale is developed among State civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of said employees."

We speak of the apparent legislative approval of the commission's and board's actions as to sick leave, only as showing the legislative intent when the 1937 provisions as to sick leave were enacted. As above suggested, we are here concerned with the validity of rule 191 in July, 1945—not with the validity of rule 14a on the date of its adoption in 1932, or on the effective date of article XXIV in 1934. (It may be noted in passing that grants of sick leave with pay to state civil service employees from the time of the adoption of rule 14a in 1932 until the effective date of the 1937 Civil Service Act were in any event valid, insofar as concerns at least one phase of respondents' arguments [contention numbered (4), hereinabove set forth], in that all such leaves were approved by the appointing powers.)

[1] Although the State Personnel Board has not formally adopted rule 14a it has by enforcing and amending such rule sufficiently established it as a rule of the board. In 1937, as above related, the board was directed by the Legislature (1937 Civil Service Act, § 151, supra) to make rules concerning "sick leave." As respondents admit, neither dictionaries [2] nor law dictionaries [3] nor reported decisions [4] expressly compel the conclusion that "sick leave" in section 151 means only leave granted to one who is himself sick and that such meaning cannot be enlarged by the board. Respondents rely upon the statement of Field, in his text on Civil Service Law, that "It is often said that to be entitled to sick leave it is neces-

1945, when the instant controversy arose, the 1937 Civil Service Act has been repealed (Gov.Code § 500035; Stats.1945, ch. 123, § 2) and a new Civil Service Act (Gov.Code, §§ 18500–19765; Stats.1945, ch. 123, § 1) enacted. The code provisions as to sick leave are now applicable to all state employees; the provisions here pertinent are otherwise unchanged. The sentence of section 151 of the 1937 State Civil Service Act above quoted is now section 18101 of the Government Code.

2 "Sick leave," according to Webster's New International Dictionary (2nd ed.), is "Leave of absence from duty granted on account of sickness, injury, or disability"; according to Funk & Wagnall's New Standard Dictionary (1944 ed.) it is "Leave of absence issued on the ground of injury or ill health." More supportive of respondents' position is the Oxford English Dictionary (1933 ed.) definition of "sick"; "appropriate or given up to, occupied by one or more persons in a state of illness as *sick-bay—berth—bungalow—bunk—chamber* * * *, of or pertaining to, connected with, persons suffering from illness, as *sick-allowance—book—club—cookery*, etc." Respondents argue, "Thus the noun to which the word 'sick' is so affixed takes on the aspect of being appropriate to or given up to, or occupied by, or as pertaining to, or connected with a person or persons who are in a state of illness. So a sick bay, a sick bungalow, or a sick chamber are appropriate to or occupied by ill persons—not relatives and friends of sick persons."

3 Anderson's (1893), Ballentine's (1930), Black's (1933), Bouvier's Law Dictionary, Rawle's 3d Rev., 1914, Bouvier's (Baldwin's Cent. ed., 1940), and Stroud's 1903 and 1913 supp.) law dictionaries do not define the term.

4 Words and Phrases does not define the term and no case on the subject has been found.

sary actually to be ill. From this it follows that one who is quarantined but who is not ill himself has no claim to sick leave." (Field, Civil Service Law (1939), p. 149.) Field in turn cites the 1922 opinion of the Comptroller General of the United States (1 Dec.Comp.Gen. 740) that, under the 1920 act reclassifying postal service employees (41 Stats. 1052, 39 U.S. C.A. § 823), "There is no specific provision for leave because of the employee being under quarantine, and, in view of the specific provision in the statute that sick leave shall be granted only upon satisfactory evidence of illness, it must be held that the only leave which may be granted to employees under quarantine but who are not personally ill is chargeable to regular annual leave and not to sick leave."

[2] We cannot agree that the Legislature, when it spoke of "sick leave" in section 151 of the 1937 Civil Service Act, had in mind altering the then well-established administrative practice and narrowing the scope of permissible sick leave allowance to the asserted common, well-known, limited meaning attributed to the term by respondents. The term actually has two widely known meanings. As used in civil service administration (and, indeed, in personnel management in private business and industry) it has acquired a technical meaning with which, it may be assumed, the Legislature was familiar. "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law * * *, are to be construed according to such peculiar and appropriate meaning or definition." (Code Civ.Proc. § 16.)

Establishing irrefragably that the term "sick leave" has acquired a widely accepted technical meaning appropriate to civil service administration are the civil service rules of 16 states, cited to us by petitioner, which define "sick leave" substantially as does rule 191 of the California State Personnel Board and which particularly include leave to attend a sick member of the employee's immediate family. In each of these 16 states the definition of "sick leave" was adopted by the agency charged with administering the system under presumed authority of a law which in this respect provided only that such agency had either general rule-making power, or power to make rules governing leave of absence, or power to make rules governing sick leave.[5]

[3-5] In view of our conclusion that the State Personnel Board, under section 151 of the 1937 Civil Service Act, had power to define sick leave as it has done, the following well-established propositions on which petitioner relies are applicable: "The construction of a statute by the of-

[5] Ala.Gen.Acts, 1939, No. 58, §§ 6, 9, subd. (b); Rules of State Personnel Board, rev. Oct., 1943, Rule XI, § 2, subd. (b).

Conn. Merit System Act, §§ 648e, 680e, Gen.St.Supp.1939; State Civil Service Rule II, am. June 26, 1942.

Fla. Merit System Regulations, art. XIV; Fla. Industrial Commission Regulation No. 43, effective July 1, 1945.

Idaho Code Ann.1932, § 49-206; Merit System Council Regulation II, § 4.

Ill.Smith-Hurd Ann.Stats., ch. 24½, § 42; Merit System Council Rules, art. XIV; Public Aid Commission, Bulletin 67, June 21, 1944, Rule I-B-1.

Ky.Rev.Stats., §§ 42.110 to 42.150; Personnel Rules and Regulations, Rule XI, § 3.

La.Acts 1940, Act 172; Department of State Civil Service Rule XI, § 4.

Me.Rev.Stats., 1944, ch. 59, § 4, subd. L; State Personnel Board Rule XI, part 2.

Mich.Const., art. VI, § 22; Civil Service Commission Rule XII. Mich.Pub.Acts, 1941, No. 370; Civil Service Commission of Wayne County Rule 15, § 2(b), effective Jan. 1, 1944.

Minn.Laws, 1939, ch. 441, § 6, subd. (a), and § 22, subd. (2); Civil Service Rules, § 13.8.

Neb.Sess.Laws, 1945, ch. 238, § 14; Regulations for a Merit System of Personnel Administration, art. XIV.

No.Car.Gen.Stats., 1943, § 126-2; Merit System Rule, May, 1941, art. XIV; Regulation on Attendance and Leave for County Welfare Departments, § 4.

So.Car.Civ.Code, 1942, § 4996-2; Rule for Merit System of Personnel Administration, rev. July 1, 1945, art. XIV; Administrative Regulations on Attendance and Leave, § 2, par. 2 (a).

Tenn.Civ.Service Act, Pub.Acts, 1939, ch. 221, §§ 6, 28; Rules and Regulations for Administering the Civil Service Act, Department of Personnel Bulletin 3, 1940, § 15.5.

Wisc.Civil Service Law, § 16.275; Civil Service Rule XV, § 5.

Wyo.Laws, 1937, ch. 88, §§ 3, 5; 1940 Wyo.Supp., §§ 103-1603, 103-1605; State Department of Public Welfare Rules, art. XIV.

ficials charged with its administration must be given great weight, for their 'substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute.' [Citations.] When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. [Citations.]" (Whitcomb Hotel, Inc. v. Cal.Emp.Comm. (1944), supra, 24 Cal.2d 753, 756–757, 151 P.2d 233, 235, 155 A.L.R. 405.)

Moreover, with particular reference to the administration of civil service, it is the policy of the courts of this state that "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere." (Maxwell v. Civil Service Comm. (1913), 169 Cal. 336, 339, 146 P. 869, 871; Pratt v. Rosenthal (1919), 181 Cal. 158, 164, 183 P. 542; Mann v. Tracy (1921), 185 Cal. 272, 274, 196 P. 484; Haub v. Tuttle (1926), 80 Cal.App. 561, 569–570, 251 P. 925, 928; Mitchell v. McKevitt (1932), 128 Cal.App. 458, 465, 17 P.2d 789.) "To narrowly proscribe the rule-making power of the [board] * * * would be to overlook one of the fundamental purposes of the policy of delegation of powers and to deprive the Legislature and the people of the state of one of the major benefits thereof. The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect, and provision by the Legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating the legislative function. [Citations.]" (First Industrial Loan Co. v. Daugherty (1945), 26 Cal.2d 545, 549, 159 P.2d 921, 923.)

[6] That the controverted rule is a reasonable one to carry out the purposes of the Civil Service Act is clear. Greater uniformity as to conditions of work within the various classifications and grades of positions is promoted by a uniform policy as to leave with pay rather than by leaving the matter to the varying discretions of the heads of departments. The granting of "sick leave" with pay under the circumstances enumerated in rule 191 tends to promote the efficiency, morale, and general welfare of the employee to whom such leave is granted. Moreover, allowance of leave with pay in such circumstances is a reasonable means of promoting efficiency among other state personnel. Where a member of an employee's immediate family has just died, or is seriously ill and nursing care cannot be obtained, not only might the employee himself be unable to work efficiently, but the impact of his emotional state upon, and the natural sympathies of, fellow employees might reflect upon their work. Allowance of leave with pay to one who has been exposed to contagious disease protects primarily, not such employee himself, but fellow employees who might otherwise be exposed. It thus appears that if the board had desired to so express its rules it could properly have provided for allowance of "sick leave with pay" to employees personally ill and for allowance of "leave of absence with pay" in the other circumstances enumerated in rule 191.[6] When the matter is considered in this way the question becomes: Is the board's action invalid because it has said, "Sick leave is hereby defined to mean * * *," instead of, "Employees shall be entitled to leave on the grounds. * * *"

Furthermore, it will be remembered, the Legislature appears to have agreed with the board's consistent and long-continued policy as to sick leave. The fact that the

6 In Colorado, for example, the Rules and Regulations for Administration of the Merit System in the County Department of Public Welfare, as amended January 1, 1945, provide for sick leave and (§ 8) for "Other approved leave (Personal). (a) 3 days for death in the family * * * (b) 3 days for illness in family * * *"

Legislature when in 1937 it enacted section 151 of the State Civil Service Act, when in 1939 and (twice) in 1943 it amended such section, and when in 1945 (after the validity of the board's definition had been challenged in Hatch v. Ward, (Cal.Sup.1946), 168 P.2d 22), it enacted the same language into section 18101 of the Government Code, did not define or limit the term "sick leave," indicates approval of the board's definition.

[7] Relative to respondents' contention that the State Personnel Board was powerless to adopt rule 191 in that by virtue of section 350 of the Political Code the power to grant and regulate sick leave was lodged exclusively with the heads of the several departments, we are satisfied that such section cannot properly be held effective to limit the power otherwise conferred on the board by article XXIV of the Constitution and the 1937 Civil Service Act. (See language of article XXIV and of the 1937 act quoted ante.)

For the reasons above stated we have concluded that the definition of sick leave in rule 191 of the State Personnel Board is authorized and valid.

Let a peremptory writ of mandate issue as prayed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.



27 Cal.2d 883

HATCH v. WARD, Chief Accounting Officer of Department of Industrial Relations, et al.

L. A. 19600.

Supreme Court of California.

April 4, 1946.

1. States ⇐67

Rule of the State Personnel Board defining "sick leave" for civil service employees as absence from duty of an employee because of certain reasons, including attendance on a member of his immediate family seriously ill and requiring the care or attendance of such employee, is valid and within the power of the board to adopt.

See Words and Phrases, Permanent Edition, for all other definitions of "Sick Leave".

2. States ⇐67

Rule of State Personnel Board, providing for allowance and cumulation to a total of 100 working days of sick leave with pay for civil service employee absent from duty because of attendance on a member of his immediate family seriously ill and requiring care or attendance of employee, is not invalid because it grants up to 100 days. Gen.Laws, Act 1404, § 1.

3. States ⇐51

A determination of the maximum length of necessary absence with pay of a civil service employee, on sick leave to care for a member of his immediate family who was seriously ill and requiring care and attention, is a function of the State Personnel Board. Gen.Laws, Act 1404, § 1.

4. States ⇐51

The question of the number of days of sick leave which can be cumulated by a civil service employee, and which can be allowed, is an administrative detail as to which courts should allow the State Personnel Board reasonable latitude. Gen. Laws, Act 1404, § 1.

5. States ⇐67

The fact that State Personnel Board, after controversy arose concerning its rule providing for allowance and cumulation to a total of 100 working days of sick leave with pay, amended the rule by providing that five consecutive days of sick leave shall be the maximum sick leave for any single period that may be granted to an officer or employee for care of members of his immediate family, did not establish that the rule prior to amendment was unreasonable. Gen.Laws, Act 1404, § 1.

In Bank.

Appeal from a judgment of the Superior Court of Los Angeles County, Emmet H. Wilson, Judge. Reversed with directions.

Petition for writ of mandate by Elizabeth Hatch, petitioner, against Mary F. Ward, as Chief Accounting Officer of the Department of Industrial Relations and others, respondents, to compel payment to petitioner of salary for period during which petitioner was necessarily absent from her duties in the office of the Industrial Acci-

dent Commission in order to care for her seriously ill mother. From a judgment denying the petition for writ of mandate, the petitioner appeals.

Judgment reversed with directions to issue peremptory writ of mandate as prayed.

Robert F. Shippee, of Los Angeles, for Appellant.

James H. Phillips, of Sacramento, as Amicus Curiae, on behalf of Appellant.

Robert W. Kenny, Attorney General, Walter L. Bowers, Assistant Attorney General, and R. C. McKellips, of San Francisco, for Respondents.

SCHAUER, Justice.

Petitioner, a civil service employee of the state of California, appeals from a judgment which denies her petition for writ of mandate to compel payment of her salary for a period which is the equivalent of 90 working days. During such period (from August 1, 1943, through December 10, 1943) petitioner was necessarily absent from her regularly assigned duties in the Los Angeles office of the Industrial Accident Commission in order to care for her seriously ill mother. Prior to the occasion in question petitioner, under the provisions of rule 14a of the State Personnel Board (hereinafter quoted in material part), had during eight years of service to the state, without any absence on account of sick leave with pay, accumulated 96 days of such leave at the rate of 12 days' sick leave for each year of service. The State Personnel Board in conformity with the mentioned rule ordered that petitioner be allowed sick leave with pay for the specified period. Petitioner's appointing power, the Director of Industrial Relations, has instructed respondent Ward, the Chief Accounting Officer of the Department of Industrial Relations, to issue no check for petitioner's salary for the 90-day period until petitioner's claim "has been upheld by a competent court." In controversy is the validity of rule 14a of the State Personnel Board as it read in July, 1943. We have concluded that the rule was valid and that petitioner is entitled to the writ sought.

The more detailed factual basis of this proceeding, in essential particulars, is as follows: On July 28, 1943, respondent accounting officer informed petitioner that she had accumulated, as of July 16, 1943, 96 days of sick leave. Petitioner requested, and her appointing power refused to recommend, leave with pay for petitioner's necessary absence to care for her mother. On November 12, 1943, the appointing power reported that petitioner had been dismissed from her position. Petitioner duly appealed to the State Personnel Board from the actions of the appointing power. On February 11, 1944, the board ordered that petitioner be allowed 90 working days of sick leave and that she be reinstated in her position. On May 11, 1944, the board denied a petition of the appointing power for rehearing of petitioner's appeal. As heretofore stated, respondent accounting officer, under instruction of the appointing power, refuses to issue and deliver to petitioner a check for her salary for the period from August 1, 1943, through December 10, 1943. By a petition which alleges the facts above stated, petitioner sought mandate to compel respondent accounting officer to issue and deliver to petitioner a check upon the revolving pay-roll fund for such salary and to compel respondent Controller of the State of California to reimburse the revolving fund by warrant in favor thereof. The general demurrer of respondents to the petition was sustained without leave to amend upon the ground that the provisions of rule 14a here material were invalid.

Rule 14a provided for allowance and cumulation to a total of one hundred working days of sick leave with pay and further provided that "Sick leave is hereby defined to mean the absence from duty of an * * * employee because of [stated grounds including] * * * attendance upon a member of his immediate family seriously ill and requiring the care or attendance of such employee." There was no limitation on the amount of accumulated leave with pay which might be granted in any particular circumstance.

[1] Respondents challenge the validity of the rule on two main grounds. They first argue that the board was without power to adopt the portion of the rule above quoted. Their contentions in this regard are those of respondents in Nelson v. Dean, ante, Cal.Sup., 168 P.2d 16, this day filed. For the reasons stated in our opinion in that case such contentions cannot be sustained.

[2] By amendment of rule 14a on December 28, 1943 (i. e., after this controversy arose), it, was provided "that five con-

secutive days of sick leave shall be the maximum sick leave for any single period that may be granted to an officer or employee for the care of members of his immediate family." Respondents' second ground of attack upon the rule is that, conceding its validity since such amendment, prior to the promulgation of the quoted five-day limitation the rule was unreasonable. The purposes of the 1937 Civil Service Act (Stats. 1937, ch. 753, p. 2085, as amended; Deering's Gen.Laws, 1937, Act 1404), as stated in section 1 thereof, included promotion of "economy and efficiency in the State service" and provision for a comprehensive personnel system wherein "The rights and interests of the State civil service employee are given consideration in so far as consistent with the best interests of the State" and "A high morale is developed among State civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of said employees." Respondents urge that the rule as it read at the time here material permitted consideration of the personal welfare of one in petitioner's situation to the detriment of the morale of fellow employees and the interests of the state.

We do not think it proper for us to hold, contrary to the implied finding of the personnel board, that the fact that an employee during his necessary absence for a period of 90 or 100 working days was paid his salary must have had the unfavorable effects on other employees and on the state asserted by respondents. As pointed out in Nelson v. Dean, ante, Cal.Sup., 168 P.2d 16, such absence with pay for a lesser period can in proper circumstances be obviously beneficial to all concerned and not only permissible under, but an aid to carrying out, the purposes of the Civil Service Act.

[3, 4] It is peculiarly the function of the board charged with administering the act to determine the maximum length of necessary absence with pay which is consistent with and in furtherance of the purposes of the act. The question of the number of days of sick leave which can be cumulated and allowed is one of those administrative details as to which, it is often pointed out, the courts should allow reasonable latitude. See, e. g., Monahan v. Department of Water & Power (1941) 48 Cal.App.2d 746, 753, 120 P.2d 730; Stohl v. Horstmann (1944) 64 Cal.App.2d 316, 323, 148 P.2d 697.

[5] As hereinbefore related, after this controversy first came before the board it amended the rule by adding the five-day limitation above quoted. Respondent Ward argues that the reasonableness of the rule as so changed shows that the rule prior to such amendment was, and was regarded by the State Personnel Board as, unreasonable. We cannot agree that the board's action in amending the rule has any such significance. It is to be expected, and it is a fundamental and desirable purpose of delegating rule-making power, that the board, as it gains experience in the practical operation of its rules, will from time to time amend such rules, better to effectuate the policies and purposes of the act. The rule prior to its amendment may, in the particular application now before us, have emphasized one purpose of the enabling act more than other purposes, but we do not think that it can be held that such rule necessarily excluded any other purpose, or contravened, enlarged, or limited any of the stated purposes. That respondents or the board or this court may be of the view that the rule as amended is better adapted to carry out the provisions of the act, is not material.

The judgment is reversed with directions to the trial court to issue its peremptory writ of mandate as prayed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

74 Cal.App.2d 127

CRUMBACK v. MURDOCK et al.

Civ. 3512.

District Court of Appeal, Fourth District, California.

April 22, 1946.

1. Appeal and error ⇐1069(1)

Where liability clearly appeared from testimony of defendant driver, evidence on issue of liability could not be said to be so close that fact that jury was out only 40 minutes would be indicative of failure to give real consideration to evidence and of the arrival at a verdict through passion and prejudice.

2. Damages ⇐132(3)

$25,000 to a 26 year old married man with a life expectancy of 38 years, who was the father of one child and expecting another, for a broken back and other painful and permanent injuries, was not excessive.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Williard E. Crumback against John Gilbert Murdock and Byron G. Foss for personal injuries resulting from a collision between plaintiff's automobile and a truck owned by defendant Foss and operated by defendant Murdock. Judgment for plaintiff, and defendants appeal.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

Eckhart A. Thompson and Galen McKnight, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries resulting from a collision between an automobile operated by the plaintiff and a pick-up truck owned by the defendant Foss and operated by the defendant Murdock. The accident happened on December 2, 1944, and the trial of the action was begun on May 21, 1945. A jury brought in a verdict in favor of the plaintiff for $25,000, and the defendants have appealed from the judgment which followed.

[1] The only point raised is that the amount of damages awarded is grossly excessive and could have been arrived at only through the influence of passion and prejudice. Incidentally, it is argued in this connection that, although conflicting, the evidence on the issue of liability was very close; that the jury was out only forty minutes; and that it follows that the jury must have given no real consideration to the evidence with respect to the extent of respondent's injuries. We do not regard the evidence on this issue as close. Liability clearly appears from the testimony of the defendant driver himself, and it may not be assumed that the jury spent much time on that issue.

Briefly stated, the appellants argue that the evidence clearly shows that the respondent was still improving at the time of the trial, a little less than six months after the accident, and that there is no satisfactory evidence of any permanent disability. It is argued that even the respondent testified that his back was improving and his headaches becoming less frequent; that the doctor called by the respondent testified that a good restoration had been had of the shape of the vertebra which had been broken; and that the doctor called by the appellants testified that he found everything healed and normal, that the prognosis was good, that he could find nothing which would prevent the respondent from resuming his normal occupation but this would depend considerably on the individual, and that the respondent's headache and dizziness condition was subsiding. What the respondent testified in this regard was that he did not then have headaches as often as he did "the first month or two" and that the pain in his back was "less than it was at first." This could well be true without indicating a continuing improvement at that time. While the respondent's doctor testified that he considered that there had been a good restoration as far as the shape of the broken vertebra is concerned his testimony, as a whole, indicates that other conditions were not so satisfactory. Even the testimony of the appellants' doctor lends itself to a different interpretation than that which they suggest.

The respondent was 26 years old, with a life expectancy of 38 years. He had a wife and one child and was expecting another. Before entering the military service he had been employed as a truck driver in work which required him to lift and handle heavy timbers. At the time of the

accident he was in military service, having passed all physical examinations, and was assigned to duty as a cook, working 17 hours a day every other day. On his off-days he was working in a raisin packing plant where his duties required him to lift heavy boxes of raisins above his head.

In this accident the respondent was pinned under his own automobile with his back in a jack-knifed position, he was taken to a military hospital where he was found to be suffering from a broken back consisting of a compressed fracture of the third lumbar vertebra, from a severe concussion of the brain with possible brain contusion, from gasoline burns, and from contusions and abrasions of the head and body. The respondent testified at the trial that he still had headaches and dizziness, had lost most of his strength, and had been unable to do any work since the accident; that he had continuous pain in his back, which gets worse at times; that he had a headache almost every day and when he walked or over-exercised this got worse and he became dizzy; that he had had dizzy spells about five times in the last two or three weeks, and that about six times in the last month he had had spells of nausea, causing vomiting; that a week previously he had been discharged from the military service on account of disability; and that he did not have the headaches as often as he did the first month or two.

An army doctor, who had treated the respondent at a military hospital near Fresno from December 2, 1944 to February 19, 1945, testified that when the respondent was brought to this hospital he was suffering from pain in his back and his head, that he had some gasoline burns, that he had received a blow on the head and that he was in moderate shock. He then testified that there was a spinal fracture, the third lumbar vertebra being crushed, that because of the patient's abdominal condition and low blood pressure, and because of his acute general injuries, they were delayed for four or five days in treating the fracture of his spine; and that in the meantime he was given blood plasma and other treatment. With respect to the treatment for the spine fracture he testified that the patient was strung up by his heels and by his thorax and his head thrown back in a marked hyperextension when the spine was forcibly manipulated and the fracture sprung back into position; that a plaster cast, extending from his knee to his armpit, was then applied to hold his back in that over-corrected position; that such a cast is usually kept on for six weeks, when a shorter cast is applied; and that this plaster cast is uncomfortable and many patients are not able to tolerate it. There is evidence that after these casts were removed steel braces were applied from his hips to his shoulders. He still wore these braces at the time of the trial and will have to wear them for at least another year and probably two. After about twelve weeks, the respondent was removed from the hospital near Fresno and taken to a hospital at Santa Ana where he remained about thirteen weeks and until shortly before the trial.

While this doctor testified that there had been a good restoration of the fracture insofar as the bone itself was concerned he testified that this referred merely to the shape of the bone and that this "is not the final answer"; that in such fractures cartilage discs and joints are also injured and that these injuries to the soft tissues in some cases not only produce a painful condition but cause a disability in addition to the fracture itself; that in spine fractures of this type "between one third and one half of them are not rehabilitated in spite of the best treatment we know, are not rehabilitated"; that in fractures of this type "the end result is usually accomplished in six to eight months, and in a good percentage of these patients we get a good recovery. However, if there is considerable pain at the end of six months, as there is in this patient, the strong probability is he will have a permanent disability and pain in that back of a fairly high degree." He further testified, with respect to the headaches, that he could not tell whether they would continue to grow worse or better. On cross-examination, he stated that he was unable to see that this case was one "in the upper brackets" insofar as good results after a fracture are concerned. This doctor again examined the respondent during the trial, after which he testified that he found certain objective symptoms, as distinguished from what the patient told him, which consisted of (1) all motions of his back are performed guardedly and slowly in an attempt to protect his back movement; (2) he has not re-established the normal curves in his back which is necessary to get a good back that will perform the job it is required to do; (3) that he does have abnormal curves, including one which causes him to stand off-balance;

(4) and that this is associated with a constricture of the muscles controlling his spine movements, and that "as long as that constricture persists, and it may be permanent, he will continue to have pain."

The appellants' doctor, who examined the respondent two days before the trial, testified that the respondent complained of a great deal of pain in the lower portion of his back which was such as to force him to keep his hands behind his back when he was climbing on the table; that when he asked the respondent to go through the usual motions of bending foward and backward ar ' from side to side "he was unable to perform all of these functions in a normal manner"; that when he himself bent the patient foward "the lower portion of the back seemed to be held somewhat by some spasm of muscle"; and that "it is possible that some of the pain which he still has at the present time may gradually disappear as time progresses, and the back will stabilize itself as it was before." When asked if he thought the respondent would finally be able to do the work he did prior to the time he entered the army this doctor replied: "The X-ray evidence we have in this case would lead us to expect that. However, the complaints of pain which this man has, it is hard to see how he will be able to go about and do that work unless the pain entirely ceases." He further testified that while it was usual in cases of fractured backs for patients to entirely recover within a year some cases took longer and "in some cases they never recover," that in examining the respondent he found a mild curve in this vertebra "which is sort of rotated somewhat." With respect to the blow on the head which this respondent suffered this doctor testified that "one would have to diagnose it as severe cerebral concussion," and that he was unable to state whether or not there was also a contusion of the brain. When asked for his opinion as to whether or not the respondent will ever entirely recover from his headaches this doctor testified: "Assuming the history is true, and the progress of the headaches cease, I would say that he would have trouble the rest of his days."

[2] In the light of the evidence, which we have but briefly referred to, it cannot be held that it was insufficient to justify an inference that some of the injuries received by the respondent would result in some considerable permanent disability. It may be observed that the testimony of these two doctors, read in its entirety, tends to support that conclusion considerably more than can be disclosed by such short quotations therefrom as are practicable here. There can be no doubt that the respondent suffered from serious injuries which entirely incapacitated him at the time of the trial, and the evidence justifies the inference that considerable permanent disability will result. Under the well-known rules, which need not be here repeated, it cannot be said that the verdict exceeds any amount justified by the evidence. Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513. While the amount of the verdict is large it cannot be held that there is such an absence of evidence as to indicate that it was influenced by passion or prejudice.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



74 Cal.App.2d 70

PEOPLE v. PUGHSLEY.

Cr. 3977.

District Court of Appeal, Second District, Division 2, California.

April 17, 1946.

1. Homicide ⇐250, 257(1)

Evidence authorized conviction of assault with a deadly weapon with intent to commit murder and of manslaughter.

2. Jury ⇐29(6)

Where both defendant and her counsel stated that defendant was willing to waive right to a trial by jury, statement of deputy district attorney that people were willing to submit case on testimony taken at preliminary examination subject to right of either side to offer any additional evidence desired was the equivalent of a waiver by the people of a jury trial, so that, both sides having waived jury, the proceeding with trial without a jury did not deprive defendant of her constitutional rights. Const. art. 1, § 7.

3. Jury ⇐29(6)

Waiver of jury trial by the people may be expressed by any word or act that clearly indicates to the court the wishes of counsel for the people. Const. art. 1, § 7.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Thelma Pughsley was convicted of assault with a deadly weapon with intent to commit murder and of manslaughter, and she appeals.

Affirmed.

Walter L. Gordon, Jr., and Crispus A. Wright, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

[1] Having been accused of murder and of assault with a deadly weapon with intent to commit murder, appellant was convicted of the latter offense and of manslaughter. The only ground of appeal is that "the defendant was tried without a jury in violation of her constitutional rights." In view of the fact that the evidence submitted to the court shows conclusively that the appellant by the use of a deadly weapon under the heat of passion or excitement shot and killed one Elmer L. Wright, a human being, and that her identity was definitely established, no question remains for consideration except that raised by appellant's assignment.

In this she must fail. After both parties had announced ready for trial defendant's counsel and defendant both in audible language stated to the court in reply to its inquiry that appellant was willing to waive her right to a trial by jury. The deputy district attorney thereupon stated: "We are ready your honor. * * * So far as the people are concerned we are willing to submit our case on the testimony taken at the preliminary examination, subject to the right of either side to offer any additional evidence they desire."

[2, 3] That the deputy district attorney who represented the people at the trial heard and comprehended the defendant's waiver of a jury trial is established by the fact that after defendant and his counsel had audibly stated that it would be a court trial the deputy announced his readiness to proceed and to submit the case upon the record made at the examining trial. Such conduct could indicate nothing other than that the people waived a trial by jury. Such waiver may be expressed by any word or act that clearly indicates to the court the wishes of counsel. People v. Smith, 71 Cal.App.2d 555, 163 P.2d 94; People v. Bastio, 55 Cal. App.2d 615, 131 P.2d 614. There is no constitutional or statutory provision specifying the manner in which such waiver must be expressed other than Article I, Section 7 of the Constitution.

The judgment is affirmed.

McCOMB, and WILSON, JJ., concur.



HEIMANN et al. v. CITY OF LOS ANGELES.

Civ. 14971.

District Court of Appeal, Second District, Division 2, California.

April 12, 1946.

Rehearing Denied April 24, 1946.

Hearing Granted June 11, 1946.

1. Eminent domain ⇐271

Action by abutting property owners against city for damages resulting from erection of a viaduct in street adjacent to their property was distinct from an action in eminent domain, since it involved damage to private property as a result of public use to which a public thoroughfare was subjected and not the taking of private property for a public use. Const. art. 1, § 14.

2. Eminent domain ⇐297

In action by abutting property owners against city for damages resulting from erection of a viaduct in street, trial court properly confined evidence to market value

of abutting property at time construction of viaduct allegedly was commenced and at time it allegedly was completed, and properly excluded evidence of market value 8 years before construction was commenced when it became known that city contemplated erection of the viaduct some time in the future. Const. art. 1, § 14.

3. Eminent domain ⇐271

Damages are not recoverable for depreciation in market value of property due to a proposed improvement by a municipality. Const. art. 1, § 14.

4. Eminent domain ⇐285

City was not liable in damages to abutting property owners for blocking of streets and consequent interference with ingress to and egress from abutting property by Works Progress Administration during construction of a viaduct in street under contract with city or for the placing of construction materials on abutting property, in absence of showing that city by contract or otherwise sanctioned the acts of contractor in so doing. Const. art. 1, § 14.

5. Eminent domain ⇐295

Abutting property owners suing city for damages resulting from erection of a viaduct in street could not recover damages for unreasonable delay in construction of the viaduct in absence of evidence or offer of proof of any such unreasonable delay or to negative the presumption of regularity of official action. Const. art. 1, § 14.

6. Evidence ⇐142(1)

In action against city by abutting property owenrs for damages resulting from erection of a viaduct in street, trial court properly excluded testimony of plaintiffs as to prices paid by other public bodies for property in the vicinity. Const. art. 1, § 14.

7. Evidence ⇐142(1), 558(8)

Evidence of price paid for land adjacent to a parcel being condemned is not admissible on direct examination, but may be admissible on cross-examination to test the accuracy of opinion of witness who has testified as to value of condemned property.

8. Eminent domain ⇐307(3)

In response to allegations in complaint seeking damages for injury to abutting property resulting from erection of a viaduct in street, trial court properly instructed jury concerning city's right under police power to erect a viaduct in street, legitimate exercise of police power, and measure of damages for injury to abutting property. Const. art. 1, § 14.

9. Eminent domain ⇐302

An action to recover damages against city for injury resulting from a change in use of a street is a claim for unliquidated damages and does not draw interest. Const. art. 1, § 14.

10. Costs ⇐18

Where judgment in superior court is for an amount which could have been awarded by municipal court, plaintiff is not entitled to recover his costs.

11. Costs ⇐18

Action against city of Los Angeles by abutting property owners for damages resulting from erection of a viaduct in street could have been filed in municipal court, and plaintiffs, having commenced such action in superior court, were not entitled to recover their costs where judgment therein was for less than $2,000. Const. art. 1, § 14.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa and Leslie E. Still, Judges.

Action by Gustave A. L. Heimann and others against City of Los Angeles, etc., to recover damages to abutting property resulting from erection of a viaduct. From a judgment in their favor, plaintiffs appeal.

Judgment affirmed.

John F. Poole and E. H. Delorey, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Charles F. Reiche, Asst. City Atty., and Arthur William Green, Deputy City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in their favor after trial before a jury of an action to recover damages as abutting property owners resulting from the erection of a viaduct on West First Street, Los Angeles.

The material facts are these:

Plaintiffs are the owners of two parcels of real property which are adjacent to the viaduct constructed on West First Street over Glendale Boulevard. On July 10,

1931, the city of Los Angeles filed a condemnation action which resulted in a judgment whereby a portion of the lots above mentioned was condemned. In such action plaintiffs were paid full compensation for the land taken together with severance damage to the remainder of their property.

In 1932 defendant city of Los Angeles installed in First Street and streets adjacent thereto stanchions and foundations for a proposed steel viaduct over Glendale Boulevard. This work was done in connection with the widening of First Street and Beverly Boulevard and consisted in the building of foundations in the street which were carried up to within two or three feet of the surface of the street, buried, and the street paved over them. The purpose was to have the foundations so that if a bridge was constructed in the future it would not be necessary to make large holes in the pavement. The actual construction of the viaduct commenced on September 1, 1940, and was completed in October, 1942. The viaduct was constructed by the Works Progress Administration under a contract with the defendant city. The jury awarded plaintiffs damages in the sum of $800.

There are presented for our determination seven questions which will be stated and answered hereunder **seriatim**:

First: *Is the instant case (1) in eminent domain or (2) to recover damages by a property owner for injury to his property resulting from the erection in the street adjacent to his property of a viaduct?*

[1] It is the latter, and is predicated upon a provision in Article I, section 14 of the Constitution of the State of California which reads in part: "Private property shall not be * * * damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *." It is to be noted that this cause of action is entirely separate and distinct from a cause of action in eminent domain. In a cause of action in eminent domain private property is *taken* for a public use, while in the instant case private property is not being *taken* for a public use but private property is *damaged* as a result of the public use to which a public thoroughfare is subjected. (See Reardon v. City and County of San Francisco, 66 Cal. 492, 500 et seq., 6 P. 317, 56 Am.Rep. 109; Rose v. State of California, 19 Cal.2d 713, 719 et seq., 123 P.2d 505, 510 et seq.*)

Second: *Did the trial court commit prejudicial error in refusing to permit plaintiffs to prove the market value of their property in 1932?*

[2, 3] This question must be answered in the negative. Plaintiffs alleged in their complaint that the construction of the viaduct "commenced on or about September 1, 1940, and was not completed until October, 1942"; they further alleged that in 1932 defendant had threatened to construct the viaduct in question and that as the result of such threats their property was damaged. The law is settled that plaintiffs are not entitled to recover any damages by reason of the depreciation of market value in property due to a proposed improvement by a municipality. (Atchison, Topeka & Santa Fe R. Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 517, 57 P.2d 575.) In the present case the trial court properly confined the evidence to the market value of plaintiffs' property on or about September 1, 1940, the date it was alleged that the construction of the viaduct was commenced, and to October 3, 1942, the date it was alleged the viaduct was completed. Under the rule of law above stated it was immaterial whether or not the market value of plaintiffs' property was depreciated on or about 1932 due to the fact that it was known that the city contemplated the erection of a viaduct sometime in the future.

Third: *Did the trial court err in refusing to permit plaintiffs to prove damages to their property resulting from (a) blocking streets in front of and surrounding their property during the time the viaduct was being erected, (b) placing of material on their property during the construction of the viaduct and, (c) unreasonable delay in the construction of the viaduct?*

[4, 5] This question must also be answered in the negative. The city of Los

* The phrase "eminent domain" appearing in the last paragraph on page 719 of 19 Cal.2d in Rose v. State of California should have been deleted from the opinion since such phrase is not a part of Article I, section 14 of the Constitution of the State of California. The blackfaced heads throughout the text of the Constitution of the State of California have been inserted to assist the readers by the publishers of the Constitution of the State of California.

Angeles is not liable for any of said items of alleged damage. (a) A municipality is not liable if a private contractor blocks streets and interferes with ingress to and egress from private property during the time an improvement is being made. (McCray v. Manning, 22 Cal.App. 25, 28, 133 P. 17.) (b) Neither is a city liable for placing construction materials on private property abutting an improvement, if the municipality does not by contract or otherwise sanction the act of the contractor in so doing. (c) There is nothing in the evidence or in any offer of proof to indicate that there was an unreasonable delay in the construction of the work or to negative the presumption of the regularity of official action.

Fourth: *Did the trial court err in excluding proffered testimony of plaintiffs as to the price paid by other public bodies for property in the vicinity of the plaintiffs?*

[6, 7] This question must be answered in the negative. The rule is settled in California that evidence as to the price paid for land adjacent to a parcel which is being condemned is not admissible on direct examination but may be admitted on cross-examination to test the accuracy of the opinion of the witness who has testified as to the value of the condemned property. (Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 532, 28 P. 681.) In the present case plaintiff was offering in his own behalf to testify as to prices paid by the Bureau of Water and Power of the City of Los Angeles, State Board of Education and the State of California for property located in the vicinity of his land. He was not offering to testify as to the value of his own land, therefore the objection was properly sustained.

Fifth: *Did the trial court err in instructing the jury as follows:*

a) *"You are instructed that defendant under and pursuant to its police power has a right to build and construct a viaduct or bridge within its streets for the health, welfare and safety of the traveling public."*

b) *"You are instructed that police regulations which are designed to subserve the public health, welfare and safety and affect all persons alike within the sphere of their operations constitute legitimate exercise of the police power of a municipality and such regulations will not be construed to be unlawful when they are generally admitted to be essential to the safety and well-being of society and when sanctioned by usage and necessity."*

c) *"Without regard to any such plans the owners of the real property involved in this case are entitled to the difference in market value of their properties immediately before and immediately after the construction of the viaduct or bridge, nothing more, nothing less."*

[8] This question must be answered in the negative. In paragraph six of plaintiffs' complaint it was alleged: "That on or about the 3rd day of October, 1942, the defendant herein wrongfully and against the will of plaintiffs and without legal authority, by and through its several contractors, officers, agents, servants and employees, entered in and upon said First Street and caused to be erected and constructed for a public use, to wit: for street purposes and public travel, a bridge and viaduct in, upon and along said First Street and Beverly Boulevard, in front of and in close proximity to the property described in paragraph II hereof of the complaint herein; that said construction was commenced on or about the 1st day of August, 1940, and was not completed until October 3, 1942; that said bridges and viaduct as constructed upon, along and through First Street between Edgeware Road and Lucas Avenue and Beverly Boulevard from Lucas Avenue to Witmer Street, and more particularly in front of and adjacent to the plaintiffs' property aforesaid, is some nine hundred feet (900) in length, fifty (50) feet in width, and thirty-five (35) feet in height." Responsive to the foregoing allegations are the trial court's instructions as set forth above. Each of the instructions, in view of the allegations in the complaint, constituted accurate statements of the propositions of law involved therein.

Sixth: *Did the trial court err in not allowing plaintiffs interest on the amount of their damages from the date of the commencement of work upon the viaduct?*

[9] This question must likewise be answered in the negative. In an action, as in the present case, to recover damages against a city for injury resulting from a change in the use of a street the claim being for unliquidated damages, does not draw interest. (McNutt v. City of Los Angeles, 187 Cal. 245, 259, 201 P. 592.)

Seventh: *Did the trial court err in granting defendant's motion to strike plaintiffs' cost bill?*

[10, 11] This question must be answered in the negative. The law is settled that where the judgment in the superior court is for an amount which could have been awarded by the municipal court the plaintiff is not entitled to recover his costs. (Beckjord v. Slusher, 22 Cal.App.2d 678, 683, 72 P.2d 563.) In the present case the action could have been filed in the municipal court, and the judgment being for less than $2000 plaintiffs were not entitled to recover their costs.

Collier v. Merced Irr. Dist., 213 Cal. 554, 572, 2 P.2d 790, Rose v. State of California, 19 Cal.2d 713, 720, 123 P.2d 505, and City of Oakland v. Pacific Coast Lumber and Mill Co., 172 Cal. 332, 334, 156 P. 468, Ann.Cas. 1917E, 259, relied on by plaintiffs, are not here in point for the reason that each of the cases mentioned is factually distinguishable from the instant case. Therefore plaintiffs were entitled to recover their costs in such cases.

Since no error appears in the record the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



74 Cal.App.2d 51

FINNEGAN v. HERNANDEZ.

Civ. 15114.

District Court of Appeal, Second District, Division 2, California.

April 17, 1946.

1. Trusts ⇐72

In order for a conveyance of realty to constitute a resulting trust where the purchase price is paid by another, it must be shown that the grantee had no beneficial interest.

2. Trusts ⇐72

Where plaintiff purchased contract for purchase of home on consideration that decedent would care for plaintiff until plaintiff died and plaintiff had contract assigned to decedent but continued to make the payments, the fee vested in decedent at time of assignment and a resulting trust in favor of plaintiff did not arise.

3. Trusts ⇐89(5)

A resulting trust can be established only by clear and convincing evidence by him who asserts its existence.

4. Trusts ⇐86

The codal provision providing that, when a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, does not apply in case of a conveyance to a child or other natural object of bounty, in which event a gift will be presumed. Civ. Code, § 853.

5. Trusts ⇐86

Where the relationship between him who pays the consideration for property and him who takes the title thereto is such that the payor is under obligation to make provision for the grantee, the presumption arises of an intention of the payor to discharge his obligation and the purchase is evidence of a gift.

6. Husband and wife ⇐273(1)

Where plaintiff in pursuance of agreement assigned contract of purchase of realty to decedent in consideration that decedent would take care of plaintiff for rest of plaintiff's life, and agreement also provided that plaintiff would continue payments and if deed were received during plaintiff's lifetime, plaintiff was to have life interest, and if plaintiff predeceased decedent vendor was to convey to decedent, decedent had a remainder after life estate of plaintiff which passed to decedent's husband as community survivor at her death.

7. Trusts ⇐80

In establishing a resulting trust in realty in a transaction where title is taken in the name of one person and the payments are made by another, the paramount and ultimate fact of such a transaction is the payor's intention in advancing the moneys.

8. Trusts ⇐89(3)

In action to quiet title to realty where contract of purchase was purchased by plaintiff and assigned to decedent upon consideration that decedent care for plaintiff for duration of plaintiff's life, evidence sup-

ported finding that plaintiff made payments in order to vest fee in decedent and a life estate in herself.

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

Action by Fannie A. Finnegan against Simon Hernandez, wherein defendant filed a cross-complaint. From a judgment quieting title in favor of defendant, plaintiff appeals.

Affirmed.

Mark Edwards, of Santa Paula, for appellant.

Charles F. Gerard, of Ventura, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment quieting title to her home in favor of defendant. She contends (1) that having paid the consideration, the deceased wife of defendant, Antonia Hernandez, as grantee became trustee of a resulting trust in plaintiff's favor, and (2) that the evidence does not support the findings and the judgment that plaintiff intended to, or did, convey a life estate to herself with the remainder to decedent.

The Established Facts.

About April 1, 1937, plaintiff was aged, ill and feeble. She desired to acquire a home and to have decedent care for her as long as plaintiff might live. Pursuant to plaintiff's request decedent made inquiry and found one F. S. Hinkle who held a contract for the purchase of a home in Santa Paula from a building and loan association for $800. The exact balance due does not appear. He demanded $200 for his equity which plaintiff paid. The contract was assigned to decedent who received also from Hinkle the book containing receipts for sums which she thereafter sent to the association at the times of making subsequent payments. At the time of the transaction with Hinkle plaintiff and decedent agreed "that in consideration of Antonia Hernandez' taking care of and assisting in caring for said Fannie A. Finnegan during her lifetime" the latter would give the property to Antonia and the latter at the same time promised to care for and assist plaintiff during her lifetime. After payment of the $200 she caused Hinkle to assign to decedent his contract of purchase and the passbook of the association. Antonia thereby assumed the obligation to pay the balance due to the association. Plaintiff took possession of the passbook and prior to November 10, 1941, made "periodical payments upon said agreement." During such period in performance of the parol agreement decedent cared for and assisted plaintiff and fully performed her covenants until her decease. Immediately subsequent thereto defendant, husband of Antonia, in a probate proceeding properly instituted and conducted, caused a decree to be entered on December 8, 1941, by the Superior Court of Ventura County, setting aside to him as the community survivor the entire estate of decedent, including her interest in the contract assigned to her by Hinkle. Thereafter defendant paid the balance due on the contract, towit, $156.35, and received a deed from the association on July 12, 1943.

Upon such facts a decree was entered adjudging that by reason of the oral agreement of the women decedent became entitled to a conveyance of the property; that such right passed to defendant by virtue of the probate decree and that he is entitled to have the title vested in him; that he is the owner of the property but that his title is subject to a life estate in plaintiff for her natural life with the right to occupy it while she lives; that she must pay defendant all sums he has paid on account of taxes and the balance on the contract and must pay all taxes falling due during her occupancy and avoid injuring any improvement on the property.

No Resulting Trust.

[1, 2] The contention that decedent became trustee of a resulting trust by virtue of plaintiff's advancement of the purchase payments cannot prevail. To constitute a resulting trust it must be shown that the grantee had no beneficial interest. 54 Am. Jur. 152. The findings establish beyond a peradventure that decedent's interest in the title arose at the moment of the assignment to her by Hinkle. From the complaint and from plaintiff's testimony it is established that the fee of the property should vest in Antonia and that she was to render valuable services therefor over an indefinite period.

[3-5] A resulting trust can be established only by clear and convincing evidence by him who asserts its existence. Moulton v. Moulton, 182 Cal. 185, 187 P. 421; Gomez v. Cecena, 15 Cal.2d 363, 101 P.2d 477. The provisions of section 853 of the Civil Code do not apply in case of "a child or other natural object of bounty." In such event

a gift will be presumed. Gomez v. Cecena, supra, 15 Cal.2d at page 367, 101 P.2d 477. Where the relationship between him who pays the consideration for property and him who takes the title thereto is such that the payor is under obligation to make provision for the grantee, the presumption arises of an intention of the payor to discharge his obligation and the purchase is evidence of a gift. Spitler v. Kaeding, 133 Cal. 500, 502, 65 P. 1040; Lezinsky v. Mason Malt Whisky Distilling Company, 185 Cal. 240, 196 P. 884.

Appellant points out that the cases cited relate to situations in which legal heirs were the beneficiaries of the gifts. But the testimony of appellant established not only a genuine personal friendship between herself and decedent who had served plaintiff for fifteen years. It shows also that decedent was thereafter to nurse and serve plaintiff for an indefinite period. She had also cared for Mr. Finnegan for two years in his lifetime. Such services had been often gratuitously rendered, for Mrs. Finnegan had been the recipient of old age relief. Such was the situation when Hinkle accompanied Antonia to plaintiff's bedside where the oral contract was made. No relationship could more justifiably warrant an inference of intention to give than that which existed between the two women at the time of the Hinkle assignment. Plaintiff then stated to decedent that if she should receive a conveyance of the property during her lifetime it would vest a life interest in herself with the remainder to Antonia. In the light of their mutual confidence in each other the oral agreement justified the finding that plaintiff caused the contract to be assigned to decedent with intent to vest her with the fee.

However, it is not accurate to say that plaintiff's act was a gift of the property to Antonia. Not only had she been served by decedent for over 15 years prior to Hinkle's assignment at slight expense to herself, but in addition to her promise to serve following the assignment decedent did in fact care for plaintiff for over four and a half years. On the basis of 50 cents a day for her nursing plaintiff and caring for the latter's home after the assignment Antonia earned no more than $810, which exceeds the total advanced by plaintiff. Payment of the monthly sums by plaintiff to the association was not a gift. Such payments constituted plaintiff's own appraisal of the actual value of decedent's service to her and should be deemed virtual compensation for the property. Therefore it is clearly an inaccuracy to say that plaintiff advanced the "periodical payments" aggregating about $650 as a gratuity. It would be inequitable to deny decedent's ownership of the fee in view of the assignment to her, of plaintiff's declared intention to invest her with the fee and of the consideration she actually paid with service.

But aside from plaintiff's evident appraisal of the services of decedent the facts show clearly an intention on the part of plaintiff to advance the payments for decedent's benefit as well as for her own. She testified that it was agreed that at her death the fee should vest in Antonia. The predominating facts in the transaction are the chronic illness of plaintiff and the faithful service of decedent. The determination evidently derived by the court below is that such portion of the money advanced on the contract as was not repaid with nursing and domestic service, if any, was a gift.

Plaintiff Intended Only a Life Estate for Herself.

[6] The complaint alleged that the women orally agreed that if decedent would take care of plaintiff and assist her in taking care of the premises during plaintiff's lifetime appellant would give decedent the property; that pursuant to such agreement decedent assumed the Hinkle contract which was assigned to her; that the women agreed that plaintiff would advance the consideration for purchase and that if a deed were received during plaintiff's lifetime a life interest would be vested in plaintiff with the remainder to decedent, and if plaintiff should predecease Antonia the association should convey the property directly to Antonia. In accordance with such pleading plaintiff testified that Antonia brought her boy along with Hinkle to witness her agreement with plaintiff, namely, that plaintiff should live on the property all of her life and pay out the contract but should thereafter make no more payments; then it was to be Antonia's. Such pleading and proof leave no doubt of plaintiff's intention to hold only a life estate and that the remainder should go to Antonia.

[7, 8] The contention that the vesting of the remainder in decedent was subject to a condition subsequent is disposed of by the finding that plaintiff agreed to and did advance the payments on the purchase price in return for Antonia's promise to care for

and assist her friend. The paramount and ultimate fact of such a transaction is the payor's intention in advancing the moneys. Quinn v. Reilly, 198 Cal. 465, 468, 245 P. 1091. In this case the court found that appellant made the payments for the purpose of vesting the fee of the property in decedent and a life estate in herself. The testimony of plaintiff and the Hinkle assignment to Antonia support that finding. No valid reason appears why the judgment awarding plaintiff a life estate in the property with remainder to defendant should be disturbed.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



74 Cal.App.2d 66

MARKULICS v. MAICO CO., Inc., et al.

Civ. 15221.

District Court of Appeal, Second District, Division 2, California.

April 17, 1946.

1. Evidence ⇐9

A court may take judicial notice of the impotence of a B battery to develop fire.

2. Evidence ⇐4

Judges cannot pretend to be ignorant of what is within the knowledge of most men of their jurisdictions.

3. Sales ⇐441(3)

Evidence of physical facts was sufficient to support findings that a hearing aid and accessories, purchased by plaintiff from defendants, were fit for their intended purposes, and that burns on plaintiff's body were not caused by chemicals from or electricity generated by batteries of such aid.

4. Appeal and error ⇐1071(6)

One suing for breach of implied warranty of fitness of a hearing aid, purchased by her from defendants, was not aggrieved by trial court's failure to make findings on plaintiff's allegations respecting such warranty, defective condition of device, items of damage suffered, and demand for cancellation of sale contract, in view of findings that plaintiff suffered no damage by use of instrument and that device and accessories were reasonably fit for their purposes and not defective.

5. Trial ⇐391

The prayer of complaint is not an allegation of fact and hence requires no finding by trial court.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Helen Markulics against the Maico Company, Inc., and others for breach of an implied warranty of the fitness of a hearing aid. Judgment for defendants, and plaintiff appeals.

Affirmed.

Earl Malmrose and A. James Ayers, both of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant was denied recovery on her action for damages resulting from the breach of an implied warranty of the fitness of a hearing aid. The instrument consisted of (1) a bakelite amplifier to be attached to her garment between the breasts; (2) batteries contained in a cloth case to be strapped to the outside of the left thigh; (3) a belt to extend around the abdomen; (4) an ear mold fitted into the left ear, and (5) insulated wires connecting the batteries with the ear piece and the microphone. On June 3, 1943, she contracted for the purchase of the device, received it on June 11, wore it each day until the 17th when, while at work, she felt an itching sensation near her left breast under the microphone and on the left thigh beneath the battery. She promptly "placed a napkin and a handkerchief underneath the battery and also on my breast." Shortly thereafter the device lost its power. On arriving at her home she discovered multiple third-degree burns on the thigh where she had worn the battery and under the left breast. She had second degree burns on her abdomen. The third degree burns were green or greenish black like the color of the B battery. The sack which contained the bat-

tery and her upper stocking near the thigh burns were also of a greenish color. The attending physician testified that the second degree burns had healed in December, 1944, but that plaintiff was nervous, and her scars on the thigh and breast were visible in March, 1945.

[1-3] Appellant contends that the evidence does not support the finding that the hearing aid and accessories were fit for the purpose for which they were intended. On the contrary appellant's testimony that she had successfully used the device for five days prior to the burn disproves such contention. The record is devoid of evidence of the device's lack of efficacy as an aid to hearing.

The trial court by processes of deduction and elimination derived that the burns could have been caused by the hearing aid in only two ways: (1) by chemicals from the batteries; (2) by electricity generated thereby. Since the batteries were dry cells and contained no violent acid, such burns could not have been caused by them. The absence of corrosion from their exterior is proof that no dangerous chemicals leaked or exuded from the cells. Their freedom from acid contents was established also by the fact that the sack which held them was not in the least impaired. Such would indubitably have followed the leak of destructive chemicals. Even had the batteries contained sulphuric acid there was no means by which it could have reached the abdomen which was encircled with a harmless piece of cloth or the breasts against which was suspended her brassiere underneath the innocent plastic microphone.

Conceding, arguendo, that the current generated by the B battery was of sufficient power to effect a third degree burn, clearly it could not have done so without first destroying the insulation of the connecting wires which had suffered no deterioration. Such a current would also have burned the battery bag if not the napkin and handkerchief inserted to avoid the pricking sensation. None of these was in the least impaired, nor did the brassiere give proof of electrical heat. On the contrary the battery did not have sufficient voltage to cause a flesh burn. It was proper for the court to take judicial notice of the impotence of a B battery to develop fire. 20 Am.Jur., p. 111, § 97; 31 C.J.S., Evidence, § 9, p. 510; People v. Associated Oil Company, 211 Cal. 93, 105, 294 P. 717; Coughlin v. Great Western Power Company, 183 Cal. 548, 551, 191 P. 920. Judges cannot pretend to be ignorant of what is within the knowledge of most men of their jurisdictions. Varcoe v. Lee, 180 Cal. 338, 346, 181 P. 223; 31 C.J.S., Evidence, § 9, p. 513. Moreover, the facts (1) that the area affected on the thigh had burns of five or six different sizes in a space six inches square and (2) that they were greenish black indicate that some substance, and not an electric current, operated on the thigh as well as on the breast. The undergarments in both places were free from such colors. No explanation is offered of the group of burnt splotches instead of a continuous blistered area. The court's inferences from the physical facts are not irrational or arbitrary but are reasonable and logical and therefore support its findings. Patten & Davies Lumber Company v. McConville, 219 Cal. 161, 164, 25 P.2d 429; Morse v. Custis, 38 Cal.App.2d 573, 576, 101 P.2d 702.

[4, 5] Appellant deems herself aggrieved by the failure of the court to make findings upon her allegations with reference to (1) respondents' warranty of the fitness of the device, (2) its defective condition, (3) the numerous items of damage suffered, and (4) the demand for a cancellation of the written contract for the purchase of the hearing aid. The answer thereto is in the findings that appellant suffered no damage by the use of the instrument and that the device and accessories were "then reasonably fit for the purpose for which it was to be used" and were not defective. The prayer is not an allegation of fact and therefore requires no finding.

The issues were thoroughly explored and they were settled by reasonable deductions and inferences and correct conclusions.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

74 Cal.App.2d 5

U. S. MACHINERY CO. v. INTERNATIONAL METALS DEVELOPMENT, Inc.

Civ. 7202.

District Court of Appeal, Third District, California.

April 15, 1946.

1. Sales ⇐479(6)

Under the uniform sales law, a purchaser under a conditional sale contract may keep the goods upon payment of any balance due, after court determines the amount of any damages buyer has sustained by breach of warranty by seller, and, whatever may be the nature of the action brought, the equities between the parties should be adjudicated in the one action. Civ.Code, § 1789(1) (a).

2. Sales ⇐479(6)

Under conditional contract of sale failure of buyer to include in tender a small amount of interest due did not render the tender insufficient.

3. Sales ⇐479(13)

Where contract for sale of machinery provided that upon buyer's default the amount paid by buyer should be retained as rental for the use of the machinery, but the machinery as delivered was not assembled and had no rental value, court improperly awarded seller damages for the use thereof, in addition to the machinery and the amount paid thereon.

4. Contracts ⇐318

Forfeitures are abhorrent to the law and will not be declared if there is any other reasonable theory upon which the case can be settled.

5. Sales ⇐479(9)

In conditional sales, the title is held only for security and when a vendor gets the whole amount due him, together with interest, costs and attorney's fees, he has recovered all he is equitably entitled to under his contract and should not be permitted to resume possession of the property sold and retain the initial payment and recover in addition damages for detention. Civ.Code, § 1789(1) (a).

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by U. S. Machinery Company against International Metals Development, Inc., to recover the balance due under a lease or a contract of sale of certain machinery, wherein defendant filed a counterclaim. From the judgment, defendant appeals.

Reversed with directions.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Charles L. Gilmore, of Sacramento, for respondent.

ADAMS, Presiding Justice.

On May 10, 1943, the parties to this action entered into a written agreement, in the form of a lease, by the terms of which plaintiff leased to defendant a 100 horsepower Diesel engine and a 100 KVA generator and exciter, together with a switchboard panel. The rental agreed to be paid by lessee was $3,500 plus sales tax of $105, of which $1,855 was payable at once, and the balance of $1,750 in two monthly installments of $875 each, plus interest. The agreement also provided that upon payment of the installments and compliance with the other conditions of the agreement the lessor, at lessee's election, would execute and deliver to the lessee a bill of sale of the property and sell same to lessee for $1. The execution of this agreement had been preceded by oral negotiations between the parties, in the course of which defendant had paid $1,855 on April 18th, and had taken possession of the equipment, unassembled, on May 5th. On execution of the agreement it also executed and delivered to plaintiff two promissory notes for $875 each, one payable June 10, and the other July 10, 1943.

After defendant had taken possession of the equipment it was found that more than thirty parts of same were missing, and it was not put into operating condition until sometime in August, 1943, by which time defendant had expended the sum of $1,480.64 thereon. These expenditures were the subject of correspondence between the parties, which correspondence culminated in a demand from plaintiff, by a letter dated October 9th, that "Unless payment in full on your contract is received by October 20, it will be necessary to send our trucks for the equipment." Nothing was stated as to the amount due, which had not been agreed upon, and our attention is di-

rected to no other demand. On October 14th defendant replied to this letter, listing the expenses it had incurred and showing the balance it deemed to be due, after deducting such expenses as it had incurred, to be $303.48, which it stated would be paid within a few days. On November 26th defendant wrote plaintiff, enclosing a check for $303.48, stating that same, together with costs of repairing the machinery, completed payment of the balance due. Plaintiff returned this check to defendant on December 2d, and this action followed.

The complaint alleged the execution of the "lease", annexing a copy of same as an exhibit. The reasonable value of the property was alleged to be $3,605, and the reasonable rental value of same $1,167 per month. Plaintiff prayed for a judgment for the recovery of the machinery, or for the sum of $3,605, the value thereof, $1,167 per month from August 10, 1943, for rental, for attorney's fees in such sum as the court might fix, and for such further relief as the court might deem proper.

Answering this complaint defendant set up its payment of $1,855, its necessary expenditure of $1,480.63 to render the equipment usable, and its tender of $303.48 as the balance due plaintiff upon the notes. Also by way of counterclaim it set up the items which it had paid to condition the property. It prayed for a judgment in its favor for $1,480.64, in plaintiff's favor for $303.48, and for general relief.

After trial by the court without a jury, findings were made. It was found that the contract was not one of lease but a conditional sales contract, that defendant had paid $1,855 thereon and executed the two promissory notes of $875 each, and that the total purchase price of the machinery was $3,506, plus $1; that the promissory notes had not been paid nor any interest thereon, nor had the sum of $1 been paid; that there was an implied warranty of the equipment sold by plaintiff that same was in a good and serviceable condition; that same was not in such condition when sold and that defendant necessarily spent $1,446.52 to put same in working condition; that defendant had tendered plaintiff the sum of $303.48 in full settlement of its claims, but that such tender was insufficient to cover the amount due; that the contract provided that defendant should pay all expenses, including attorney's fees, that might be incurred by plaintiff to enforce the contract or repossess the machinery, and that $350 was a reasonable atttorney's fee. The value of the machinery was found to have been at all times $3,605, and it was found that plaintiff had been damaged in the sum of $1,500 by reason of the detention and use of same by defendant. Judgment was entered providing that plaintiff recover possession of the machinery, together with $1,500 and attorney's fees of $350; that in case delivery could not be had plaintiff should recover $3,605, the value thereof, together with the said damages and attorney's fees. Defendant was awarded the sum of $1,446.52 on its counterclaim, but was given no credit for the $1,855 paid on account of the purchase price, and there was no requirement for surrender of the notes.

The effect of this judgment, then, is that if plaintiff recovers the machinery it will have machinery valued by the court at $3,605, and will also have, not only the $1,855 which defendant paid it, but also the $1,500 awarded by the judgment—a total of $6,960, less the $1,446.52 awarded to defendant, or $5,513.48 for equipment which it agreed to sell for $3,500; and if defendant is unable to deliver same it will have to pay plaintiff the full value of the machinery, the $1,500 damages, together with attorney's fees and costs of suit, for machinery found to be worth only $3,605, and will have lost the initial payment of $1,855 less the amount of the judgment in its favor of $1,446.52.

Such results can hardly be said to be equitable. Respondent has not attempted to justify them, for it has filed no brief in this court in support of the judgment. We shall therefore assume, for the purposes of this opinion, that the court properly held that the so-called lease was a conditional sales contract; that there was an implied warranty that the equipment sold was reasonably fit for the particular purpose for which it was sold; that said machinery was not in good or serviceable condition or reasonably fit for the purposes for which it was sold; that defendant was entitled to offset against the purchase price the amount found to have been expended by it in order to put same into serviceable condition, and that defendant tendered to plaintiff the sum of $303.48, which defendant refused.

Appellant's contention before this court is that the judgment of the trial court

should have been that defendant was entitled to have permanent possession and ownership of the equipment upon payment to plaintiff of the sum of $303.48. This contention is based upon section 1789 of the Civil Code of this state which is a part of the Uniform Sales Act enacted in 1931, and which provides:

"Remedies for breach of warranty. (1) Where there is a breach of warranty by the seller, the buyer may, at his election:

"(a) (Recoupment.) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price; * * *."

It urges that under this statute defendant was entitled to do what it did do—set up against the seller the breach of warranty by way of recoupment in diminution of the price; and that a proper judgment in the action would have been in favor of plaintiff for only the amount found due it as the balance of the purchase price, after deducting the down payment and the amount of the expenditures necessary to put the equipment into serviceable condition.

In support of this contention appellant relies especially upon Peuser v. Marsh, 218 N.Y. 505, 113 N.E. 494, Ann.Cas.1918B, 913, in which case the plaintiff sued to recover possession of a piano, together with stool and scarf, which defendant had purchased under a conditional sale contract which provided for a down payment and the balance in monthly installments. It was there averred that defendant had failed to pay a due balance of $141, with accrued interest. Defendant set up certain warranties and the breach thereof to his damage in the sum of $200. The question presented on appeal was whether, in the case of a conditional sale, where the seller sought to recover the goods by means of an action of replevin, the buyer might defend by pleading a breach of warranty by way of recoupment in diminution or extinction of the price. The court held that since it was provided by the Uniform Sales Act, which had been adopted in New York, and which provided, as does section 1789 of our Civil Code, that in case of a breach of warranty by the seller the buyer of personal property might at his election "accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price," the defense pleaded by the buyer was proper. Peuser v. Marsh was followed in Studebaker Corporation of America v. Silverberg, Sup., 199 N.Y.S. 190, 193.

In W. H. Bintz Co. v. Mueggler, Idaho, 154 P.2d 513, an action to recover the possession of a bread-wrapping machine sold to defendant on a conditional sales contract, defendant set up a breach of warranty, and was awarded the sum of $554.05 as damages therefor. It was also decreed that he should be entitled to retain possession of the machine until such time as plaintiff returned a trade-in machine, repaid the down payment of $150, and paid the judgment for damages; but that defendant was also entitled, at his election, to keep the machine upon paying to plaintiff the difference between the unpaid balance and the damages awarded to defendant. Except that the Supreme Court of Idaho held that the amount of damages allowed was too large, the decision of the lower court was affirmed under the provisions of the Uniform Sales Law, then in effect in Idaho. Peuser v. Marsh, supra, was cited and followed; also Wayne Tank & Pump Co. v. Harper, 118 Okl. 274, 247 P. 985, holding that the plea of breach of warranty may be shown as a defense pro tanto in a replevin action between the parties based on a conditional sales contract for the sale of machinery.

In Mercantile Trust Co. v. Roland, 143 Okl. 190, 288 P. 300, 304, it was held that a replevin action is sufficiently flexible to authorize a settlement of all the equities between the parties arising from or growing out of the main controversy. It was said that it was necessary, in such an action, for a defendant to prove a loss or damage in an amount equal to the balance then due upon the contract, but it was also stated that in the event that the total damages suffered by defendant should be found to be less than the balance due under the sale contract, judgment should be entered for the plaintiff *unless the defendant should elect to pay to plaintiffs such difference and retain the property.*

In W. H. Bintz Co. v. Mueggler, supra, it was said that by its prayer for general relief the plaintiff had submitted itself to the equity side of the court, and this justified the relief which was granted. Plaintiff's prayer in the case before us makes a similar appeal to the equity side of the court, and we think that, in this case as in that one, the trial court should have pro-

vided in its judgment that defendant, having elected to retain the machinery, should be permitted to do so on condition that it pay to plaintiff the balance due on the purchase price, with interest and attorney's fees, after deducting the amount found due defendant for damages for the breach of warranty.

While it is said in some cases that to justify such a judgment the amount found due for damages for breach of warranty should equal or exceed the balance due on the purchase price, section 1789 of the Civil Code above cited specifically provides that where there is a breach of warranty a buyer may accept the goods and set up the breach of warranty by way of recoupment either *in diminution* of or in extinction of the price; and if it were to be held that under such statute defendant could keep the goods only if the amount to which he was found entitled as damages for breach of warranty was sufficient to extinguish the debt, the word diminution would have no meaning. There are no reported decisions in this state that are directly in point here, but analogy may be found in cases holding that damages for the fraud of a seller may be set up as a defense in a possessory action. In Nevada Land, etc., Co. v. Sistrunk, 220 Cal. 174, 178, 30 P.2d 389, an action in ejectment where it was alleged that plaintiff was entitled to possession of land which defendant had contracted to purchase since defendant had failed to make certain payments in conformity with the contract, defendant set up fraud as an affirmative defense by way of cross-complaint and alleged that the land was not worth the amount that he had already paid on the purchase price. The trial court sustained a demurrer to the cross-complaint without leave to amend, and struck out the defense of fraud in the answer. But the Supreme Court said that the right of a defrauded vendee to set up the fraud of the vendor by way of "defensive relief" as an answer to the demand, or in abatement of damages in a suit for the purchase price, had been recognized in numerous cases, and that "There would be little consistency or justice in a rule which, when suit was for the payments due under the contract, would allow the buyer to set up damage caused by the fraud of the seller in answer to the demand or in abatement of damages, but, when the action was one for possession of the premises and to quiet title, would not allow the same matter to be pleaded as a defense against a forfeiture for failure to make the payments which the law says he may withhold." Kent v. Clark, 20 Cal.2d 779, 783, 128 P.2d 868 871, 142 A.L.R. 576, presented a similar state of facts. The court said that in such a situation, as the vendee's failure to make payments was excused (where there was fraud on the part of the seller), the vendee might set up such fraud in an action by the vendor to have the contract canceled, to quiet title to the property and for possession. Also see Kaluzok v. Brisson, Cal., 167 P. 2d 481, and General Refrigeration Sales Co. v. Roberts, 145 Kan. 333, 65 P.2d 269.

[1] A reasonable and equitable construction of section 1789, supra, is that a purchaser under a conditional sales contract may be permitted to keep the goods upon payment of any balance which the court finds due to plaintiff after determining the amount of the damages the buyer has sustained by reason of a breach of warranty by the seller; and the equities of the situation dictate that whatever may be the nature of the action brought, the equities between the parties should be adjudicated in the one action. It is the apparent purpose of the Uniform Sales Law to so provide.

[2] It is alleged in defendant's answer, and the evidence shows without contradiction, that defendant tendered to plaintiff the sum of $303.48, as the balance due under the contract. The trial court, however, found that this amount was insufficient since it did not include $1 provided for in the contract. The provision of the contract in this respect was that the title to the property should remain in the lessor until all of the payments therein provided for had been made, "whereupon, should Lessee so elect, the Lessor shall make, execute and deliver to said Lessee a bill of sale of said property, and sell to said Lessee the said property for the sum of One Dollar ($1.00)." However, the court did not find the value of the property to include this $1, and it has been held that same is not proper to be considered a part of the purchase price under such a contract. See Rapoport v. Rapoport Exp. Co., 90 N.J.Eq. 519, 107 A. 822, 823; 8 Cal.L. Rev. 192.

While the amount tendered by appellant did not include a very small amount of interest on the unpaid balance of the purchase price, to hold that because of this omission plaintiff should recover the machinery together with the $1,855 already

paid and an additional $1,500 for damages, reduced only by the amount allowed defendant for breach of warranty, can hardly be said to be equitable, especially where there had been no judicial determination nor any agreement between the parties as to the amount which defendant should be allowed as damages for the breach of warranty—all of which emphasizes the propriety of determining in the one action, whether it be deemed one in claim and delivery or otherwise, the balance due either party, and the entering of a money judgment for either as the facts might warrant. And this is especially true where the parties themselves have appealed to the equity side of the court.

[3] But even if defendant were not entitled in this action to keep the goods upon payment of the balance found due to plaintiff, we think that the trial court erred in adjudging that, in case delivery could not be had, plaintiff, in addition to recovery of the equipment, should recover the sum of $1,500 by reason of defendant's detention and use of same. Upon what basis and upon what evidence the trial court fixed this sum of $1,500 does not appear from its findings, and the only evidence upon which it could be based was the following: "Q. Do you know the reasonable rental value of this whole equipment here, whole plant as of the date of this contract? A. The reasonable rental value of that equipment is between $350.00 and $400.00 a month."

As of the date of the contract the equipment was not assembled and obviously had no rental value. Also it does not appear from the findings or the record for what period of time the rental was allowed. Even assuming that evidence was sufficient to justify the amount awarded, the sales contract provided that in the event of default by the lessee (buyer), the amount paid prior to the date of repossession should be retained by the lessor (seller) "as rental for the use of said machinery during the time it has been in the custody of the Lessee." Defendant paid to plaintiff the sum of $1,855 on account of the purchase price, for which it was given no credit by the court, and since the only basis in the evidence for a finding of damages to plaintiff for detention was "rental", plaintiff was obviously adequately compensated therefor by the amount of the advance payment, especially in view of the fact that it never did put the equipment into operating condition.

[4, 5] As hereinbefore stated, the prayer to plaintiff's complaint invites the doing of equity as does that of defendant's answer. Forfeitures are abhorrent to the law and will not be declared if there is any other reasonable theory upon which a case can be settled. In conditional sales the title is held only for security, and when a vendor gets the whole amount due him, together with interest, costs and attorney's fees, he has recovered all that he is equitably entitled to under his contract. And to permit plaintiff to resume possession of the property in this case, to retain the initial payment of $1,855, and to recover in addition damages for detention, seems to us to be contrary to the fundamental principles of equity, especially where the balance due is so small in comparison to the value of the machinery and in view of the faulty condition of same when delivered. And, as previously stated, respondent has not defended the judgment before this court.

Appellant urges that we should reverse the judgment in the case with directions to the trial court to enter judgment in favor of plaintiff in the sum of $303.48. This, however, we are unable to do, since it is apparent upon the face of the record that plaintiff is entitled to some small amount of interest on the deferred payments, which interest the said sum of $303.48 does not cover. The judgment is, however, reversed with instructions to the trial court to enter judgment that defendant retain possession of the property on condition that it pay to plaintiff, within a specified time, the balance of the purchase price found due, with interest, and attorney's fees as fixed by the trial court, after deducting from the purchase price the $1,855 payment made by defendant in April, 1943, together with the sum of $1,446.52 found to be the amount of the damages suffered by defend ant by reason of plaintiff's breach of warranty; otherwise plaintiff to recover possession of the machinery together with said attorney's fees and costs. Plaintiff, in the event of such payment by defendant, should also be ordered to deliver to defendant the two promissory notes given it as evidence of the two unpaid installments on the purchase price.

PEEK and THOMPSON, JJ., concur.

74 Cal.App.2d 1

PEOPLE v. KORST.

Cr. 3983.

District Court of Appeal, Second District, Division 1, California.

April 15, 1946.

Rehearing Denied April 26, 1946.

Hearing Denied May 13, 1946.

1. Criminal law ⇐1173(2)

In prosecution for burglary, that court did not instruct that unanimity of verdict was necessary was not prejudicial error requiring new trial where jury had all agreed on the verdict at time it was returned and defendant had waived polling of the jury. Pen.Code, § 1181, subd. 5; § 1182.

2. Burglary ⇐41(1)

In prosecution for burglary, evidence supported conviction.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Frederick L. Korst was convicted of burglary, with a prior conviction, and he appeals.

Affirmed.

Paul E. Tapley and E. W. Miller, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from judgment and order denying defendant's motion for a new trial.

Defendant was accused by information with the crime of burglary; the conviction of a prior offense of burglary was also alleged. A jury trial resulted in a verdict of guilty. The prior conviction was admitted on arraignment.

It is contended on appeal that the evidence is insufficient to support the judgment; also that the failure of the court to instruct the jury that a verdict of guilty required a concurrence of all twelve members of the jury, was error.

The evidence reveals that on the night of July 16, 1945, about 11 p. m., two officers while cruising in an automobile saw defendant running down the street "in a peculiar manner". Their suspicions aroused, they followed a short distance and finally drew up and stopped the car. One of the officers stepped out of the car and informed defendant, "we are police officers". Defendant immediately fled and while being pursued was seen by the officer to throw away some object which, when found after defendant's capture, was the purse or handbag, and contents, belonging to the complaining witness, Juanita Jensen. Miss Jensen lived in a one room apartment on the ground floor of an apartment building located about one block from where the defendant was first seen by the officers. On the same night at about the same time herein mentioned, the handbag had been stolen. It had been placed on the bed near a partially open window when Miss Jensen arrived home about 11 p. m. About five minutes thereafter, attracted by a noise, she entered the room, found the screen open, the window raised and the purse gone.

With regard to the return of the jury and recording of the verdict, the reporter's transcript contains the following:

"The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

"The Foreman: We have, your Honor.

"The Court: Will the foreman please hand the verdict to the Bailiff? Will you read the verdict? (The Court examines the verdict.) You recall the instruction which the Court gave you as to the degree of burglary; instructions that if you find the defendant guilty of burglary it is up to you to determine the degree thereof as burglary in the first degree. I will have to ask you to return and complete the verdict by filling in the degree.

"The Clerk: Have they decided the degree?

(At this point the foreman of the jury stepped forth, accepted the verdict and inserted the word "First" in pencil writing preceding the word "Degree".)

"The Court: Was that decided upon in the jury room?

"The Foreman: Yes.

"The Clerk: (reading) 'The People of the State of California, Plaintiff, vs. Frederick L. Korst, Defendant.

" 'We, the jury in the above entitled action, find the defendant, Frederick L. Korst, guilty of Burglary, a felony, as

charged in the information, and find it to be burglary of the first degree.

"'This 19th day of September, 1945.

"'(Signed) I. Sonnenschein, Foreman.'

"Ladies and gentlemen of the jury, so say you one, so say you all? (All members of the jury replied "Yes".)

"The Court: Do you care to have the jury polled?

"Mr. Drabin: We will waive polling of the jury, if your Honor please.

"The Court: Very well. Do you wish a recording of it?

"Mr. Drabin: I will waive the recording of the verdict, a reading of the verdict after recording.

"The Court: I want to thank you very much, ladies and gentlemen, for your attendance here today. I will ask the Clerk how your records are as to further attendance.

"Mr. Sonnenschein is excused, and the remainder of the jury are to return here Thursday, September 27, 1945, at 8:45 A. M. in Department 44. Mr. Sonnenschein is permanently excused, having finished his term, and I take it the other jurors are to return Thursday, September 27, 1945, at 8:45 A.M. in Department 44 of this building.

"Mr. Drabin: At this time, if your Honor please, on behalf of the defendant, Frederick L. Korst, I wish to make a motion for a new trial on the grounds set forth in 1181 and 1182 of the Penal Code, and more particularly upon Section 5 of that section regarding instructions to the jury.

"Arguing my motion, it will be based upon the grounds, if your Honor, please, that in your instructions to the jury you failed, first, to instruct the jury, when they left the court room, to appoint or elect one of their number as foreman, and the foreman to bring the verdict back into the court; and, point two, that your Honor wholly failed to instruct the jury that this was a criminal procedure it is necessary for there to be a unanimity of the verdict, and that instruction was not given to the jury.

"The Court: Apparently there was unanimity, and that is what they answered upon. You had an opportunity to determine that by polling the jury.

"Mr. Drabin: Yes, but, if your Honor please, that instruction should have been given to the jury at the time and I think it is a material instruction to be given to the jury, and the failure to do so prejudiced the right of the defendant to a fair and impartial trial. I think if your Honor will review the record and look at the instructions you will find that you did not give that instruction, and I think the court reporter in taking down the instructions did not receive any such instruction."

Following a somewhat extended discussion between the court and counsel the motion was denied with the following comment:

"The Court: The Court sees no ground for charging the court with the burden of a further trial in this matter, and on the grounds of your motion I will have to deny the motion."

[1] Manifestly, even though the failure to instruct on the matter in question were an oversight, a new trial would be necessary if such error had been prejudicial. It is evident, however, that no prejudice resulted. It seems apparent from the above record that defendant's counsel was the only one who noted the oversight and was aware of it before the jury retired. A reminder at that time would not have been unethical nor would it have been in violation of any duty resulting from the relation of attorney and client in a criminal action. The trial court had tendered a remedy; the offer was rejected. Having declined to poll the jury, the defendant can not now be heard to complain. The motion for a new trial, in the circumstances, was properly denied.

[2] The evidence supports the judgment and there being no prejudicial errors, the judgment and order are affirmed.

YORK, P. J., and WHITE, J., concur.

73 Cal.App.2d 947

PEOPLE v. HERMES.
Cr. 3966.

District Court of Appeal, Second District, Division 1, California.
April 12, 1946.

1. Criminal law ⇐1178

Where argument in brief was limited to three of nine grounds assigned for reversal, Court of Appeal would not search the record for purpose of ascertaining whether other errors occurred in the trial.

2. Criminal law ⇐1178

Failure of appellant to make any attempt to support a certain ground of appeal amounted to a tacit confession that any errors therein were without prejudice.

3. Constitutional law ⇐266
Criminal law ⇐12, 662(6)

The code section authorizing testimony given at preliminary examination by a witness for people, who defendant cross-examined or had opportunity to cross-examine, to be read at the trial is not violative of state constitutional provisions for due process and for taking depositions in the presence of accused and counsel in criminal cases other than homicide or violative of Sixth Amendment to Federal Constitution relating to accused's right to be confronted with witnesses against him. Pen.Code, § 686, subd. 3; Const.Cal. art. 1, § 13; U.S. C.A.Const. Amend. 6.

4. Criminal law ⇐543(2), 1153(6)

Whether prosecution has satisfactorily shown to the court that prosecuting witness cannot with due diligence be found within the state, so as to authorize the reading at the trial of her testimony given at the preliminary examination, is primarily addressed to trial judge and his determination will not be interfered with unless reviewing court is satisfied that trial judge abused his discretion. Pen. Code, § 686, subd. 3.

5. Criminal law ⇐662(6)

Where witness for the people was fully cross-examined by defendant at preliminary hearing upon all issues concerning which she gave testimony, defendant was "confronted with the witness" in constitutional sense. Pen.Code, § 686, subd. 3; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Confronted With the Witness".

6. Criminal law ⇐662(1)

The object of Federal and State Constitutions with respect to confronting an accused with witnesses against him is to provide accused full opportunity for cross-examination. Const.Cal. art. 1, § 13; U.S. C.A.Const. Amend. 6.

7. Criminal law ⇐544

General statement by defendant's counsel that defense had discovered other information and could not cross-examine absent prosecuting witness thereon, in absence of showing that testimony would have been different had witness been present at trial or that evidence of an impeaching character had materialized since preliminary examination, was insufficient to support objection to reading at trial of the testimony of prosecuting witness given at preliminary examination when prosecuting witness could not be found. Pen.Code, § 686, subd. 3.

8. Criminal law ⇐543(2)

Evidence sustained finding of trial judge in burglary and attempted rape prosecution that prosecuting witness could not with due diligence be found within the state so as to authorize the reading at the trial of her testimony given at the preliminary examination. Pen.Code, §§ 459, 686, subd. 3.

9. Criminal law ⇐369(2)

Independent crimes, the evidence of which has no tendency to prove some material fact in connection with particular crime charged, may not be proven against a defendant, but rule does not exclude evidence of other crimes when evidence thereof does tend to prove some material element of crime for which defendant is on trial even though minds of jurors might be prejudiced.

10. Criminal law ⇐371(6)

Where in view of charges, it was incumbent on prosecution, in proving burglary, to satisfy mind of trier of fact beyond a reasonable doubt that defendant entered dwelling of prosecuting witness with intent to commit rape, testimony of defendant's admission that when he had a sex desire he was liable to break into a house and commit such an act and had done so before was relevant in establish-

ing defendant's intent when he entered dwelling notwithstanding that it incidentally disclosed another offense. Pen.Code, § 459.

11. Criminal law ⇐1141(2), 1163(1)

Defendant on appeal has burden of showing error and also establishing that prejudice to him ensued therefrom.

12. Criminal law ⇐1169(3)

In prosecution for burglary and attempted rape, any prejudice resulting to defendant from testimony of officer as to defendant's admissions of prior similar offenses was removed when defendant, testifying as a witness in his own behalf, admitted a previous conviction of burglary and of attempted rape. Pen.Code, § 459; Code Civ.Proc. § 2051.

13. Witnesses ⇐337(5)

Where defendant voluntarily becomes a witness in his own behalf, prosecution is justified in eliciting from him on cross-examination by way of impeachment that he has suffered prior felony conviction. Code Civ.Proc. § 2051.

14. Burglary ⇐41(1)
Rape ⇐53(1)

Evidence authorized conviction of burglary and of attempted rape. Pen. Code, § 459.

15. Criminal law ⇐1159(3)

The rule that an appellate tribunal will not ordinarily disturb a judgment of conviction upon the grounds of insufficiency of the evidence when there is a conflict of evidence will not be lightly departed from.

16. Criminal law ⇐260(11)

Contradictions in testimony of prosecutrix did not require conclusion by reviewing court that her entire testimony was per se improbable and that it was duty of trial judge to wholly disregard it and find a reasonable doubt in favor of defendant.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Julius Felix Hermes was convicted of burglary and attempted rape and from the judgments and from an order denying his motion for a new trial, he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This prosecution was instituted through the filing of an information by the District Attorney of Los Angeles County wherein the defendant was charged in count 1 with the crime of burglary, in that on the 3d of June, 1945, he willfully entered a building occupied by the prosecuting witness with intent then and there to commit the crime of rape. By count II the defendant was accused of committing the crime of rape upon the prosecuting witness, who was then of the age of 17 years and not his wife. It was also charged in each count that the defendant had theretofore been convicted in the Superior Court of Los Angeles County of the crimes of burglary and attempt to commit rape.

To both counts of the information defendant duly entered his pleas of not guilty and a denial of the prior conviction. Upon proper stipulation, the cause was tried before the court sitting without a jury, resulting in the defendant's conviction of the offense of burglary as charged in count I, which was found to be burglary of the first degree. As to count II, the court found the defendant guilty of an attempt to commit rape, a lesser but necessarily included offense. Concerning the prior conviction charged against the defendant, the court, upon a stipulation of facts, found such allegation to be true. A motion for new trial was denied and judgments pronounced. From the judgments of conviction and from the order denying his motion for a new trial defendant prosecutes this appeal.

[1, 2] The notice of appeal herein sets forth nine grounds upon which it is predicated, including the claims that both the court and district attorney were guilty of misconduct to the prejudice of the defendant. However, in his brief appellant limits his argument for a reversal to three grounds, first, that the court abused its discretion in permitting the prosecution to read into evidence the testimony of the complaining witness given at the preliminary examination on the ground that such witness could not with due diligence be

found within the State of California; second, the admission of evidence of other wrongful acts allegedly committed by the defendant; and, thirdly, that the judgments are contrary to the law and the evidence. We shall give consideration only to the three just mentioned grounds urged and argued by appellant in his brief. No showing having been made in support of the remaining grounds of appeal, it is not incumbent upon this court to search the record for the purpose of ascertaining whether or not other errors warranting a reversal occurred in the trial of the cause. We have, nevertheless, as is our custom in such cases, examined the record with some care and have failed to find any substantial errors which require consideration by us of any of the grounds of appeal not urged by appellant in his brief. Indeed, the failure of appellant to make any attempt to support the remaining grounds of appeal amounts to a tacit concession that any errors, upon which in the first instance he might have based any hope for a reversal, were without prejudice to his rights. People v. Buenaflore, 40 Cal.App.2d 713, 719, 105 P.2d 621; People v. Fouts, 61 Cal.App. 242, 245, 214 P. 657; People v. Buck, 46 Cal.App.2d 558, 567, 116 P.2d 160.

The factual background underlying this prosecution may be thus epitomized: About 4 o'clock on the morning of June 3, 1945, while the complaining witness was asleep in her bed, she awakened and observed a man standing over her; she "smelled a funny odor" and asked the man who he was, to which he replied that he was Earl; that she grabbed a badge he was wearing and screamed; that while the bedroom was dark, some light came in through the windows; that the man had his private parts out and they were against her body. The witness testified that when she screamed the man ran; that she then arose from bed, armed herself with a butcher knife, and ran to a next-door neighbor. The neighbor returned with the complaining witness to her home and the intruder was still there.

The neighbor, Clarence Mitchell, testified to the complaining witness' coming to his home and telling him there was a man in her house; that he accompanied her back to the premises, where the man was standing in the bedroom. Both the complaining witness and Mr. Mitchell identified the defendant as the man in question. Mr. Mitchell testified that he asked the defendant who he was and what made the complaining witness scream and rush out of her house, to which the defendant said, "Must have been somebody, let's call the law." To this the witness Mitchell replied, "I am going to leave that up to her, if she wants to call the law, it is OK and if she don't, it is OK." After some little discussion the defendant left.

Clarence W. Kissam, one of the investigating police officers, testified that the defendant was arrested on June 3, 1945; that he had a conversation with the defendant concerning the case; that he asked defendant where he was employed and was advised by him that he worked at the shipyards from 7 p. m. until 5:30 a. m. except on Saturdays, when he went to work from 4:30 p. m. to 3 a. m. He asked the defendant whether he wore an identification badge and the latter admitted he did; that the same consisted of a badge with his picture on the front and his signature and fingerprint on the rear thereof. Defendant told the police officer that he had no idea where the badge was at present, but he had used it the preceding night to go to work. He denied ever being in the home of the complaining witness. Subsequently, and after the complaining witness and her neighbor, Mr. Mitchell, had identified defendant as the man who was in her home, the police officer had a further conversation with the defendant, in which the latter told him that he had been in similar trouble before. "He said he might be walking down the street anywhere and have a sex desire and he was liable to break into a house and commit such an act." The officer asked the defendant, "Was that the same procedure that you followed in the other case that you were involved in when you was serving this time and that you are now on probation for?" to which the defendant replied, "Yes." According to the police officer, the defendant finally stated, that "he had known this woman before, had seen her around, and walked right up to this house, walked into the house and committed the act, and he started to tell us the whole story. He went on about how the moon affected him certain times of the month, that is what changed his feelings on the sex angle, and he told us when the other two officers left—he said, 'I will talk to you later on.' But when later on came around he didn't have anything fur-

ther to say. He said, 'I don't care to talk any more.' "

In behalf of the defendant a witness, Ben Gollette, testified that he had known the defendant for about two or three years and had worked with him; that on the morning of June 3, he met the defendant accompanied by a young lady; that he stopped and asked the defendant, "Where are you going, Julius?" to which the defendant replied, "I am going home with this girl"; that this was around 3:30 o'clock in the morning.

Testifying in his own behalf, defendant stated that he was employed at Bethlehem Steel Works for about six years; that on the morning in question, after he had alighted from a street car returning home, he saw a girl sitting in the passenger station crying; that he went over and asked her what the trouble was, to which she replied that "she had had a fight with a sailor"; that the girl was intoxicated at the time and asked the defendant to take her home, to which he agreed; that they proceeded toward her home when they encountered the aforesaid witness Gollette; that after this meeting they continued to the girl's house; that the young lady was telling him about her husband being in the army; that she had a couple of children; that she and her husband were separated. Defendant testified that the complaining witness advised him that she was "kind of broke and that she needed a little help"; that when they entered the house, "why, she kind of propositioned me a little, you know. She asked me—she said, 'Well, is it worth $5.00 to you?' And I kind of—I thought, 'Well, yes.'—I told her, 'I will give you $5.00. I haven't got a lot of money on me this morning.' I had only about $25.00. Then she, all of a sudden, changed her mind and she said, 'If you got $25.00 on you why can't you give me more than $5.00?' " The defendant testified that he refused to give her any more, and suddenly "she jumped up, started to scream and ran out of the house." He testified that he remained in the house until the arrival of the complaining witness' neighbor, Mr. Mitchell, and after some discussion with him, walked away from the premises. The defendant admitted that he remained in the house in an attempt to recover his shipyard badge.

In answer to questions as to why he had made conflicting statements to the police officers, defendant denied telling them that he had not missed his badge until he had arrived at his home. He also denied telling them anything "about the moon" affecting him. He also denied making any statement to the effect that "he might be walking down the street anywhere and have a sex desire and he was liable to break into a house and commit such an act." Defendant also denied telling the officer that he had never been in the home of the complaining witness and stated that he told the officer that he "preferred not to talk about it until I see my lawyer." The defendant testified that he was twenty-five years of age and admitted on cross-examination that he had been previously convicted of burglary and attempted rape.

It was stipulated that if the witness Louise Jackson were present she would testify that on the morning following the alleged occurrence she had a conversation with the complaining witness and that the latter "had liquor on her breath."

With regard to appellant's first contention, namely, that the trial court erred in permitting the testimony given by the complaining witness at the preliminary examination to be read at the trial instead of requiring the presence of such witness, the record discloses that a subpoena was issued for the witness in question and delivered to a member of the Bureau of Investigation of the District Attorney's office, who was assigned as a process server for the department of the court in which the prosecution was pending. The process server went to the address in Compton where the mother of the prosecuting witness lived, on or about July 9 or 10; he inquired for the witness at the bungalow court where she had formerly lived; he went to every house in the bungalow court, there being eight or nine of them; that he obtained the address of the bungalow court from the transcript of the testimony given by the prosecuting witness at the preliminary hearing; that he did not find her; that subsequently he went to Riverside about the 11th and 12th of July. There he made inquiry at the Riverside Mission Inn and at five or six restaurants on the chance she might be working at one of them because she had been a waitress at the Mission Inn. He checked with the police department and went back to the bungalow court where the prosecuting witness had lived. He talked with a man

residing there and was referred by him to another person by the name of Carl as one who might have information concerning the whereabouts of the missing witness. He found Carl, who said he had known the family for many years and knew the prosecuting witness very well. When the process server asked him where the prosecuting witness was, Carl answered, "I haven't seen Betty for two or three weeks." The process server then went to another restaurant in search of the witness and asked a dozen people who were acquainted with her, from each of whom he received the information, "I think she has gone away. I think the shame and humiliation of an open trial in court sort of embarrassed her, and she doesn't want to come back to Compton any more. I haven't seen her for about three weeks." The process server testified that he had worked with the police department in the search and for some ten days preceding the trial had devoted practically all of his time to an attempt to locate the prosecuting witness.

The mother of the prosecuting witness testified that she had contacted every one whom she thought knew her daughter, in an effort to find her; that she had a telegram from the prosecuting witness dated June 2, 1945, which was the last word she had from her; that she made inquiry of a girl friend of the missing witness; but notwithstanding all of her inquiries she failed to get any clue as to the whereabouts of the witness. The mother testified that she had contacted the police department and vainly sought information concerning her daughter. She further testified that the prosecuting witness was the mother of a baby fifteen months old, then in the custody of the prosecuting witness' mother; that she and her daughter lived together at the Nevada Hotel in Riverside at about the time of the preliminary examination on June 11, 1945; that the prosecuting witness worked at a cafe in Riverside, giving up that position about a week prior to the preliminary examination and returning to Compton; that she remained there only a few days, when she departed; that since that time she had not returned nor had her mother heard anything of or concerning her.

[3] The authority for the procedure adopted by the trial court in permitting the testimony of the absent witness to be read is contained in subdivision 3 of section 686 of the Penal Code. That section, as amended in 1911, has been held not to be repugnant to the Sixth Amendment to the Constitution of the United States, which provides that a defendant in a criminal action is entitled "to be confronted with the witnesses against him," or to section 13, Article I, of the Constitution of the State of California. People v. Schwarz, 78 Cal.App. 561, 579, 248 P. 990; People v. Wilson, 26 Cal.App. 336, 337, 146 P. 1048; People v. Bernstein, Cal. App., 161 P.2d 381.

[4-6] In the instant case but one question was presented for the court's determination under subdivision 3 of section 686 of the Penal Code, and that was whether it was "satisfactorily shown to the court" that the prosecuting witness could not "with due diligence be found within the state." That question is one primarily addressed to the trial judge, to be determined by him from the evidence presented. It is a question of fact, the determination of which by the trial court will not be interfered with unless the appellate court be satisfied that the trier of facts abused the discretion lodged in him in determining that due diligence had been used and that the witness could not be found. In the case at bar it is not suggested that the absent witness was not fully cross-examined at the preliminary hearing upon all issues concerning which she gave testimony. It must therefore be conceded that at such preliminary hearing the prosecuting witness confronted the defendant. The object of the Federal and State Constitutions is to provide a person who is being tried for a public offense full opportunity for cross-examination, and this right appellant herein admittedly had exercised. People v. Bernstein, supra.

[7, 8] In the case with which we are here concerned there was no showing that the testimony in question would have been any different had the absent witness been present at the trial, nor was there any showing that evidence of an impeaching character had materialized since the preliminary examination. People v. Bernstein, supra; People v. Collup et al., Cal. Sup., 167 P.2d 714. The only showing made in support of the objection to reading the testimony of the prosecuting witness was the general statement of appellant's counsel that "Of course, it puts the defendant at a disadvantage. We have discovered other information, and we can-

not cross-examine her on the trial." Such a showing was totally inadequate to bring the case within the rule enunciated by the Supreme Court in People v. Collup et al., supra, and relied upon by appellant. As was said by the trial judge, "Each individual case is decided on its individual set of facts." In the case at bar we are satisfied that a zealous and faithful effort was put forth to produce the prosecuting witness at the trial in the superior court and that no abuse of discretion was committed by the trial judge under the facts here present in determining that due diligence had been used and that it was "satisfactorily shown" that the witness could not "with due diligence be found within the state." Pen.Code, sec. 686, subd. 3; People v. Bernstein, supra.

Appellant's second contention is that the court fell into error in its ruling admitting evidence of other offenses committed by the defendant. In this regard the record reflects that while the witness Clarence W. Kissam, one of the investigating officers, was testifying, he was asked to relate a conversation had by him and other officers with the defendant following the latter's arrest. In answer to the interrogatory, the witness stated, "He told us that he had had trouble about similar cases like that. He said he might be walking down the street anywhere and have a sex desire and he was liable to break into a house and commit such an act." An objection and motion to strike on the grounds that the testimony was incompetent, irrelevant and immaterial was overruled. The witness then proceeded to testify further as follows: "I asked him at that time if * * * 'Was that the same procedure that you followed in the other case that you were involved in when you was serving this time and that you are now on probation for?' He said, 'Yes.' He said he had known this woman before, had seen her around, and walked right up to this house, walked into the house and committed the act, and he started to tell us the whole story. He went on about how the moon affected him certain times of the month, that is what changed his feelings on the sex angle, * * *."

[9-12] While it is true that independent crimes, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged, may not be proven against a defendant, that rule does not exclude evidence of such other crimes when the evidence thereof does tend to prove some material element of the crime for which the defendant is on trial. And the fact that the minds of the jurors might be prejudiced by inducing the belief that the defendant had been the perpetrator of another crime, is no ground for the exclusion of such evidence. People v. Nakis, 184 Cal. 105, 114, 193 P. 92; People v. Wilson, 46 Cal.App.2d 218, 224, 115 P.2d 598; People v. Morani, 196 Cal. 154, 159, 236 P. 135; People v. Bernstein, supra; 8 Cal.Jur. 60, sec. 168. This well recognized exception to the general rule is frequently applied in cases where evidence of the crime tends to prove a motive for the commission of the crime charged; where a felonious or fraudulent intent, being a necessary element in the crime charged, the evidence of other crimes tends to establish and fix the existence of such motive or intent; and in cases where the evidence tending to establish the crime charged is intermixed with the evidence of the other offenses. We are persuaded that the character of the offense charged in count I, viz., burglary, and the facts of the case bring it within the second condition just set forth. It was incumbent upon the prosecution in connection with proving the charge of burglary to satisfy the mind of the trier of fact beyond a reasonable doubt that the defendant entered the dwelling of the prosecuting witness with the intent then and there to commit the crime of rape. Pen. Code, sec. 459. Therefore, the statements volunteered by the defendant to the officer relating to his impulse to commit the same crime upon other occasions were clearly relevant and material in establishing the intent with which he entered the home of the complaining witness in the case on trial, notwithstanding that it incidentally disclosed the guilt of the defendant of some offense other than the one for which he was on trial. It might also be here observed that on appeal a defendant is burdened not only with the duty of showing error, but also to establish that prejudice to him ensued from such error. People v. Horowitz, Cal.App., 161 P.2d 833. In the instant case, whatever prejudice the defendant suffered was removed when, testifying as a witness in his own behalf, he was asked the following questions pursuant to the authority of section

2051 of the Code of Civil Procedure, and to which interrogatories he gave the answers herein narrated:

"Q. You have previously been convicted of burglary and the offense of attempted rape; is that correct? A. That is right, yes, sir."

[13] As was said by this court in People v. Jeffries, 47 Cal.App.2d 801, 807, 119 P.2d 190, 193, "In view of appellant's decision voluntarily to become a witness in his own behalf, the prosecution was justified in eliciting from him on cross-examination, by way of impeachment, that he had suffered such prior felony conviction. Such being the case, he cannot now be heard to complain of any prejudice occurring from evidence of that fact having been presented to the jury."

[14-16] Appellant's final contention, that the judgments are contrary to law and to the evidence, does not call for extended notice. In this regard, appellant urges that the "testimony introduced on behalf of the People is entirely discredited or inherently improbable to the extent that it is rendered of little value as evidence." This stricture upon the evidence which is hereinbefore set forth is without merit. The salutary rule and the reason therefor that an appellate tribunal will not ordinarily disturb a judgment of conviction upon the grounds of insufficiency of the evidence when there is a conflict of evidence, ought not to be lightly departed from. While the alleged variances or claimed inconsistencies in the testimony of the prosecuting witness, as well as the contradictions referred to, afforded opportunity for an argument to the trial judge against the reliability of her testimony, we see in them nothing from which a reviewing court could justly conclude that her entire testimony is per se improbable and that it was the duty of the trial judge not only to wholly disregard it but to accept the defendant's story or at least find that the latter's guilt had not been disclosed by evidence to a moral certainty and beyond a reasonable doubt. Our views with reference to the functions of an appellate court when the claim is advanced that the judgment of conviction is not supported by the evidence are fully set forth in People v. Ohman, 67 Cal.App. 2d 467, 474, 475, 476, 477, 154 P.2d 463, and are determinative of appellant's final contention in the case at bar. The testimony of the prosecuting witness, that at the time the defendant made his attempt to accomplish his purpose she grabbed his badge which contained his photograph and description and showed his place of employment, coupled with the fact that a few minutes after the occurrence defendant was present and was observed to be searching in the bedclothes and about the room, justified the inference by the court that he realized his failure to recover the badge would completely reveal his identity. Added to this are the inconsistent and admittedly false statements made by the defendant to one of the investigating officers, as well as the highly incriminating statements made by him and testified to by one of the officers. The defendant was fairly tried and under the evidence was justly convicted.

The judgments and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.



74 Cal.App.2d 86

SIEGEL et al. v. LEWIS et al.

Civ. 15005.

District Court of Appeal, Second District, Division 1, California.

April 19, 1946.

Rehearing Denied May 7, 1946.

Hearing Denied June 18, 1946.

1. Appeal and error ⇐1008(1)

In vendors' action to recover balance of unpaid purchase price of realty, question whether amending of escrow instruction by vendors with respect to termite condition was result of understanding between the parties was one of fact for trial court.

2. Vendor and purchaser ⇐84

Where escrow instruction gave purchasers right to terminate contract unless termite infestation was remedied by vendors, and amended escrow instruction by vendors limited vendors' liability to amount

less than estimated cost of remedying termite condition, amended instruction was a refusal to and election not to remedy the termite infestation and purchasers' letter cancelling the escrow was in effect a termination of the contract.

3. Vendor and purchaser ⇐107

A vendee of real property may rescind for any one or more statutory causes, or for any cause which the contract itself provides shall be ground therefor, regardless of his motives.

4. Vendor and purchaser ⇐84

Where vendors' escrow contract amendment gave purchaser right to terminate contract for failure to remedy termite condition, fact that after contract was canceled and before date set for foreclosing of the escrow, vendors offered to and did complete the termite work, could not bind purchasers after contract had been terminated.

5. Contracts ⇐217

Once an option to terminate a contract is exercised, the contract is extinguished and it cannot thereafter be revived by the other party through an offer to perform the act, the nonperformance of which gave rise to the option to terminate.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Ben Siegel and Esther Siegel against Thomas H. A. Lewis and Loretta Y. Lewis, to recover an unpaid balance under a contract for sale of real property. From adverse judgment, plaintiffs appeal.

Affirmed.

Pacht, Pelton, Warne, Ross & Bernhard, Isaac Pacht, Clore Warne, and Bernard Reich, all of Los Angeles, for appellants.

Overton, Lyman & Plumb and B. R. Ware, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an action to recover the unpaid balance of the purchase price of realty under a contract which is evidenced by two sets of corresponding and complementary escrow instructions, one set executed by plaintiffs, as the seller, and the other by defendants, as the buyer.

The escrow herein was opened on June 2, 1944, at the instance of Mrs. Mary Helena Lederer, a real estate broker and the escrow instructions for the parties were prepared upon information furnished by Mrs. Lederer, who on the following day deposited $8,500 in the escrow on behalf of the buyer, as part payment on the purchase price of $85,000. Said defendants, as buyer, agreed to pay the balance of said purchase price on or before August 2, 1944. Buyer's escrow instructions contained the following direction: "Before closing this escrow you will hold for the Buyer a letter or report by an exterminator indicating that the improvements on said real property are free from infestation by termites, dry-rot or fungus."

Prior to the execution of their corresponding escrow instructions, plaintiffs' attorney added thereto the following directive: "In connection with the termite report, the Seller shall have no obligation to obtain such report except to pay the usual and normal charge in connection therewith. If any infestation by termites, dry-rot or fungus is found, unless such condition is remedied by the Seller, the Buyer may terminate the agreement to purchase the property as herein set forth."

On June 14, 1944, defendants (buyer) executed a supplemental instruction in order to conform to seller's redraft as above quoted.

On June 22, the exterminator company filed in the escrow its termite report to the effect that the improvements located on the real property described in the escrow instructions were infested with subterranean termites, and that the reasonable cost for remedying said condition was the sum of $350.

Thereafter, on June 29, 1944, plaintiffs (seller) again amended their escrow instructions by the addition thereto of the following:

"At close of escrow you will charge to the Seller and credit to the Buyer the sum of $250.00 in lieu of any termite work, from which the Buyer is to pay the inspection fee of Raymond C. Jones Co. (the exterminator company)."

On July 5, 1944, defendant Thomas H. A. Lewis, by means of a letter addressed to the escrow agent, cancelled the buyer's escrow instructions and terminated the escrow, whereupon plaintiffs instituted the instant action.

The trial court made findings of fact substantially in accordance with the foregoing recital, and in addition thereto found as follows: "It is not true, as alleged * * * that plaintiffs have tendered or offered performance of each and every matter and thing to be done and performed on their part under said escrow instructions dated June 2, 1944, and June 14, 1944, but it is true that the plaintiffs refused to and elected not to remedy the aforesaid infestation of termites, and made a different and counter-offer and proposal. It is not true that prior to the date when performance was required on the part of plaintiffs, defendants gave notice that they would fail or refuse to perform further under said agreement."

From the facts, as found, the court concluded as follows:

"I. That the defendants had ample and sufficient cause and basis for and were justified in executing and delivering to the escrow holder their said letter and notice dated July 5, 1944, terminating and cancelling said escrow and escrow instructions.

"II. That said escrow and escrow instructions and any agreement between the parties hereto set forth and contained therein, were properly terminated and cancelled by said letter and notice.

"III. That the plaintiffs are not entitled to a judgment against the defendants or to recover any sum whatsoever or any interest from said defendants or either of them. * * *"

From the judgment which followed, plaintiffs prosecute this appeal.

Appellants here contend that the "court erred in finding that the plaintiffs refused to and elected not to remedy the termite infestation". They urge that the amended escrow instructions of June 29th were no more than a reduction to writing of a prior understanding that the buyer was to bear $100 and the seller $250 of the cost of correcting the termite condition. With respect to such cost, the record discloses that Mrs. Lederer discussed this matter with Mr. Ross, attorney for appellants, but at no time did Mr. Ross inform Mrs. Lederer that the appellants would pay the $350 to be paid to the exterminator. Meanwhile, Mr. Ross did discuss the matter with Mr. Siegel, who agreed with Mr. Ross that $350 was too high.

When the original buyer's escrow instructions were executed, respondent Thomas H. A. Lewis was in the service, and upon his return home on June 17, 1944, he called at the office of the escrow holder where the termite provision in the escrow instructions was explained to him, to-wit:

"Mr. Pattillo showed me this document; explained to me that it was the right of the seller not to remedy the termite work; and he referred me to another document, which was another amendment to the escrow, and referred again to his explanation of that to me, that it was within the seller's right—he could elect not to remedy any work of the termites, and he pointed out to me another provision in that same document and said, 'In turn, I again refer you to our conversation, that you have an election not to buy, unless, of course, you wish to buy with the responsibility of the termites.'" Said respondent also saw the termite report at this time.

Thereafter the escrow holder notified Colonel Lewis of the seller's amended instruction of June 29th, and he went to the bank to discuss such amendment with Mr. Pattillo, to-wit:

"Q. Did Mr. Pattillo talk to you about it? A. Yes.

"Q. Did he tell you who brought it in? Did he say anything about that? A. He said Mr. Ross brought it in, * * *

"Q. Did Mr. Pattillo tell you that the Siegels asked you to pay a part of the charge of freeing the property of termites? A. He didn't phrase it that way. He said that they had declined to free the property of termites in whole, although they had submitted some compromise, I understand. * * *

"Q. Did he say they gave any other instructions relative to termites except this Exhibit C (instruction of June 29)? A. No. The only thing I heard on that was the statement I previously referred to, from Mrs. Lederer, that they refused to do it, that was in total. The next thing that occurred was the definite thing, this paper, that was that they refused to clear it in part, refused to clear it completely. * * *

"Q. Did you understand this to be a proposal to modify your arrangement as to the sale in the particulars provided for in

this memorandum? A. I understood it as a repudiation of the contract.

"Q. Who told you that, anybody? A. Mr. Pattillo.

"Q. Mr. Pattillo said that this document in the form it was handed to them constituted a repudiation of the contract? A. Constituted an abrogation of the escrow, something of that sort, and that there was now no contract, unless I wished to re-enter an agreement and sign such an agreement as that."

In reply to a question as to whether he was concerned with any other matter than the statement contained in the amended escrow instruction of June 29, Colonel Lewis stated: "Well, I must say it made me lose confidence in the deal, so I must be honest and say yes; The Siegels were selling the house and didn't want to accept the responsibility, which was normal, to see that it was free and clear of termites; that they were willing to pay $250, but not accept the responsibility of even the matter between that and the complete cost; and I must be honest and say to you that I did not feel at all sure that the termite work would be limited to that."

Mrs. Lederer testified that within a week subsequent to June 22d, the date of the termite report, she had a conversation with appellants' attorney, Mr. Ross, in which she stated that she "would try to get Colonel Lewis to pay $100, and if he didn't, I would rather pay it than to lose my client, because I couldn't afford to." Also, that she did not hear from Mr. Ross again and did not discuss the matter with either Colonel Lewis or Mrs. Lewis.

Mr. Ross, however, testified that he had a conversation with Mrs. Lederer on the day the amended escrow instructions were prepared, to-wit: June 29, 1944; that Mrs. Lederer called him "and wanted to know if we had come to any decision about the termite work and its being done. I told her I was waiting for some word from her and she said, 'Well, the best I can do is to get the Lewises to pay $100. You will just have to pay the rest.' I told her that that was agreeable, and she said, 'Well, for God's sake, get the papers signed and get going, because we have to get this thing settled. Mrs. Lewis wants to be sure she can get into the house on August 2nd.' And I told her I would. * * * I told her I would see the papers were prepared accordingly."

[1, 2] In the face of such conflicting evidence, it became a question of fact for the trial court to determine whether the escrow instruction of June 29th was the result of an understanding between the parties. The court found against appellants on that question when he found that they "refused to and elected not to remedy the termite infestation", which they had a perfect right to do under the terms of the seller's original escrow instructions, hereinbefore quoted. Those instructions also gave to the buyer the right to terminate the contract to purchase unless the termite infestation was remedied by the seller. The escrow instruction of June 29th expressly limited seller's liability to $250 although the exterminator estimated it would cost $350 for the work of remedying the termite condition. Consequently, buyer's notice of cancellation of July 5, 1944 was an effective termination of the contract, in accordance with the express terms thereof.

[3] As stated in 25 Cal.Jur. 715: "A vendee of real property may rescind for one or more of the statutory causes, or for any cause which the contract itself provides shall be ground therefor regardless of his motives in so doing. (Citing Conlin v. Osborn, 161 Cal. 659, 120 P. 755; Crim v. Umbsen, 155 Cal. 697, 702, 103 P. 178, 132 Am.St.Rep. 127; De Bairos v. Barlin, 46 Cal.App. 665, 672, 190 P. 188.)" See, also, Shirreffs v. Alta Canyada Corp., 8 Cal.App.2d 742, 747, 48 P.2d 55.

[4, 5] With respect to appellants' contention that they were entitled to avoid on the ground of mistake the instrument pleaded by respondents as a defense to the action, to-wit: appellants' amended escrow instruction of June 29th, the record discloses that appellants fully understood when they refused to remedy the termite condition that they were putting it within the power of respondents to withdraw from the contract. The fact that, after respondents cancelled the contract and before the date set for the closing of the escrow, appellants made an offer to, and actually did complete the termite work, does not materially affect the situation. Once an option to terminate a contract is exercised, the contract is extinguished and discharged; it cannot thereafter be revived by the other party through an offer to perform the act, the nonperformance of which gave rise to the option to terminate.

See Altman v. Bautzer, 54 Cal.App.2d 543, 548, 129 P.2d 458; 17 C.J.S., Contracts, § 455, p. 936.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



74 Cal.App.2d 132

DOUGHERTY v. LEE.

Civ. 7243.

District Court of Appeal, Third District, California.

April 23, 1946.

Rehearing Denied May 23, 1946.

1. Sales ⇐441(3)

Plaintiff, seeking damages for breach of warranty of fitness of hay purchased from defendant, had burden to show by a preponderance of evidence that the hay contained poison which killed plaintiff's cows as alleged, but plaintiff was not required to furnish evidence which absolutely precluded the possibility of the cattle procuring some other poisonous food. Civ. Code, § 1735(1).

2. Appeal and error ⇐1001(1)
Food ⇐25
Sales ⇐441(3), 445(4)

Where the evidence is susceptible of a reasonable inference that death or illness resulted from eating of contaminated food, a prima facie case of negligence or breach of implied warranty of the fitness of the food has been established, and a verdict for defendant may not be directed, nor may a judgment for plaintiff on that issue be reversed on appeal. Civ.Code, § 1735(1).

3. Sales ⇐441(3)

Evidence that plaintiff's cows were confined in corral where they had no access to other food, that several of them died within 24 hours after eating hay purchased from defendant, that a post-mortem examination and analysis disclosed the presence of botulina bacilla in the stomach and liver of the dead cows and in the hay, was sufficient to establish a prima facie case that the death of the cows resulted from poison contained in the hay, and justified recovery by plaintiff for breach of implied warranty of fitness of hay. Civ.Code, § 1735(1).

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Jim Dougherty, Jr., against John E. Lee for damages for the breach of an implied warranty as to the fitness of hay purchased by plaintiff from defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. M. Brack, of Modesto, for appellant.

Wm. N. Graybiel, of Turlock, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment of $678 which was rendered against him as damages for the breach of an implied warranty. The plaintiff lost seven dairy cows which died from botulism poisoning alleged to have resulted from eating hay purchased from the defendant. It is not contended the judgment is excessive. The appellant concedes that the only issue on appeal is whether there is substantial evidence to support the finding that plaintiff's cows died as a result of poison contained in the hay which he purchased from the defendant.

The plaintiff maintained a small dairy consisting of twenty head of cows which, for several days prior to the poisoning, he kept in a corral where there was no pasturage or other feed to which the cows had access. In the latter part of October, 1944, he purchased from the defendant one ton of baled Sudan hay. The defendant recommended the purchase of the Sudan hay rather than alfalfa hay. The following morning at about seven o'clock, the plaintiff opened two or three bales and fed it to the cows in the corral. He fed some of the same hay again that evening. The following morning he found five dead cows in the corral. Three other cows were "slobbering" at the mouth and staggering around in the corral. Two of the sick cows soon died. The other one finally recovered. The plaintiff promptly called a veterinarian from Turlock who performed a post-mortem examination of one of the cows. He took the contents of the stomach, a portion of the liver and a sample of the hay

from the center of an unopened bale, together with some water from the watering-trough, and sent them in separate glass jars to the Mossman Clinical Laboratory for analysis. Doctor W. G. Mossman testified that he made a chemical analysis of the contents of the stomach and of the liver and found that they contained botulism bacilli, commonly found in canned vegetables, hay and grain; that he injected the poison into a guinea pig and "positively identified the organism" as botulism bacilli. The analysis of the hay was not so conclusive. But he did make a bacteriological examination of the hay. He said in that regard: "In the event I had positive findings on the bacteriological examination, I wouldn't do any chemical analysis on it because I didn't feel it was necessary. If I found botulism bacilli, that would be self explanatory. It wouldn't be necessary to do the chemicals." Regarding the analysis of the sample of hay he said: "I found some organism that looked like botulina bacilla." He said that the bacilli develops in contaminated fruit or in mouldy deteriorated hay, very rapidly and discharges a toxin excretia which may result in death within twenty-four hours or possibly in four or five days. He also said the victim might show symptoms of the disease by frothing at the mouth, by blurred eyesight and unsteady, wobbling legs.

The sick cows had those symptoms. The veterinarian testified to that fact. There can be little doubt that the cows died from poisoning within a few hours after eating the hay purchased from the defendant. The bales were opened and fed to them in the corral. We are also of the opinion there is substantial evidence that the hay contained botulism poison. In addition to the evidence of the pathologist that he found in his analysis of a speciman of the hay what "looked like botulina bacilla," the veterinarian testified without objection that plaintiff told him the cattle had been kept in the corral for several days before they were fed the hay in question, during which time they had not been pastured. He examined the corral, and the sick cow, with a view of determining the cause of the death of the seven cows. He said that he was suspicious they died from botulism poisoning. No evidence was adduced to indicate that the cows had access to any other food in the corral or elsewhere, from which they could have been poisoned. It seems quite persuasive that the hay contained the poison which killed the cows, since not one, but seven of them, died within a few hours after eating the hay, and that no other character of food was found in the corral.

It is true that after the defendant learned of the report of the cause of the death of plaintiff's cows, he sold some fifty tons of baled hay from the same stack to other persons, five of whom testified that they fed the hay to their cattle without any bad result. But it is also true that the defendant sold the hay to those purchasers at a greatly reduced price. He charged plaintiff $28 per ton, and he subsequently sold hay to the other persons for $18 per ton. It does not appear whether they first opened the bales and exposed the hay to the light and sun before they fed it to their stock. In support of the judgment, we may assume that they did so. The evidence is uncontradicted that the opening and exposing of the hay to the light and sun for several hours will effectively destroy the poisonous germs. The defendant testified that he had a first cutting of his hay which was prematurely baled before it was thoroughly dry. That would cause it to sweat, mold and deteriorate.

It is true, as the appellant earnestly and plausibly argues, that pea-vines, beanstalks, cabbage heads and other vegetables, packed and stored so as to exclude the sun and air, may retain moisture and develop bacillus botulinus to a dangerous extent. But the evidence in this case reasonably infers that the plaintiff's dairy cows did not have access to any such poisonous vines or vegetables. The evidence might have been more definite in that regard. But we think there is sufficient evidence to reasonably support the finding of the court that the cattle died as a result of eating the hay purchased from the defendant and that it contained that poison.

[1] Of course the burden was on the plaintiff to show by a preponderance of the evidence that the hay which he purchased from the defendant contained poison which killed the cows. But it was not necessary for the plaintiff to furnish evidence which absolutely precluded the possibility of the cattle procuring some other poisonous food. The case of Monahan v. Economy Grocery Stores Corp. 282 Mass. 548, 185 N.E. 34, 35, upon which the appellant relies, properly stated the rule requiring the plaintiff to establish a prima facie showing, in a case

of this nature, that the food in question is poisonous or deleterious. The court said in that regard:

"The plaintiff was not bound to exclude every other possible cause for his illness, but he was required to show *that the probable cause* was the unwholesomeness of the corn. (Citing authorities.) In our opinion, the evidence did not afford a basis for more than a conjecture that the corn was unwholesome and that the plaintiff's illness was due to the corn rather than to other food or drink partaken by the plaintiff and his wife or to intestinal influenza." (Italics added.)

In the Monahan case, supra, judgment for the defendant was affirmed. That was a suit for damages for breach of implied warranty of the fitness for human consumption of canned corn purchased by the plaintiff, from which she made and ate chowder. It was alleged the canned corn contained ptomaine poison. Twelve hours after eating the chowder the plaintiff became ill, suffering severe pains in her stomach and vomiting. She testified that the chowder "looked, smelled and tasted good." None of the chowder or canned corn was analyzed or examined. Plaintiff's physician testified that "every symptom of the plaintiff and his wife was consistent with intestinal influenza, and that their subnormal temperature was inconsistent with food poisoning." The judgment for the defendant was therefore affirmed.

In the case of Barham v. Widing, 210 Cal. 206, 291 P. 173, the Supreme Court quoted with approval from the opinion of this court regarding the rule with respect to the burden of proof and the sufficiency of the evidence to establish the negligence of a dentist in using an improper solution or an unsterile hypodermic needle in treating an infected jaw after an ulcerated tooth had been removed. Infection followed and the plaintiff was seriously damaged. It was contended that the plaintiff was what is commonly termed "a bleeder," and that the evidence did not show that the infection and damage was the result of the negligent use of an unsterile needle or contaminated solution. Judgment for the plaintiff was affirmed. Regarding the sufficiency of the evidence required of the plaintiff to establish a case of negligence under such circumstances the court said at page 215 of 210 Cal., at page 177 of 291 P.:

"It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. Ley v. Bishopp, 88 Cal.App. 313, 316, 263 P. 369."

Suits for damages resulting from partaking of poisoned food, whether they are based on negligence or upon a breach of implied warranty, are closely allied, and we assume the foregoing rule would apply to both classes of cases.

For the purpose of this appeal the appellant concedes that the hay, which is involved in this suit, was sold by the defendant with the implied warranty provided for in Section 1735(1) of the Civil Code that it was reasonably fit for the purpose of feeding the dairy cows.

[2] Where the evidence is susceptible of a reasonable inference that death or illness resulted from the eating of contaminated food, a prima facie case of negligence or of a breach of implied warranty of the fitness of the food has been established, and it is erroneous for the court to direct a verdict for the defendant. Under such circumstances a judgment for the plaintiff on that issue should not be disturbed on appeal. Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799; Jensen v. Berris, 31 Cal.App.2d 537, 88 P.2d 220; Stell v. Townsends California Glace Fruits, Inc., 138 Cal.App.Supp. 777, 28 P.2d 1077.

[3] In the present case plaintiff's dairy cows were confined in a corral where they had no access to other food. Seven of them died within twenty-four hours after eating baled Sudan hay purchased from the defendant immediately before that time. A post-mortem examination and pathological and chemical analyses of the contents of the stomach and of a portion of the liver of one of the dead cows disclosed, without conflict, the presence of botulina bacilla, and the symptoms of the sick cows indicated that they were suffering from the effect of the same poison. An analysis of a sample of the same hay resulted in the discovery of "what looked like botulina bacilla." In our opinion that showing established a prima facie case of death of the seven cows from poison contained in the recently purchased hay, as the court affirmatively determined. Under such circumstances we may not disturb the findings and judgment on this appeal.

In support of appellant's contention that the evidence in this case does not prove the cows died as a result of poison contained in the hay which he sold plaintiff, the following cases are cited: Miller v. W. T. Grant Co. 302 Mass. 429, 19 N.E.2d 704, Gracey v. Waldorf System, Inc., 251 Mass. 76, 146 N.E. 232, Geisness v. Scow Bay Packing Co. 16 Wash.2d 1, 132 P.2d 740, and Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933, 935. Those cases involved illness or death resulting from eating alleged contaminated food which was unfit for human consumption, and sold contrary to the implied warranty of fitness for that purpose. Judgments for the plaintiffs were reversed for lack of adequate proof that the food was deleterious. Each of those cases may be readily distinguished upon the facts from the present action. In none of them, with the exception of one, was the food or the contents of the stomachs of the victims analyzed by a pathologist or by any other scientist. The plaintiffs relied upon the sufficiency of the evidence, in each case, merely showing that illness or death followed the eating of the food within a few hours. If there was evidence of ptomaine poisoning, there was no proof that the victims had not eaten other food which was poisonous either before or after partaking of the food in question. In some of those cases the symptoms were found to have refuted the contentions that the victims were ill or died as a result of eating poisoned food. In one case the evidence of the plaintiff's family physician rebutted the theory of ptomaine poisoning. In the Geisness case, a physician testified positively that Mrs. Wright did not die from eating canned salmon, but that she died from pneumonia, as her family physician certified.

In the Reese case a judgment for plaintiff was reversed. Two justices dissented. The plaintiff contended that she was rendered ill from eating pork sausages, upon some of which there were maggots. She testified that she became ill and suffered pains in her stomach within a few minutes after eating the sausages. Without examination of the food, her physician said that he diagnosed her illness as the result of botulism. A subsequent examination and analysis by the Los Angeles Health Department of some of the same sausages which were left in an ice box disclosed the fact that the sausages contained no maggots, but appeared to be fresh and wholesome, and that "no organism of the food poisoning groups were present." It affirmatively appeared that botulism poisoning will not manifest itself *for several hours* after the deleterious food is eaten. The reviewing court said that, even if maggots were on some of the sausages, it did not necessarily prove that the food was deleterious; that maggots "are but the larva of insects," and may be present on the food without necessarily resulting in poisonous germs. The court concluded that the evidence lacked proof of botulism poisoning, upon which the plaintiff relied, and the judgment was therefore reversed on that ground.

The foregoing cases are not authorities which are conclusive under the circumstances of this case. The proof of the presence of poisoning in the baled hay is much more convincing in this case.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



74 Cal.App.2d 41

LANGDON v. SAYRE.

Civ. 15101.

District Court of Appeal, Second District, Division 3, California.

April 16, 1946.

1. Breach of marriage promise ⇐14
Constitutional law ⇐86

Statute abolishing actions for breach of marriage promise is not invalid as depriving a plaintiff of the right to pursue and obtain happiness guaranteed by the Constitution. Civ.Code, § 43.5; Const. art. 1, § 1.

2. Breach of marriage promise ⇐14
Constitutional law ⇐153

Statute abolishing actions for breach of marriage promise is not invalid as unconstitutionally impairing the obligation of contracts, since marriage is not a "con-

tract" within such constitutional provision. Civ.Code, § 43.5; Const. art. 1, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

3. Breach of marriage promise ⇐14
Constitutional law ⇐208(1)

Statute abolishing action for breach of marriage promise does not violate constitutional provisions prohibiting legislation in behalf of favored individuals or classes. Civ.Code, § 43.5; Const. art. 1, §§ 11, 21; art. 4, § 25.

4. Breach of marriage promise ⇐14

Statute abolishing action for breach of marriage promise is not invalid as being contrary to sound public policy, since the statute itself is a declaration as to what is the public policy. Civ.Code, § 43.5.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Elizabeth Langdon against Lansing Sayre for breach of promise of marriage. From a judgment dismissing the action, upon sustaining a general demurrer without leave to amend, plaintiff appeals.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellant.

Claire T. Van Etten, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

The plaintiff in this case appeals from a judgment by which her action for breach of promise of marriage was dismissed upon a general demurrer being sustained without leave to amend. Her complaint was framed under two counts, the first alleging that in September of 1943 the defendant mailed his offer of marriage which was accepted by her in writing at Cincinnati, Ohio. For defendant's breach of this agreement she sought damages. In the second count the plaintiff alleged that on October 27, 1943, she and the defendant entered into an agreement to marry which the defendant repudiated on October 16, 1944. Upon the facts alleged in the second count she asked that the court decree "within a reasonable time to be fixed by said Court that said defendant marry said plaintiff as in accordance with his proposal of marriage," praying that the agreement to marry be specifically performed forthwith or that the defendant respond in damages in a substantial sum of money in the event of his failing to carry out the order of the court. Although each count undertakes to state a separate cause of action it is apparent that they both relate to and are founded upon a claimed breach of promise to marry.

By enactment of section 341.5, Code of Civil Procedure, the legislature provided in 1939 that an action for criminal conversation, seduction of a person over the age of legal consent, alienation of affections or breach of promise of marriage must be commenced within sixty days after the statute became effective. The present action was filed on May 3, 1945. With the exception of such of the causes above named as might be filed within the sixty day limit, all suits of the character mentioned were barred by the enactment in 1939 of Civil Code, section 43.5. It reads as follows: "No cause of action arises for: (a) Alienation of affection. (b) Criminal conversation. (c) Seduction of a person over the age of legal consent. (d) Breach of promise of marriage." The States of Alabama, Indiana, Illinois, Michigan, New Jersey, New York, Pennsylvania, Colorado and Massachusetts had adopted similar statutes beginning in the year 1935.

In the year following the enactment of the California statute, a writer in 28 Cal. L.Rev. 444 said: "It may perhaps be suggested, as contended recently in a similar situation in New York, that in abolishing so-called 'heart-balm' suits, that is, suits predicated upon breach of promise to marry, alienation of affections, and criminal conversation, the legislature has unreasonably and therefore unconstitutionally interfered with valuable rights recognized by the common law as springing from the relations and the contracts involved. As pointed out by the New York Court of Appeals in answer to a similar contention, such arguments would seem unfounded due to the fact that: the marriage contract is not an ordinary contract; the state is a 'third interested party' in such a contract and in the consequent marriage status; the constitutional protection of contracts against legislative interference does not apply to marriage contracts; the legislature in dealing with the subject of marriage has plenary power; and the

rights of the husband in the wife's affections and society are not 'property' within the due process clause." A foot-note on page 445 refers to two New York cases, "Fearon v. Treanor, 1936, 272 N.Y. 268 5 N.E.2d 815, 109 A.L.R. 1229, appeal dismissed, 1937, 301 U.S. 667, 57 S.Ct. 933, 81 L.Ed. 1332 (upholding abolition of suits for breach of promise to marry); Hanfgarn v. Mark, 1937, 274 N.Y. 22, 8 N.E.2d 47, appeal dismissed, 1937, 302 U.S. 641, 58 S.Ct. 57, 82 L.Ed. 498 (upholding the abolition of actions for alienation of affections and for criminal conversation)." The dismissal of each of these cases was entered by the Supreme Court of the United States "for the want of a substantial Federal question."

In an article published in 1939, 13 So. Cal.L.Rev. 37, under the caption "The 'Anti-Heart Balm' Statute," the following comment appears: "The actions for breach of promise to marry, seduction and alienation of affections have long been the target of criticism. It has been urged, with much vigor: that they were more the weapons of a blackmailer than the shield of an appealing victim; that they were anomalous attempts to protect, by law, duties and obligations unsuited to litagious procedures; and that, as they had developed, they permitted recoveries of damages out of all proportion to the real injuries involved. Finally, in 1935, Indiana, by statute, abolished them entirely. Other States have since followed this example, and now the California Legislature has joined the group of reforming States. * * * The original of such statutes were, as might have been expected, subject to immediate attack on constitutional grounds—the chief point being that it was unconstitutional to abolish entirely all remedy for a common law cause of action. However, when the New York statute came before the Court of Appeals, that court held that the special nature of the marriage relation, and the great public interest therein, gave to the Legislature a plenary power, in its discretion, to abolish entirely the common law causes of action," citing Fearon v. Treanor, supra, 1936, 272 N.Y. 268, 5 N.E.2d 815, 109 A.L.R. 1229, and Hanfgarn v. Mark, supra, 1937, 274 N.Y. 22, 8 N.E.2d 47. The material on this topic was prepared by Professor Robert Kingsley of the University of Southern California, and the foot-notes on pp. 37 and 38 indicate by citations to reports and many legal publications the extensive scope of his inquiry.

In the instant case we see the statute attacked upon constitutional grounds. Appellant claims that section 43.5 violates section 1, Article I of the Constitution of California in subjecting "the happiness of every unmarried adult to the caprice or deceit of whomever arbitrarily proves false to the most solemn and sacred of obligations." A further contention is that this new statute "violates section 16 of Article I of the Constitution and impairs the obligation of contracts." It is claimed also that it violates section 11 of Article I, which reads that "all laws of a general nature shall have a uniform operation," and also section 21 of the same Article, providing that "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." A final claim is that the section infringes upon section 25 of Article IV, which provides among other things that "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity."

[1] Appellant argues that section 43.5 "subjects the happiness of every unmarried adult to the caprice or deceit of whomever arbitrarily proves false to the most solemn and sacred of obligations," and she has thereby been deprived of the right to pursue and obtain happiness which is guaranteed to her by Article I, section 1, of the Constitution. We can understand that plaintiff feels aggrieved at having failed in her pursuit of happiness, but if damages would assuage her grief, that healing agent, we think, is not one which is guaranteed to her by the Constitution.

[2] The second contention of appellant that the obligation of contracts is violated by section 43.5 was given special consideration in the case of Fearon v. Treanor, supra, which has been published with an annotation in 109 A.L.R. at page 1229. It was there stated (272 N.Y. 268, 5 N.E. 2d at page 816, 109 A.L.R. at page 1232): "Marriage is not a contract within the meaning of the provision of the Federal

Constitution which prohibits the impairment by the States of the obligation of contracts (Const.U.S. art. 1, § 10, cl. 1). Maynard v. Hill, supra [125 U.S. 190, 205, 8 S.Ct. 723, 726, 31 L.Ed. 654]. The Domestic Relations Law provides in great detail when and how marriage may be entered into, how the relation may be dissolved, the grounds for divorce and annulment, the rights and liabilities of husband and wife, the age at which the relation may be entered into and the class of persons who are disqualified from marrying.

"From time immemorial the state has exercised the fullest control over the marriage relation, justly believing that happy, successful marriages constitute the fundamental basis of the general welfare of the people. Our people believe that marriage should be entered into freely as a matter of choice, not through fear, restraint, or compulsion."

It is also stated in the same opinion (272 N.Y. 268, 5 N.E.2d at page 816, 109 A.L.R. at page 1231): "* * * the Legislature in dealing with the subject of marriage has plenary power." Here will be found also various quotations substantiating the decision of the court upon constitutional questions and a reference to Prof. Schouler's remarks, cited with approval in Goddard v. Westcott, 82 Mich. 180, 188, 46 N.W. 242, 244, which it seems appropriate for us at this time to requote in part (272 N.Y. 268, 5 N.E.2d at page 816, 109 A.L.R. 1232): "'The marriage state ought not to be lightly entered into. It involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred. * * * From such a stand-point, we view the marriage engagement as a period of probation, so to speak, for both parties, —their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, and incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off.'"

[3] The other constitutional provisions upon which appellant relies prohibit legislation in behalf of favored individuals or classes, but considering those provisions we do not find that section 43.5 runs counter to any of them since it applies equally to all persons and deals with no particular class.

[4] We observe but are not seriously impressed by the contention of appellant that section 43.5 is contrary to sound public policy, for that argument seems not to have prevailed where similar statutes have been questioned elsewhere, nor was it sustained in the recent California case, Thome v. Macken, 1943, 58 Cal.App.2d 76, 136 P.2d 116. There the court said (58 Cal.App.2d at page 81, 136 P.2d at page 119):

"While the legislature of this state in enacting section 43.5, supra, did not expressly declare that the actions proscribed thereby are contrary to public policy, we doubt not that they constitute such a declaration.

"It is said in 12 Am.Jur. 668, regarding the sources of public policy, that 'Where there are constitutional or statutory provisions, they govern as to what is the public policy. Where the lawmaking power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.'"

The opinion cites on the same subject, United States v. Trans-Missouri Freight Association, 166 U.S. 290, 340, 17 S.Ct. 540, 41 L.Ed. 1007; Young v. Young, 236 Ala. 627, 184 So. 187; and A. B. v. C. D., D.C., 36 F.Supp. 85.

The judgment is affirmed.

SHINN and WOOD, JJ., concur.

74 Cal.App.2d 72

In re FIDDYMENT'S ESTATE.

FIDDYMENT v. HAMAN et al.

Civ. 7184.

District Court of Appeal, Third District, California.

April 17, 1946.

1. Executors and administrators ⇐14

A person has a right to select whomsoever he may desire to carry out the terms of his will, and his expressed desire should not be thwarted unless the plain provisions of the law or the interests of justice otherwise demand.

2. Executors and administrators ⇐16

The disqualification or renunciation of one of the coexecutors named in will did not affect right of the other coexecutor to be appointed and to carry out terms of will. Probate Code, §§ 324, 408.

3. Executors and administrators ⇐16

Whether deceased's daughters named in will as executrices renounced the right to be appointed executrices was a question of actual intention which depended on actual and not imputed knowledge of their having been so named. Probate Code, § 324.

4. Executors and administrators ⇐15

The failure of deceased's daughters named in will as executrices to file will for probate within 30 days did not entitle applicant to letters of administration instead of daughters, where applicant was not prejudiced by the failure. Probate Code, § 324.

5. Executors and administrators ⇐15

The failure of deceased's daughters named in will as executrices to marshal assets of estate and take possession of deceased's property was not a hostile and antagonistic act depriving daughters of right to be appointed executrices, where prior to her death deceased placed all her property in a trust which had terminated and there was no estate belonging to deceased not included in the trust. Probate Code, §§ 324, 571.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of Ella Fiddyment, deceased. From a judgment appointing Mabel E. Haman and Marjorie E. Chilton as executrices of the last will and testament of Ella Fiddyment, deceased, and denying the application of Russell F. Fiddyment for letters of administration with the will annexed, Russell F. Fiddyment appeals.

Affirmed.

Anthony J. Kennedy, of Sacramento, for appellant.

K. D. Robinson, of Auburn, and Fontaine Johnson, of Sacramento, for respondents.

THOMPSON, Justice.

This is an appeal from an order of the trial court appointing respondents executrices of the last will and testament of Ella Fiddyment, deceased, and denying the application of appellant for letters of administration with the will annexed.

Ella Fiddyment died during the month of August, 1939, being survived by three sons and three daughters, all of legal age. Five years later, on August 19, 1944, appellant filed his petition for letters of administration on the estate of said decedent, alleging that no will had been found and that to his best knowledge and belief decedent had died intestate.

On September 6, 1944, respondents filed their objections to the granting of letters of administration to appellant upon several grounds, to-wit: That decedent left a will and codicil thereto naming respondents as executrices; that prior to her death deceased placed all of her property in a trust which was then terminated; that so far as respondents knew there was no estate belonging to decedent not included in said trust; that for these reasons respondents did not file an application for letters testamentary; and that respondents and not appellant were entitled to letters testamentary.

On the same day respondents filed their petition for the probate of the will of said decedent and requested that they be appointed executrices thereof.

Thereafter, on September 26, 1944, the date set for the hearing of the probate of the will, appellant filed objections to the granting of letters testamentary to respondents on the grounds that: (1) The respondents had failed to produce the will although they had knowledge of the death

of the decedent for five years, (2) the failure of said respondents to produce the will showed on their part a lack of competency, and, (3) likewise a lack of integrity, and (4) by said failure respondents had renounced their right to serve as executrices under said will.

Also on the same day appellant filed his petition for letters of administration with the will annexed, alleging that by reason of the said delay respondents had renounced their right to serve as executrices.

On February 16, 1945, the trial court made its order granting the petition of respondents for probate of said will, and denying appellant's petition for letters of administration with the will annexed.

Appellant has raised three issues on appeal: (1) That the failure of respondents to file said will for probate within thirty days constitutes a renunciation to act as the executrices thereof, (2) that respondents have not shown good cause for their delay in producing the will, and (3) that knowledge of the attorney of the existence of the will must be imputed to the executrices.

From the transcript it appears that Mr. K. D. Robinson, who had acted as attorney for the estate of the deceased's husband and for the decedent herself since her husband's death, had drafted decedent's will on June 13, 1934, and retained the same in the files in his office ever since, with the exception of a few days immediately following the execution thereof, when, as he testified, according to the best of his recollection the decedent had the will in her possession. He further testified that decedent had established a trust to be terminated five years after her death, to which had been transferred all of her property except certain real property situated in the city of Berkeley; that he did not recall whether or not he had ever notified the executrices named therein nor anyone else of the existence of the will; that after the creation of the trust and the transfer of title to the Berkeley property the decedent had no property; and that he had dismissed the matter of the will and codicil from his mind. The witness further stated that he had acted as attorney for the trust estate and had represented the executrices in their individual capacities, although this was denied by one of them, Mrs. Haman, on direct examination.

Mrs. Haman testified that her mother, with whom she was living, had told her of the existence of the will, and that witness knew she was named as an executrix thereof, and that because of their close relationship her mother had discussed many matters with her relating to the property, although there had been no discussion between them concerning either the terms of the trust or the will. She further testified that she and her mother maintained a joint bank account at a Berkeley bank, but that only her mother drew checks against it. It was also her testimony that she felt there was no need to probate the will by reason of the fact that all of the property had been placed in the trust. She concluded by stating she had made no attempt to find the will, nor had she ever talked to Mr. Robinson concerning the possibility of a probate of her mother's estate or the existence of a will.

Mrs. Chilton, the other named executrix, testified that she had no knowledge of the will, that her mother never discussed the will with her, and that Mr. Robinson had not informed her that he had the will in his possession.

Another daughter testified to a conversation which she thought had occurred several years previously between Mr. Robinson and herself, at which time she was informed that the trust followed very closely the wording of the will. One of decedent's sons testified that he lived with his sister, Mrs. Haman, but that he had never been advised of the existence of the will. Appellant herein testified that he had seen Mr. Robinson several times a year for many years, and that he had no knowledge of the will until it was filed for probate.

[1] It is a well settled principle, subject only to such limitations as may be imposed by law, that a person has a right to select whomsoever he may desire to carry out the terms of his will, In re Bauquier, 88 Cal. 302, 26 P. 178, 532, and that his expressed desire should not be thwarted unless the plain provisions of the law or the interests of justice otherwise demand it. 11A Cal.Jur. 271; In re Chadbourne's Estate, 15 Cal.App. 363, 114 P. 1012.

Admittedly the respondents do not come within the class of persons expressly mentioned in section 405 of the Probate Code, and therefore, under the circumstances herein, their right to act as executrices of said estate would be controlled by the provisions of section 324 of the Probate Code, which provides:

"If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown."

In its interpretation of this section, the Supreme Court, in Re Estate of Randall, 177 Cal. 363, 170 P. 835, in affirming an order of the trial court revoking the letters of administration with the will annexed previously issued to a sister of the decedent and granting, instead, letters to the widow who had been named as executrix in the will, stated that the renunciation referred to in said section is not the equivalent of a voluntary renunciation, and that the action of the trial court in appointing the named executrix as provided in the will must be sustained in the absence of a showing of an abuse of discretion. In other words, as the District Court in Re Estate of Martin, 31 Cal.App.2d 501, 507, 508, 88 P.2d 234, 237, succinctly stated, "it should be further noted that section 324 of the Probate Code is not mandatory but is discretionary." See also In re Estate of Vernon, 182 Cal. 91, 187 P. 11; Estate of King, 4 Coffey's Prob. Dec. 10, 20.

A like conclusion was reached in Rice v. Tilton, 13 Wyo. 420, 80 P. 828, 832, wherein the construction of a code section identical with ours was at issue and it was held that:

"Upon an examination of the entire record, we have arrived at the conclusion that there was not such an abuse of discretion on the part of the district court, if in fact there was any, as to warrant us in interfering with its judgment."

[2] It might be concluded from the evidence that Mrs. Haman had such knowledge as is contemplated by said section 324. Still, Mrs. Chilton, the other named executrix, denied any knowledge at any time concerning the will or her appointment. Therefore, the fact, if it be a fact, that one of the co-executors named in the will was disqualified to act or should be deemed to have renounced her right to act, would not affect the right of the other to be appointed and to carry out the terms of the will. See, Probate Code, § 408; In re Estate of True, 120 Cal. 352, 353, 52 P. 815.

[3] It is difficult to see how the doctrine of imputed knowledge, relied on by appellant can have application to the situation herein. This is not the case of a transaction between a principal and a third person, wherein the principal is sought to be charged with liability by reason of facts which it would be the agent's duty to communicate to him. On the question of renunciation, the daughters, if they had been aware of the circumstance that they had been named as executrices in the will, were entitled at their election to renounce or accept the trust. Whether they did renounce it is a question of actual intention which depends on actual and not imputed knowledge. As the author of the Restatement of the Law of Agency, vol. 1, p. 613, sec. 275, points out:

"In many situations, in order for one to be responsible, it is necessary that the act should be done with knowledge in a subjective sense and it is not sufficient that one has means of information."

The case of Flinn Realty Corp. v. Charter Constr. Co. 181 App.Div. 610, 169 N.Y.S. 116, 118, involved the question of the validity of a rescission of a contract for an exchange of properties on the ground of mistake. The defendant contended that the plaintiff had knowledge of the true facts because its agent, a broker, had such knowledge. In overruling the contention the court stated:

"As to the fact of constructive notice by reason of his agency, this fact is without significance, because here is a question of actual intention, and *actual intention can only be judged by actual knowledge and not by constructive knowledge.*" (Italics added.)

Other examples of situations where the doctrine of imputed knowledge is inapplicable are furnished in the cases of Pacific Vinegar etc. Works v. Smith, 152 Cal. 507, 514, 93 P. 85; Burns v. McCain, 107 Cal.App. 291, 296, 290 P. 623; and Palo Alto etc. Assoc. v. First Nat. Bank, 33 Cal. App. 214, 224, 225, 164 P. 1124.

[4] In any event, appellant fails to show that the conduct of respondents, whether or not it resulted from ignorance of the facts, was in any way prejudicial to appellant. As the court stated in Re Estate of True, supra, 120 Cal. at page 353, 52 P. 816:

"The appellant derives his right to be appointed an executor from the testator, and not from the respondent [coexecutor].

The appointment of each is a part of the testator's will, equally with the disposition made by him of his estate. The execution of the will is a trust that has been conferred upon each of them by him, and neither of them can be estopped from carrying out this trust by reason of any conduct towards the other. While the failure of the appellant to apply for letters until after they had been issued to the respondent might have precluded him from claiming a right to them, so long as those letters were in force he is not estopped by reason of his renunciation from claiming them at any time before they were granted to her."

Again, in the case of Estate of King, supra, the court observed (4 Coffey's Prob. Dec. page 20):

"In what has been said section 1301 is not overlooked, wherein it is provided that a failure for thirty days to petition for letters may be held to amount to a renunciation unless good cause for delay is shown; but the cause for the delay here sufficiently appears, and even if no such cause appeared, there would be no occasion for the court to exercise the discretion given by this section against the executors, for the delay has resulted in no injury to the persons interested under the will, or to the heirs of the testator."

[5] Appellant next challenges the assertion of respondents to the effect that, it appearing that no property existed in the estate as distinguished from the trust, and hence that there was no need for an administration of the estate, consequently the delay in making application for letters testamentary was shown to be excusable for "good cause," within the meaning of section 324 of the Probate Code. In this connection appellant points out that under section 571 of the Probate Code it is the duty of the executor to marshal the assets of the estate and take possession of all of the decedent's property. From this he reasons that, on the authority of In re Estate of Schwartz, 67 Cal.App.2d 512, 521, 155 P.2d 76, the failure of the respondents to comply with the provisions of said section of the code amounts to a showing of hostility toward the estate and precludes the exercise of any discretion on the part of the trial court in granting respondents' petition for letters testamentary.

We do not so understand the Schwartz case. There, one of two named executors applied for letters testamentary. The other executor instituted proceedings to contest the will on the ground that the testator was of unsound mind and therefore without testamentary capacity at the time she executed the document. The District Court said that, as the course of conduct followed by the contestant was inconsistent with any desire on his part to act as a co-executor, the evidence was sufficient to support the finding of the trial court that the contestant had refused to act, and that the order granting letters to the other applicant alone was proper.

Applying the rule in the Schwartz case to the present controversy, it would appear that, as neither of the respondents herein is contesting the will or declining to act thereunder, letters testamentary should issue to them, or one of them, unless it can be said as a matter of law that the acquisition by respondents of certain real and personal property by gift from the decedent prior to her death defeats any showing of good cause for the respondents' failure to file their petition sooner.

In the previously cited case of In re Bauquier, objections were made to the appointment of the executrix named in the will on the ground that, by means of intimidation, falsehood, fraud, deceit, misrepresentation, and undue influence, she had induced her father to "assign, set over and deliver" certain real and personal property, and that because of such fact she was incompetent to act. The trial court found that her position was antagonistic and hostile to the estate, and therefore she was incompetent to act as executrix. In reversing that order, the Supreme Court held that the fact that she claimed property as her own which the other legatees claimed belonged to the estate would not of itself, and without some reflection on the honesty of her claim, show a want of integrity, and stated [88 Cal. 302, 26 P. 180]:

"We feel entirely satisfied that the words 'want of integrity,' found in section 1350 of the Code of Civil Procedure, do not apply to a case where there is a simple conflict of interest in regard to the estate between the executor named in a will and the other legatees. We are also satisfied that, if the legislature had designed to make such a conflict of interest a cause for refusing to appoint an executor so named, such intention would have been manifested by language more apt for that

purpose than is to be found in that section of the Code of Civil Procedure.

"We may add that, while the court is authorized to refuse to appoint an executor named in a will for want of integrity, yet for manifest reasons this power should not be exercised except upon clear and convincing evidence establishing such disqualifying fact.

"The executor may always be removed after appointment, unless he discharges the duty of his trust faithfully, and as directed by law."

It follows that the so-called hostile and antagonistic acts of the respondents were not in themselves or necessarily a disqualifying factor.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



74 Cal.App.2d 46

McPHEETERS v. BOARD OF MEDICAL EXAMINERS OF STATE et al.

Civ. 3510.

District Court of Appeal, Fourth District, California.

April 16, 1946.

1. Mandamus ⇐187(2)

Order denying motion to strike out petition for peremptory writ of mandate was not appealable. Code Civ.Proc. § 963.

2. Evidence ⇐48, 51

Court of Appeal may take judicial notice of the records of a public agency, but should be furnished with some official information of what such records contain, particularly where counsel disagree as to contents of such records.

3. States ⇐45

The State Board of Medical Examiners is a public agency exercising governmental functions. Business and Professions Code, §§ 100, 101, 2100.

4. States ⇐191(2)

Proceeding by licensed physician against State Board of Medical Examiners and its members for peremptory writ of mandate requiring respondents to dismiss a proceeding against petitioner pending before the board was a suit against board and its members in their official capacity as respects necessity of consent to be sued. Business and Professions Code, §§ 100, 101, 2100.

5. States ⇐191(1)

The state and its agencies exercising governmental functions may not be sued unless statutory consent is given to maintain an action against them.

6. States ⇐191(1)

When state consents to be sued, it may state the conditions under which such right is given, and statutory provisions expressing the conditions concerning actions against the state must be complied with.

7. States ⇐191(1)

Statutes conferring the right to sue the state, being in derogation of state's sovereign capacity, will be strictly construed.

8. Venue ⇐36

Mandamus proceedings are subject to the same rules as to change of venue as are other actions.

9. Venue ⇐11

The superior court of Fresno county had no jurisdiction of proceeding for peremptory writ of mandate requiring State Board of Medical Examiners to dismiss a proceeding against licensed physician practicing in Fresno pending before the board, since under statute authorizing maintenance of legal proceedings against the board, such proceedings must be instituted either in Sacramento, San Francisco, or Los Angeles counties. Business and Professions Code, §§ 100, 101, 2100, 2109.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Proceeding by George Carl Heckman McPheeters against the Board of Medical Examiners of the State of California, Percival Dolman, and others for a peremptory writ of mandate requiring respondents to dismiss proceedings against petitioner

pending before the board. From a judgment granting the writ and orders denying a motion for change of venue and a motion to strike out the petition, respondents appeal.

Order denying change of venue reversed with instructions.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

A. A. George, of Fresno, for respondent.

MARKS, Justice.

[1] This is an appeal from a judgment in the form of a peremptory writ of mandate requiring appellants to dismiss certain proceedings pending against respondent before the Board of Medical Examiners of the State of California, and from an order denying a motion to change the place of trial, and from an order denying a motion to strike out the petition which order is not appealable. Sec. 963, Code Civil Proc.

[2] The record before us consists of a clerk's transcript on appeal. Both counsel have gone outside the record in their briefs and arguments. While it is true that we may take judicial notice of the records of a public agency, as suggested by counsel, they should realize that we should be furnished with some official information of what those records contain as we should not be called upon to take judicial notice of facts of which we are in actual ignorance. This is especially true in the instant case as counsel do not agree as to the contents of those records. We find the information disclosed by the clerk's transcript sufficient for our purposes so we need take no steps to require appellants to disclose the contents of their official records.

The petition for a writ of mandate was filed in the Superior Court of the County of Fresno on July 6, 1945, and contains a lengthy statement which we will briefly summarize.

Respondent was a duly licensed physician and surgeon who practiced in the city of Fresno. The individual appellants are members of the Board of Medical Examiners of the State of California, and John R. Walker resides in the County of Fresno.

On December 30, 1943, a complaint was filed with the Board of Medical Examiners charging respondent with two violations of section 2377 of the Business and Professions Code. A second complaint was filed on May 19, 1944, charging another violation of the same code section.

Respondent and his attorney appeared before the board as follows: February 7, 1944, in Los Angeles; June, 1944, in San Francisco; October 17, 1944, in Sacramento; February 26, 1945, in Los Angeles, at which time the hearing was continued to August, 1945.

It is alleged that at each of those respective times and places respondent was ready to proceed with the hearing but that no evidence was produced against him and he moved to dismiss the complaints, which motions were denied.

The alternative writ of mandate issued on July 6, 1945, was made returnable on July 27, 1945, at which time appellants argued a general and special demurrer, moved to change the place of trial to Sacramento County and moved to dismiss the petition because of lack of jurisdiction in the trial court. The court minutes of that day show that the various matters were argued and counsel were given twenty, twenty and ten days respectively to file briefs, the cause then to stand submitted. The minutes of September 5, 1945, show that both motions were then denied, the demurrer was overruled "and Petition for Writ of Mandate is hereby granted." The peremptory writ of mandate was issued on September 8, 1945.

The record does not indicate that any default of appellants was taken nor that any evidence was taken in support of the allegations of the petition. There are no findings of fact and no judgment other than the minute order and the following endorsement on the bottom of the writ: "Let the foregoing Writ issue. September 8th, 1945. Dan F. Conway, Judge."

The first question for our consideration is the correctness of the order denying the motion to change the place of trial, for if the Superior Court of Fresno County had no jurisdiction of the case, the other errors urged by appellants, and some of them seem to possess merit, become unimportant.

[3, 4] It is clear that the Board of Medical Examiners of the State of California is a public agency exercising governmental functions (Secs. 100, 101, and 2100, Business and Professions Code) and that it and

its board members are sued here in their official capacity. Reed v. Molony, 38 Cal. App.2d 405, 101 P.2d 175.

[5-7] It is settled that neither the State nor any of its agencies exercising governmental functions can be sued unless statutory consent is given to maintain an action against any of them. In State of California v. Superior Court, 14 Cal.App.2d 718, 58 P.2d 1322, 1324, it was said:

"It follows that the several passages contained in said section expressing the conditions and limitations concerning actions against the state must be complied with. It will not be disputed that when the state gives permission to be sued it may state the conditions under which such right is given. Gill v. Johnson, 103 Cal.App. 234, 284 P. 510; 59 C.J. 304. As statutes conferring the right to sue the state are in derogation of the state's sovereign capacity, such statutes will be strictly construed. Westinghouse Electric & Mfg. Co. v. Chambers, 169 Cal. 131, 145 P. 1025." See also, Innes v. McColgan, 52 Cal.App.2d 698, 126 P.2d 930.

[8] It is held that mandamus proceedings are subject to the same rules as to changes of venue as are any other actions. Bloom v. Oroville-Wyandotte Irr. Dist., 34 Cal.App.2d 102, 93 P.2d 164.

The only statute called to our attention permitting actions against appellants is section 2109 of the Business and Professions Code which provides as follows:

"The office of the board shall be in the city of Sacramento. Suboffices may be established in Los Angeles and San Francisco and such records as may be necessary may be transferred temporarily to them. Legal proceedings against the board may be instituted in any one of these three cities."

[9] As the offer of the permission to sue the State or its governmental agencies must be accepted in the form in which it is given it follows that this action should have been started either in Sacramento, San Francisco or Los Angeles counties and that the Superior Court of Fresno County had no jurisdiction of the case. The motion for change of venue should have been granted.

Respondent relies on the cases of County of Los Angeles v. Riley, 20 Cal.2d 652, 128 P.2d 537, and Boland v. Cecil, 65 Cal. App.2d Supp. 832, 150 P.2d 819, to sustain the decision of the trial court.

In the first cited case the County of Los Angeles sought a writ of mandate against the State Comptroller to compel him to recalculate the credits claimed by the county in cases of child aid. The Supreme Court held that the County of Los Angeles was merely seeking to enforce a duty expressly imposed on the Comptroller by law so the action was not against the State and did not violate the rule of sovereign immunity against unauthorized suits. We have no such situation here as we know no statute expressly imposing the duty on appellants to dismiss the proceedings pending against respondent. By making this statement we do not wish to imply that in a proper case the courts are without power to require a state board to hear charges filed before it within some reasonable time. That question is not before us and we express no opinion on it.

Boland v. Cecil, supra, was an action to recover possession of meat that had been seized by officials of the Department of Agriculture. The municipal court of Los Angeles County gave judgment to plaintiff for possession of the meat or its value in case possession could not be had, and for damages for its detention.

The Appellate Department of the Superior Court affirmed the portion of the judgment for possession of the meat but struck therefrom the provisions for the recovery of its value if possession could not be had, and for the recovery of damages on the ground that an action for the recovery of property wrongfully taken and withheld by a state officer is not an action in which the State may be interested while the money judgment was against a state official. The opinion fully recognizes the rule of sovereign immunity against unauthorized suits and enforced that rule by striking out the provisions for a money judgment. We need comment no further on this case except to say that it is not authority supporting the argument of respondent.

The order denying the motion to change the place of trial of the case to the Superior Court of Sacramento County is reversed with instructions to the trial court to grant the motion

BARNARD, P. J., and GRIFFIN, J., concur.

74 Cal.App.2d 105

SCHULSTAD v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 12942.

District Court of Appeal, First District, Division 2, California.

April 22, 1946.

Hearing Denied June 20, 1946.

Municipal corporations ⇐741(1)

A plaintiff who was rendered mentally incapable of filing claim against city and county of San Francisco within time specified in charter by the same injury which was the basis of his cause of action was not barred from filing claim as soon as he regained his mental ability to do so. Civ. Code, § 3517.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Fred Schulstad against the City and County of San Francisco, a municipal corporation, and others, for personal injuries allegedly sustained when the plaintiff was struck by a bus. From a judgment for the named defendant, entered after its demurrer to the complaint had been sustained without leave to amend, the plaintiff appeals.

Reversed with directions.

John A. Foley, C. F. Eschwig, J. Emmett Chapman, and Fredrick C. Dewar, all of San Francisco, for appellant.

John J. O'Toole, City Atty., City & County of San Francisco, and Lawrence S. Mana, Deputy City Atty., both of San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment for defendant City and County of San Francisco entered after its demurrer to plaintiff's complaint had been sustained without leave to amend. The complaint is one for personal injuries alleged to have been suffered by appellant on December 5, 1943, by being struck by a bus negligently operated by respondent's employee.

The complaint alleges the presenting of a verified claim for such injuries to the controller on May 31, 1944. The San Francisco charter in section 87 requires such claims to be presented to the controller "within sixty days after the occurrence from which it is claimed the damages have arisen."

In explanation of his failure to comply with the sixty day time provision of this section the plaintiff alleged in his complaint:

"That plaintiff failed to file said claim against said City and County of San Francisco, with the Controller of said City and County, within sixty days as required by law, for the reason that plaintiff was wholly incapacitated mentally by reason of the above described injuries suffered by him, until the date upon which said claim was actually filed as hereinabove set forth."

The question is squarely presented whether a plaintiff who is rendered mentally incapable of filing a claim within the time specified in the charter by the same injury which is the basis of his cause of action is nevertheless barred although he actually files his claim as soon as he regains the mental ability to do so.

That he is barred under such circumstances was expressly held in Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580, and Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314, but we feel justified in reexamining the question in view of the later decision of the Supreme Court in Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323.

Prior to the latter decision it had been established by an unbroken line of authority in this state that the time limits fixed in claim provisions of the character here in question were not subject to any exception, however harsh their operation might be in the particular case. In Farrell v. County of Placer, supra, this harsh rule was relaxed, the court holding that the counties defendant in that case could be estopped by the representations of their agent from insisting on the filing of a claim within the time limit fixed by the law. The court said in that case (23 Cal.2d at page 630, 145 P.2d at page 573, 153 A.L.R. 323): "Although it has been repeatedly held that compliance with the appropriate claim statute is mandatory and an essential requisite to plaintiff's cause of action, nevertheless the time element with respect to the filing of the claim is essentially procedural in nature (citing cases) and is analogous to a statute of limitation. (Citing cases.) It has been

intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason."

There is a divergence of authority in other jurisdictions as to whether a plaintiff is excused from compliance with the time provision of a claim statute by the fact that as a result of the very tort for which he seeks recovery he was rendered mentally or physically incapable of filing the claim within the required time. (See Notes in 31 A.L.R. 619; 59 A.L.R. 411; and 109 A. L.R. 975.) Many cases have recognized the manifest injustice of denying to an injured person relief for his injury against a municipality where the gravity of the injury itself so disabled him that he was unable to present the statutory claim within the time required, and have held that where the very injury for which he seeks recovery has prevented his filing his claim in time, a filing within a reasonable time after he is able to do so is a sufficient compliance with the statute. Webster v. City of Beaver Dam, C.C., 84 F. 280; Green v. Village of Port Jervis, 55 App.Div. 58, 66 N.Y.S. 1042; Walden v. City of Jamestown, 178 N.Y. 213, 70 N.E. 466; Forsyth v. City of Oswego, 191 N.Y. 441, 84 N.E. 392, 123 Am.St.Rep. 605; Hillborg v. City of New York, 263 App.Div. 668, 34 N.Y.S.2d 153; City of Colorado Springs v. Colburn, 102 Colo. 483, 81 P.2d 397; Terrell v. City of Washington, 158 N.C. 281, 73 S.E. 888; Randolph v. City of Springfield, 302 Mo. 33, 257 S.W. 449, 31 A.L.R. 612; City of Tyler v. Ingram, Tex.Civ.App., 157 S.W.2d 184; Hartsell v. City of Asheville, 166 N.C. 633, 82 S.E. 946. These courts have recognized that a city should not be allowed to escape liability by reason of its own wrongful act in rendering the plaintiff incapable of complying with the time provision of its claim statute.

Thus in Green v. Village of Port Jervis, supra, 66 N.Y.S. at page 1044, the court said that "if compliance with the condition is rendered temporarily impossible by the wrongful act of the defendant, it would be monstrous to allow the defendant to assert that fact as a defense to the action. The requirement of notice necessarily presupposes the existence of an individual capable of giving it, and not one deprived of that power by the operation of the very wrong to be redressed. That the defendant should be permitted to take advantage of its own wrong is clearly not within the purview of the law."

In Terrell v. City of Washington, supra, 73 S.E. at page 895 we read: "But the jury have found, under proper instructions, that by reason of his injuries, which affected him both mentally and physically, the plaintiff was unable, during that period, to transact ordinary business or to present his claim, and that he did so within a reasonable time after he was restored sufficiently to do so. This, we think, excused the delay. * * * It may very properly be said that it would, in truth, shock the sense of justice and right if this provision was construed so as to hold the notice of the plaintiff's claim insufficient under the circumstances. It is an accepted maxim that the law does not seek to compel that to be done which is impossible. It cannot reasonably be presumed that the intention of the Legislature, in enacting this charter, would lead to any such unjust conclusion * * *."

More tersely the court said in City of Tyler v. Ingram, supra, 157 S.W.2d at page 189: "To hold that a city may, upon adopting such a charter provision, wrongfully injure a person to the degree of rendering the victim powerless to comply with its terms, and then avoid liability by invoking such charter provision in bar of the right to sue, would constitute a complete denial and abrogation of the claimant's right of recourse to the courts."

We might also quote the dry remark of Mr. Justice Butler in his concurring opinion in City and County of Denver v. Taylor, 88 Colo. 89, 292 P. 594, 598, 72 A.L.R. 833: "To adopt the strict rule, which we should decline to do, would be equivalent to offering this suggestion to municipalities: If you are negligent on any occasion, see to it that your negligence is sufficiently gross to insure the complete physical and mental disability of the victim; for by doing so, you will avoid the necessity of paying damages, which you would be required to pay if the victim were left in possession of his faculties."

Respondent argues that this case is not to be governed by Farrell v. County of Placer, supra, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, because in our case there

is no estoppel as such. That there is in our case no estoppel by representation is true, but the fundamental fact exists in both cases that defendant by its wrongful conduct prevented the plaintiff from filing his claim within the time provided by law. It is a maxim of jurisprudence embodied in section 3517 of our Civil Code that: "No one can take advantage of his own wrong." To permit defendant to take advantage of the sixty day provision of section 87 of its charter under the facts alleged in the complaint would violate this maxim as fully as a similar holding in the Farrell case would have done.

We have reached the conclusion that the reasoning of the Supreme Court in the Farrell case justifies us in refusing to follow Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580, and Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314, cited supra. We limit our holding to a case, such as this, in which the plaintiff is rendered incapable of filing the claim in time by the tortious injury for which he seeks to recover. So limited our ruling does not conflict with Artukovich v. Astendorf, 21 Cal.2d 329, 131 P.2d 831.

The judgment is reversed with directions to the trial court to overrule the demurrer.

NOURSE, P. J., and GOODELL, J. concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



74 Cal.App.2d 185

AMARAL v. UNITED BEN. LIFE INS. CO.

Civ. 7152.

District Court of Appeal, Third District, California.

April 26, 1946.

1. Appeal and error ⇐989

Where, on appeal, it is contended that findings of a trial court are not sustained by the evidence, the duty of an appellate court begins and ends with a determination as to whether there is in the record any substantial evidence, whether contradicted or uncontradicted, which, taken in its most favorable aspect together with reasonable inferences therefrom, is sufficient to support the judgment, and, when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

2. Insurance ⇐665(3)

In action on life policy, finding that insured in application did not answer falsely that he was sound mentally and physically, that he had never had kidney disease, and that he had not had any local or constitutional disease within five years, and that he was then in good health, was substantially supported by the evidence.

3. Appeal and error ⇐994(3)

In action on life policy, credibility of doctor who had examined insured some years before the issuance of the policy and the reliability of his various diagnoses, and question whether insured had knowledge of disease at time of application, was for trial court.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Evangelina Amaral against United Benefit Life Insurance Company to recover the value of a life insurance policy issued by defendant upon the life of plaintiff's deceased husband, August P. Amaral. From adverse judgment, the defendant appeals.

Affirmed.

Horace T. Beverly and Wm. R. Ouderkirk, both of San Francisco, for appellant.

Libby & Finn, of Sebastopol (A. Dal Thomson, of counsel), for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff in an action brought by her to recover the value of a life insurance policy issued by appellant upon the life of plaintiff's deceased husband, August P. Amaral. The policy was issued in May, 1942, without medical examination, upon the solicitation of a salesman employed by an agency. It is conceded that all premiums due thereon were paid up to the time of the death of Amaral in October, 1942. Defendant refused payment to plaintiff, the beneficiary, alleging in its answer to plaintiff's complaint that the policy had been issued in reliance upon answers to questions set forth in the written application which

Amaral made, and that in said application Amaral concealed from defendant and misrepresented material facts, particularly in that he represented that he was sound mentally and physically; that he had never had "Kidney Disease"; that he had not had any local or constitutional disease within five years, and that he was then in good health. It was further alleged on information and belief that Amaral's answers were false, fraudulent and untrue in that at the time the application was made Amaral was not physically or mentally sound, but, on the contrary, was in poor health and was suffering from chronic nephritis, which fact was known to him.

The cause was tried by the court sitting without a jury, and at the conclusion of the hearing findings of fact were filed in which the allegations of plaintiff's complaint were found to be true and it was specifically found that the foregoing allegations of the answer were untrue.

[1] Appellant here contends that the findings are without support in the evidence, particularly the finding that it was not true that at the time of the making of the application Amaral was in poor health and suffering from disease, or that such fact was known to Amaral, and the finding that it was not true that at said time he had suffered from chronic nephritis or that said fact was known to him. Appellant asserts that proof offered by it of the existence of kidney disease in Amaral "was clear and uncontradicted and that there was no evidence adduced from which the trial court was justified in finding to the contrary."

This contention calls for a reiteration of the well established rule that where, on appeal, it is contended that findings of a trial court are not sustained by the evidence, the duty of an appellate court begins and ends with a determination as to whether there is in the record any substantial evidence—whether contradicted or uncontradicted—which, taken in its most favorable aspect together with reasonable inferences therefrom, is sufficient to support the judgment; and that when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 223, 224, 143 P.2d 689.

Appellant relies upon the testimony of one Dr. Bulman, whose testimony, briefly stated, was that Amaral had consulted him in August, 1935, for "nerves"; that the patient was then about 25 years of age; that he examined him and concluded that he had "a grade two albumin area, he was a medio type of hypertension," and that his blood pressure was "one hundred fifty systolic and ninety diastolic"; that from his past history he made a diagnosis of "chronic nephritis with parenchymatous." That the substance of the history given him by Amaral was that as a boy of eight years "he was very swollen" for some time; that therefrom he "presumed" that at that time the boy had had an acute attack of nephritis. He first said that he did not run a kidney test in August, 1935, and only saw the patient once. Later in his testimony he said that he did make an urinalysis in August, 1935, but made no microscopic test; that the patient was supposed to come back but did not do so; that he did not see Amaral again until October, 1942, at which time the patient complained of a choking attack; that he gave him a little sedative, calcium, but did not prescribe for chronic nephritis or put him on a diet; that he then "realized he [Amaral] was approaching terminal phase," and that his condition was simply a continuation of the condition which he found in 1935, only more severe; that he attended Amaral until his death and signed the death certificate; that in said certificate he set forth that the immediate cause of death was "Uraemia Duration 4 days Due to Chr. nephritis parenchymatous 24 yrs." This witness was asked: "Doctor, in 1935 when you examined Mr. Amaral and found the condition which you testified to, did you tell him your conclusions?" The answer was, "Yes, they invariably ask how the kidneys are and we tell them exactly what the findings are right at that time"; that he told Amaral that he had "this marked edema albuminuria." In view of the fact that Dr. Bulman's testimony regarding a kidney test in 1935 was contradictory, and that he then saw the patient but once, it appears improbable that he then told Amaral that he had kidney trouble. This witness also testified that he had treated Amaral in 1928 for sore throat and had then performed a tonsillectomy, and that he then found albumin in the urine. But he gave no testimony that he treated him then or at any other time for nephritis or any other form of kidney disease. When asked by the court if he had told Amaral what albumin in the urine meant, he said: "We usually express it, it

is Bright's disease. I don't remember what I told him at that time" (1928).

In his final report made after the patient's death this doctor stated that he had treated the patient for "Uraemia and chronic interstitial nephritis." Another time he said that Amaral had "glomerulitis nephritis."

As opposed to the testimony of Dr. Bulman, plaintiff called Dr. Makaroff, who testified that about 5% of healthy young people show the presence of albumin in the urine, without having any disease of the kidneys. Regarding the conclusions of Dr. Bulman as stated variously in his testimony, in the death certificate, and in his final report of illness, that Amaral as a boy had "acute nephritis," and later had "chronic interstitial nephritis," "chronic nephritis with parenchymatous," "nephritis parenchymatous 24 yrs.," "glomerulonephritis" and "glomerulitis nephritis." Dr. Makaroff testified that there are differences between glomerulonephritis" and parenchymatous and chronic nephritis; that there is no such thing as chronic interstitial nephritis, as interstitial nephritis is an acute inflammatory condition that does not become chronic and from which the patient dies or recovers; that chronic nephritis is a condition causing the kidney cells to die and is not an inflammatory condition; that there is no way of determining the type of nephritis from which a patient may be suffering without a complete microscopic examination and further tests to determine whether the injury is here or there, or whether it is nephritis at all; that the presence of albumin without evidence showing loss of kidney function or cellular elements in the urine cannot be construed as nephritis. Also that it was quite possible for Amaral to have been free of nephritis in May and to have died of it in October—that one may die of it in a period of a few days; that in the majority of cases of even chronic nephritis the condition is not reflected in the physical appearance of the patient, who might appear to be in a normal health condition, and be unaware of his true condition; and that the tests given Amaral by Dr. Bulman would not disclose the presence of chronic nephritis. Regarding Amaral's blood pressure Dr. Makaroff testified that nervousness might cause the blood pressure Dr. Bulman found in Amaral; that he considered Dr. Bulman's diagnosis was too haphazard and not sufficiently confirmed.

Plaintiff, in addition to the testimony of Dr. Makaroff, called two witnesses who testified that they had known Amaral for twenty years or more, and had worked with him; that Amaral worked at hard manual labor, never missed work on account of his health, never complained, and was "the picture of health."

Mrs. Amaral testified that she married Amaral in April, 1935, and had known him then for two years; that during her marriage Amaral never stayed at home from work because of illness, never complained and never mentioned that he had kidney trouble; that he looked "nice and strong"; that she went with him to see Dr. Bulman in October, 1942, but Dr. Maximov then examined him as Dr. Bulman was out of town; that Dr. Maximov took his blood pressure, but did not take a urine specimen; that on a second visit they saw Dr. Bulman; that she asked both doctors what was the matter with her husband but neither answered her question.

[2, 3] From the foregoing we are satisfied that the trial court's findings, of which appellant complains, cannot be said to be without substantial support in the evidence. The credibility of Dr. Bulman, and the reliability of his various diagnoses, were matters for the determination of the trial court, as was the question whether Amaral, even if he had kidney disease, knew of the fact.

In the recent case of Lavender v. Kurn, 66 S.Ct. 740, 744, 90 L.Ed. 916, the court said:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of specluation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The functions of the trial court in the case before us were the same as those of the jury in the case last cited. That court was not compelled to accept the testimony of Dr. Bulman in toto, but may well have concluded

ed that his prescience regarding Amaral's earlier condition was due to a large extent to subsequent events. And the testimony of the other witnesses was ample to support the conclusions set forth in the findings which appellant contends do not find support in the evidence.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



74 Cal.App.2d 158

WELLS v. WELLS.

Civ. 13073.

District Court of Appeal, First District, Division 2, California.

April 25, 1946.

1. Venue ⇐66

An affidavit of merits filed in support of motion for change of venue must show that moving party fully and fairly stated facts in the case to his counsel, and a statement to effect that affiant states "his" or "my" case is insufficient. Code Civ.Proc. § 396b.

2. Venue ⇐66

Where affidavit of merits filed by defendant in support of motion for change of venue stated that affiant had fully and fairly stated the facts in "my" case to counsel, the granting of motion for change of venue was error. Code Civ.Proc. §§ 395, 396b.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Marion R. Wells against Paul David Wells, also known as Paul D. Wells, for amount allegedly due under a written agreement. From an order granting defendant's motion for change of venue, the plaintiff appeals.

Reversed.

Phil F. Garvey, of San Francisco, for appellant.

Dudley H. Nebeker, of Oakland, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order granting defendant's motion for a change of venue from the City and County of San Francisco to Alameda County. After appellant's brief was filed the respondent failed to file his brief within the time prescribed by the Rules on Appeal. Notice was duly given in accord with Rule 17(b) and the case was thereafter submitted upon the appellant's opening brief.

Plaintiff Marion R. Wells filed her complaint on August 30, 1945, in the superior court of the City and County of San Francisco, seeking to recover the sum of $2673 plus interest alleged to be due and owing under a written agreement entered into between the parties in North Carolina. On September 28, 1945, the defendant demurred to the complaint, and on the same day filed a demand for change of venue to Alameda County which was the county of his residence. A notice of motion for change of venue to that county was also filed together with points and authorities and the defendant's affidavit of merits. On October 16, 1945, the court made a minute order granting the motion and on October 22, 1945, entered a written order transferring the place of trial to the superior court of the County of Alameda.

It is admitted by appellant herein that the action is transitory in nature entitling the respondent to a trial in the county of his residence under section 395 of the Code of Civil Procedure. Appellant argues, however, that the affidavit of merits in support of the motion for change of venue failed to comply with the provisions of section 396b of the Code of Civil Procedure and therefore that the order of transfer was erroneous. The affidavit under attack reads in part as follows: "I am the defendant in the above entitled action and at the time of the commencement of said action I was, and ever since have been and now am a resident of the County of Alameda, State of California. I have fully and fairly stated the facts in *my* case in this action to my counsel, Dudley H. Nebeker, of Oakland, California, and after such statement I have been advised and verily believe that I have a good and substaintial defense to said action on the merits." (Italics added.)

[1, 2] The appellant argues that the use of the word *my*, italicized above, renders

the affidavit fatally defective. It is true that the affidavit of merits required by section 396b of the Code of Civil Procedure must show that the moving party fully and fairly stated the facts in *the* case to his counsel and that a statement to the effect that the affiant states *his* or *my* case is insufficient. Nickerson v. California Raisin Company, 61 Cal. 268; People v. Larue, 66 Cal. 235, 5 P. 157; Hanna v. De Koch, 52 Cal.App. 389, 390, 198 P. 1006; Fernandez v. Fernandez, 11 Cal.2d 568, 569, 81 P.2d 913; 25 Cal.Jur. 901 and 902. It has been held that the latter averments mean no more than that the moving party stated his defense to the case to his attorney. People v. Larue, supra, 66 Cal. 236, 5 P. 157; Phillips v. Logan, 18 Cal.App. 287, 122 P. 1096; Hanna v. De Koch, supra, 52 Cal.App. 390, 198 P. 1006. Upon the basis of these authorities the trial court should have denied the motion for change of venue.

The order is reversed.

GOODELL and DOOLING, JJ., concur.



CORPORATION OF AMERICA v. ABRAMS et al.

No. 1260–1261.

Appellate Department, Superior Court, City and County of San Francisco, California.

Jan. 4, 1939.

Courts ⇐190(6)

Motions to dismiss appeals from judgments in municipal court on ground of appellants' laches and delay in settling bill of exceptions were denied, where appellants' attorney excused the delay since the municipal court was the proper tribunal in which to try out questions of appellant's laches by a motion to terminate the proceedings. Code Civ.Proc. § 650.

Appeal from Municipal Court of City and County of San Francisco.

Actions by the Corporation of America against Jeannie Abrams and others. From adverse judgments, the defendants appeal, and the plaintiff moves to dismiss the appeals.

Motions denied.

F. W. Sawyer, of Los Angeles, for appellants.

Cushing & Cushing, of San Francisco, for respondent.

PER CURIAM.

Two motions are presented to dismiss appeals in what are apparently companion cases, numbered in the Municipal Court Nos. 340 and 341. It appears from the certificate of the clerk of the Municipal Court that in each case a notice of appeal was filed on May 29, 1934; draft of proposed bill of exceptions was filed May 31, 1934, and objections and amendments to the proposed bill were filed on July 15, 1936, and that no further steps have been taken to settle said bills. From the affidavit of Everett S. Layman it appears that the time to propose amendments had been extended to July 15, 1936, by stipulation of counsel. The motion is based on the laches and delay of appellant in perfecting the records on appeal.

Respondent cites and relies upon In re Estate of Johnston, 14 Cal.App. 376, 112 P. 191; Moultrie v. Tarpio, 147 Cal. 376 81 P. 1112; Harbaugh v. Lassen Irr. Co., 24 Cal.App. 773, 142 P. 847; and Warren v. McGowan, 7 Cal.Unrep. 190, 77 P. 909.

At the time these several cases were decided, with the possible exception of Warren v. McGowan which went on another ground, C.C.P. § 650 contained the following provision: "The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge."

An examination of the cases relied on by respondent, other than the case of Warren v. McGowan, will show that in each of those cases the appellant failed to present the proposed bill to the judge or deliver it to the clerk within the time allowed.

In Moultrie v. Tarpio, supra, the court states, 147 Cal. at page 377, 81 P. at page 1112:

"Appellant has never presented said proposed bill or amendments to the judge who made the order appealed from, or to the clerk of the court for said judge."

In Harbaugh v. Lassen Irr. Co., supra, the proposed bill of exceptions was withdrawn by stipulation and respondent allowed 30 days to prepare amendments. Nothing further was done for five years. The court held that the bill had never been presented for settlement or if presented its withdrawal made it incumbent on appellant to present it again in view of the language of C.C.P. § 650 above quoted.

In Estate of Johnston, supra, after proposed amendments were served on appellant he did nothing. Apparently the proposed bill and amendments were not presented for settlement or delivered to the clerk within ten days thereafter or at all.

In none of the three cases were any proceedings to settle a bill of exceptions pending, since appellant had not presented the bill for settlement or delivered it to the clerk within the time allowed by C.C.P. § 650.

In Warren v. McGowan, supra, the bill of exceptions was actually settled by the trial judge and filed with the clerk, but appellant thereafter took no steps to have the record certified by the clerk or filed in the Supreme Court.

On the other hand, in Curtin v. Ingle, 155 Cal. 53, 99 P. 480, 481, where the proposed bill of exceptions had been delivered to the clerk for the judge in accordance with the above quoted language of C.C.P. § 650 as it then read, the Supreme Court said of a motion to dismiss the appeal on the ground that appellant had failed to take any steps to procure the settlement of his proposed statement for over six months:

"But whether a party has been guilty of laches in that respect or not is primarily a matter for the trial court before whom the proceedings for the settlement of the statement on appeal is pending, and this court should not be called upon originally to determine, on a motion to dismiss an appeal, whether an appellant has been derelict in securing with due expedition such settlement. If, as contended for by respondent, the appellant has been guilty of such laches in proceeding with the settlement as would justify this court in saying that it amounts practically to an abandonment of his appeal, the same point can be urged in the trial court. * * *

"Almost all of the cases cited by respondent in support of the motion to dismiss for laches are cases where the action of the trial court in settling statements, over objection of the respondents against such settlement on account of laches, was before this court on appeals directly involving the correctness of the rulings of the superior court in that respect, or were cases where appeals were dismissed for failure to present statements for settlement within the time allowed by law. While it must be conceded that this court has the power to dismiss, on application therefor, an appeal where there has been a failure to proceed with proper diligence to procure settlement of the statement * * * it is deemed the better practice to require a respondent to avail himself of that objection in the lower court when the proceeding for the settlement of the statement is pending and where the disposition of it primarily belongs."

That such a procedure does not leave respondent without an adequate remedy was pointed out by the court in the following language:

"He can still avail himself of the motion in the trial court to dismiss the proceedings for the settlement of a statement on the ground of laches, or object to the settlement on that ground. If his motion is denied, or his objection overruled, he can have the ruling of the court in doing so reviewed here on appeal, and we think this the proper practice to pursue."

See also Jansson v. National S. S. Co., 189 Cal. 187, 208 P. 90, and Wadsworth v. Gonzales, 2 Cal.App.2d 651, 38 P.2d 860.

In 1929, C. C. P. § 650 was amended so as to eliminate the sentence quoted hereinabove requiring presentation to the judge or delivery to the clerk within ten days after service of proposed amendments. Under the language of the section as it now reads the proposed bill of exceptions and the proposed amendments must both be filed with the clerk within specified times. That having been done it becomes primarily the duty of the trial judge to "designate the time at which he will settle the bill," and it was said in Passow v. Bell, 27 Cal.App.2d 360, 81 P.2d 224, 225: "After a proposed bill has been duly filed with the clerk and delivered to the judge, no duty is imposed upon the appellant to compel the judge to act. * * * It will be noted that the section does not specify the time within which the trial judge must fix the date for the settlement of the bill, (and) that the

duty of the trial judge is made mandatory * * *."

We do not understand from this language that an appellant may rely entirely on the duty of the trial judge to fix the time for settlement, or that appellant may not be guilty of laches if he takes no steps to have a time for settlement fixed where the trial judge does nothing for a long period of time.

Appellant's attorney has filed an affidavit in opposition to these motions in which he states:

"Upon the delivery of said draft of said bill and proposed amendments to said trial judge for settlement the affiant was informed by said judge that he would designate a date for the settlement and have his clerk notify the respective attorneys of the same and at various times since said affiant has endeavored to obtain a date for the settlement of said bill by said judge and his said clerk and on each occasion was informed by the clerk that no date had been designated by said judge for the settlement but undoubtedly said judge would do so and notify said attorneys * * *."

This allegation stands undenied. Under the rule of Curtin v. Ingle, supra, the trial court would seem to be the proper tribunal in which to try out the question of appellant's laches and respondent may speedily do so by a motion there to terminate the proceedings for the settlement of the bills of exceptions. The motions to dismiss the two appeals are denied.

CONLAN, P. J., GRIFFIN, J., and DOOLING, Judge pro tem., concur.

28 Cal.2d 28

GARRISON, Insurance Com'r, v. EDWARD BROWN & SONS et al.

S. F. 17234.

Supreme Court of California, in Bank.

April 19, 1946.

Rehearing Denied May 16, 1946.

1. Trusts ⇐253

A fiduciary may not set off claim owed to him in his personal capacity against obligations which he has assumed as a trustee.

2. Insurance ⇐50

In action by liquidator of insolvent indemnity company to recover unremitted premiums from general agent, agent could not set off claim for damages for award of commissions which would have been earned by agent from premium and additional business written by agent but not paid because of indemnity company's insolvency, where agent undertook obligations as to remittances of collected premiums for indemnity company's policies in a fiduciary capacity.

3. Insurance ⇐50

In action by liquidator of insolvent indemnity company to recover unremitted premiums from agent, agent could set off sum expended in collecting premiums, which was debt incurred as trustee of premiums collected by agent.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Maynard Garrison, as Insurance Commissioner, against Edward Brown & Sons and others to recover insurance premiums. From a judgment for plaintiff on the complaint, and from a judgment in its favor on cross-complaint, defendants appeal.

Judgment modified and affirmed.

Arthur B. Dunne and Dunne & Dunne, all of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Hester Webb, of San Francisco, for respondent.

SHENK, Justice.

The defendant appeals from a judgment for the plaintiff on the complaint, and from a judgment in its favor on its cross-complaint.

The defendant, a California corporation, was general agent for California of Union Indemnity Company, a Louisiana corporation. Union Indemnity Company was declared insolvent in Louisiana on January 6, 1933, and in California on January 12, 1933. The plaintiff Insurance Commissioner was appointed to liquidate the company's assets in this state.

The defendant filed a claim with the liquidator for $91,743.52, as the net amount due to it from Union, which was allowed to the extent of $25,897.97. In January, 1936, the liquidator filed an action against the defendant to recover $11,702.29, alleged to represent the amount of unremitted insurance premiums collected by the defendant from Union's insureds. Defendant filed an answer setting forth certain denials and affirmative allegations of offset, and a cross-complaint by which it sought the allowance of its claim in full. In November, 1939, judgment went against the plaintiff and for the defendant in the sum of $39,267.31. On denial of a motion for a new trial the court disallowed an item of $15,000 to the defendant, and reduced the judgment to the sum of $24,267.31. Both parties filed notices of appeal from that judgment. Before either appeal was perfected the reporter died, and on June 11, 1941, the plaintiff moved to vacate the judgment and for a new trial pursuant to section 953e of the Code of Civil Procedure. The motion was denied and a motion by the defendant to terminate the proceedings was granted. The court's order was affirmed. Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 144 P.2d 570. The appeal thereafter reached this court on the judgment roll alone, and the judgment was reversed. Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 154 P.2d 377.

After the going down of the remittitur the parties entered into a stipulation of the facts which constitute the findings of the trial court in support of the present judgments for the plaintiff and the defendant.

The agreement under which the defendant operated as general agent in California for Union contained the following provision: "All premiums collected by the Agent for the Company are the property of the Company and shall be held by the Agent as a fiduciary trust until delivery to the Company. The privilege of deducting commissions which are debts due the Agent, if granted, shall not be taken as a waiver by the Company of its exclusive ownership of all premiums." In practice the premiums collected on behalf of Union (defendant was agent for other insurance companies) were not segregated in a separate account but were deposited in defendant's general commercial account. Defendant reported monthly on sheets known as "Bordereaux" showing business written, premiums due, commissions allowable, return premiums and other calculations concerning cancellations, unearned premiums, return commissions, etc., and sums expended by defendant as general agent on Union's behalf. Remittances were made or received on the monthly net balance thus shown to be due from the defendant to Union or owing to it by Union.

[1] On the former appeal it was the contention of the defendant that the practice in handling the accounts between the parties modified their written agreement so as to substitute a debtor-creditor relationship between them in place of the fiduciary relationship provided for in the agreement. Thereby the defendant sought to offset against the amount of premiums collected (which pursuant to the agreement constituted a trust res with legal ownership thereof in the company) any and all claims or credits which it could have recovered against Union. The trial court upheld the contention and permitted the offset. However, on disposing of the contention on the appeal (Garrison v. Edward Brown & Sons, supra, 25 Cal.2d 473, 154 P.2d 377), this court concluded that the findings relating to the actual practice of accounting did not support the conclusion that a debtor-creditor relationship was substituted, and that therefore the judgment was unsupported. The court applied the well-settled rule that a fiduciary may not set off claims owed to him in his personal capacity against obligations which he has assumed as a trustee. It was also held that the accounting practice, which was consistent with the written agreement, did not show an intention to modify the agreement, and that the commingling of funds did not disturb the trust nature thereof. Following the law announced in that decision the court on the second trial determined that the plaintiff was entitled to a judgment against the defendant in the sum of $9,668.50 free of any claim of offset; and that the defendant was entitled to a judgment against the plaintiff in the sum of $20,696.87 (including $110.45 for supplies theretofore allowed by the liquidator), which sum was to be paid in the course of administration of the estate of Union Indemnity Company, thereby relegating the defendant to the status of a general creditor of Union as to the total amount of the damages awarded to it in this action.

On this appeal the defendant has abandoned the contention that the accounting practice between the parties served to modify or alter the written agreement between them. It is shown that the amount allowed by the court as damages, namely $20,586.42 ($20,696.87 less $110.45 for supplies previously allowed by the liquidator) represents commissions on business written, but on which premiums remained uncollected, from October, 1932, to January 6, 1933. That sum, disallowed as a set-off, defendant might have earned but for the adjudication of insolvency of Union. It may thus be said that the sum of $9,668.50 represents the amount of premiums, less commissions, collected by the defendant for that period and unremitted to Union; and that the sum of $20,586.42 represents the amount of commissions which would have been earned by the defendant if premiums had been collected on additional business written in that period, but which remained unpaid by reason of Union's insolvency. There is no appeal by the plaintiff from the judgment in favor of the defendant and it is stipulated that the amount of $20,586.42 is the reasonable value of the service rendered by defendant to Union during that period. The defendant contends that this amount is proper as a set-off against the amount of the premiums collected and due

to Union, because of the fact that the business was written by the defendant as agent under the same contract; therefore that the amount is owing to it in the same capacity as is the sum due from it to Union. The defendant places reliance on the court's statement on the former appeal that "insofar as Brown was deprived by Union's insolvency of commissions for policies written and not cancelled, Brown is entitled to compensation equal to the commissions as damages for the breach of contract committed by Union." The court did not assume to hold, however, that the amount thereof was deductible from the amount of the collected premiums due to Union. That result depended on the character of the fund representing the collected premiums, that is, whether that fund was held by the defendant as fiduciary under the agreement, or in a debtor-creditor relationship pursuant to the claimed modification of the original agreement. The opinion declared that if the facts on retrial should show that the fiduciary relationship was not changed, the following result would be indicated: "If defendants were trustees of the premiums collected, they would therefore be obligated to remit them, deducting only commissions earned thereon as provided in the agency agreement. With respect to all claims not allowed as deductions from the premiums to be remitted, they would have to seek satisfaction from Union's insolvent estate as general creditors." Garrison v. Edward Brown & Sons, supra, 25 Cal.2d at page 477, 154 P.2d at page 379.

[2, 3] The defendant relies on the following statement in Johns v. United Bank & Trust Co., 9 Cir., 15 F.2d 300, at page 302: "The beneficiaries of the trust cannot be permitted to claim title to all the bank deposits made by their trustees and at the same time disclaim all liability for the debts which their trustees incurred." That principle is applicable under appropriate facts, but the amount of damages sought here to be offset is not a debt incurred by the trustee. An appropriate set of facts for the application of the rule invoked is shown by the stipulation and finding that the sum of $110.45 was incurred for various items in collecting the premiums constituting the trust res. That sum represents a debt incurred by the defendant as trustee of the collected premiums, and should have been allowed as an offset against the amount of the trust fund in its possession. In other cases cited by the defendant there was no contract similar to that between the defendant and Union which established a special trust relationship as to premiums collected and unremitted. General statements in those cases are not controlling under the special facts of this case. The principle which disposes of the defendant's main contention is stated on the former appeal, namely, that since the defendant undertook the obligations as to remittances of collected premiums in a fiduciary capacity, it may not set off its claim for damages against that fiduciary obligation. With the exception noted the trial court correctly applied the law declared on the former appeal.

It is ordered that the judgment for the plaintiff be modified by reducing the amount thereof to the sum of $9,558.05, and that the judgment for the defendant be modified by reducing the same to the sum of $20,586.42. As so modified the judgments are affirmed, neither party to recover costs on appeal.

GIBSON, C. J., and CARTER, TRAYNOR, and SPENCE, JJ., concurred.

SCHAUER, Justice.

I concur.

While I believe that this court erred in its determination of the original appeal (Garrison v. Edward Brown & Sons (1944), 25 Cal.2d 473, 154 P.2d 377; see dissenting opinion at p. 484 et seq.), the majority opinion therein has become the law of the case. Under the law of the case Mr. Justice Shenk's disposal of the present appeal is correct.

EDMONDS, J., concurred.

TRABUE PITTMAN CORPORATION, Limited, v. LOS ANGELES COUNTY et al.

L. A. 19169.

Supreme Court of California, in Bank.

April 9, 1946.

Rehearing Granted May 6, 1946.

1. Fixtures ⇐1

Whether an article is a "fixture" depends on manner of annexation, adaptability to the use and purpose for which the realty is used, and the intention of the party making the annexation; the intent that is material being that which is manifested by outward appearances.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

2. Property ⇐4
Taxation ⇐61

Private parties such as those bearing the relationship of landlord and tenant may mutually agree that certain property shall be deemed of a particular character, and such agreement will be controlling as to the parties thereto but is not binding upon the taxing authorities.

3. Taxation ⇐42(1)

The difference in the nature and the manner of attachment of a door installed as an integral part of a bank vault, and the nature and customary manner of attachment of a trade fixture such as used by the bank, justifies a distinction in classification for the purposes of taxation.

4. Taxation ⇐61

Tax assessors are not bound by private agreement, and should not be hindered in performing their functions by the necessity of ferreting out the undisclosed intentions of lessors and lessees relative to the terms of a lease, but for the most part must be allowed to act on the basis of outward appearances.

5. Taxation ⇐65

Vault door and frame owned and installed by national banking association in leased building and permanently annexed to realty of lessor were "real property" and subject to taxation, notwithstanding that bank was a short-term lessee. 12 U.S.C.A. § 548; Const. art. 13, § 16, subd. 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property".

6. Taxation ⇐10

Equipment consisting of tellers' cages, wickets, counters, partitions, coupon booths, and other items having the characteristics of ordinary trade fixtures, installed by national banking association in leased building constituted "trade fixtures" and personal property and were not subject to taxation by city and county. 12 U.S.C.A. § 548; Const.Art. 13, § 16, subd. 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Fixture".

7. Fixtures ⇐5

An article retains its character as personal property because it is a trade fixture.

8. Fixtures ⇐4

There is no intent to make a permanent attachment, in case of a trade fixture. Civ.Code. §§ 660, 1019.

9. Taxation ⇐335

Lessor, which included entire building in property statement as its taxable property could not complain of assessment to it of vault door and frame owned and installed by lessee bank, where bank, filed no property statement returning the vault door, but merely notified assessor of its claim of ownership and of its further claim that vault door was personalty exempt from taxation. Revenue and Taxation Code, §§ 441, 442.

10. Taxation ⇐439, 505

The assessment of vault door and frame to lessor of bank building was not void, even if erroneous, and lien against real property of lessor would be preserved, since assessment imposed no personal liability, but was against the property. Revenue and Taxation Code, §§ 613, 2188.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Trabue Pittman Corporation, Limited, against the County of Los Angeles and another for refund of taxes paid on banking fixtures installed by plaintiff lessee in leased premises. From portion of judgment denying recovery of taxes paid on vault door unit, the plaintiff appeals, and from portion of judgment granting recovery of taxes on other fixtures, the defendants appeal.

Affirmed.

Prior opinion, 161 P.2d 10.

Holbrook & Tarr, Leslie R. Tarr, and Freda B. Walbracht, all of Los Angeles, for plaintiff and appellant.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, A. Curtis Smith, Deputy Co. Counsel, Ray L. Chesebro, City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for defendants and appellants.

SPENCE, Justice.

Plaintiff and defendants have separately appealed from a judgment entered in an action instituted by plaintiff for a tax refund, which appeals have been consolidated and presented upon a single set of briefs. Plaintiff is the owner of a building leased to the Bank of America National Trust and Savings Association. Defendants are the county of Los Angeles and the city of Los Angeles. Plaintiff appeals from that part of the judgment which denied recovery of taxes, paid under protest, in reference to a vault door and door frame owned and installed by the lessee bank and assessed to the plaintiff as real property. Defendants appeal from the portion of the judgment granting recovery as to the levy upon certain tellers' cages, partitions, coupon booths, counters, and other facilities used in the conduct of a bank.

Section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548, permits the taxation of real property belonging to national banking associations "to the same extent, according to its value, as other real property is taxed." No provision is made in the federal statutes for taxation of personal property belonging to national banking associations. Article XIII, section 16, subd. 1(a), of the California Constitution provides for a tax measured by a national bank's net income in lieu of all other taxes, except taxes on real property.

The main question to be decided in this case is whether equipment installed in plaintiff's building by the Bank of America, a national banking association, and entered upon the tax rolls of defendants for the year 1941, constitutes improvements to real property and is therefore taxable by subdivisions of the State of California, or whether such equipment remains personalty belonging to a national banking association and is therefore not taxable.

During the years 1930 and 1931, plaintiff constructed, at the corner of Rimpau Avenue and Washington Boulevard in the city of Los Angeles, a building designed for the occupancy of stores and a supermarket. No part of the building was especially constructed or designed for use as a bank. The corner store, after having been occupied by a drug store and a dress shop, was leased by plaintiff on July 31, 1936, for a term of six years to the Bank of America for the purpose of establishing a branch bank. The cost of alterations, exclusive of equipment, was $11,630.36. At the expiration of the lease the premises were again leased to the bank for a new term of five years ending July 31, 1947. The leases contained the following pertinent provisions:

"The lessee accepts the said premises in the condition existing at the time of execution of the within lease, and it is agreed between the lessor and the lessee that all alterations, additions and repairs to be made to said premises, including the installation of vaults, vault doors and safe deposit boxes, together with bank fixtures and equipment necessary for the operation of the lessee's business in said premises, shall be made to said premises at lessee's own cost and expense.

"It is agreed that upon the expiration of this lease or upon the expiration of any ex-

tension, renewal or sooner termination thereof, lessee may remove all or any part of the furniture, fixtures, vaults, vault doors, vault door frames, safe deposit boxes, business equipment and all other improvements and personal property placed in, on or about said premises by lessee or by any predecessor of lessee, but it is agreed that upon the expiration of said term or any renewal, extension or sooner termination hereof, lessee shall not be required to remove the fixtures, vaults, vault doors, safe deposit boxes and improvements set forth above or any part thereof unless it elects so to do. * * *"

Interior alterations included the construction of a vault room, and the installation of a vault door, counter line, partitions, tellers' cages, wickets, etc. The vault room, built of reinforced concrete, was approximately 17 feet long, 8½ feet wide, with a door opening 7 feet 5 inches high by 3 feet 6 inches wide. In its complaint on file in the instant action, plaintiff makes the following concession in regard to the vault room and store front of the building:

"That at all times since their erection, and for the tax years 1937-38 to and including the current tax year 1941-42, said store front and vault room have been assessed and taxed, without any objection by plaintiff Landlord or lessee National Bank as to such assessment and tax, to plaintiff Landlord, as a part of the aforesaid improvements and building;

"That both plaintiff Landlord and lessee National Bank have at all times conceded, and do now concede, that, for tax purposes, the aforesaid store front and concrete vault room are improvements properly taxable to plaintiff Landlord as a part of the aforesaid building."

The bank installed, in the opening into the vault, a steel vault door frame and door comprising one unit. The door was 3½ inches thick, polished steel finish, and had a double combination and a triple time lock. Wooden wedges inserted at the top of the door and the frame held the door and frame in its vertical position. An inner air space or vestibule, approximately 3 inches in width at the sides and top walls, was composed of 3-inch by 3-inch angles and plates. Concrete grouting, in which crushed rock or gravel was intermixed with cement, was poured into this air space. When hardened the concrete grouting formed a hard and permanent attachment between the vault door frame and the vault room wall or vault door opening.

The door and door frame unit which was installed was a second-hand one taken from the bank's warehouse where a stock of used vault door frames and doors was kept on hand. It had an original cost of $1,800-$1,900. The value thereof at the time of installation was estimated at $1,500. The counter line, with its partitions and wing appurtenances, and the coupon booths were attached to the building by drilling holes in the concrete floors into which were fitted wooden pegs to which a plate board was nailed. The wing through which there was a swinging door was steadied by a metal bracket attached to additional pegs fitted into the floor, and the door plates of the coupon booths were likewise set into the floor.

During the 1941 assessment period, after the decision of this court in the case of San Diego Trust & Savings Bank v. County of San Diego, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416, the Los Angeles County Assessor added to the figures, which he had in previous years fixed as the assessed value of the improvements, the sum of $660 as representing the increase in the assessed value of the improvements by reason of the attachment thereto of the bank vault door and frame. A figure of $910 was fixed as representing the increase in the assessed value of the improvements by reason of the attachment of some of the other equipment such as counter lines, tellers' cages, wickets, and coupon booths. Prior thereto the bank had notified the county assessor in writing of its claim that the vault door and other banking equipment were personalty belonging to it and should not be assessed to plaintiff landlord as constituting a part of the improvements.

The board of Supervisors of Los Angeles County, sitting as a Board of Equalization, denied an application for a reduction of the assessed valuation placed upon plaintiff's property, by reason of the above mentioned equipment attached thereto, by the lessee bank. Plaintiff paid the tax under protest and instituted this suit. While making an opening statement, plaintiff's counsel indicated that the present case is intended to be a test for several hundred other cases.

The trial court concluded that the vault door and frame were and had become an integral part of the vault room and of the building of the plaintiff landlord, and that the door was properly assessed as a part of the improvements upon plaintiff's property. The trial court further concluded that the articles of banking equipment, other than the vault door, were trade fixtures installed by the lessee bank for the purpose of carrying on its banking business, and that for the purpose of taxation they were personalty belonging to a national banking association and hence exempt from local taxation. Judgment was entered accordingly.

In support of the judgment as to the vault doors, defendants contend that the case of San Diego Trust & Savings Bank v. County of San Diego, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416, stands for the proposition that vault doors installed by a bank on leased premises are improvements to real property and are taxable as such improvements. Plaintiff contends that the San Diego Bank case is not controlling in the instant controversy.

[1, 2] The tests to be used in determining whether or not an article is a fixture are well settled, namely: (1) the manner of annexation; (2) adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation. San Diego Trust & Savings Bank v. County of San Diego, 16 Cal. 2d 142, 149, 105 P.2d 94, 133 A.L.R. 416; City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 48. The intent that is material is that which is manifested by outward appearances. Private parties such as those bearing the relationship of landlord and tenant may mutually agree that certain property shall be deemed of a particular character, and such agreement will be controlling as to the parties thereto but is not binding upon the taxing authorities. San Diego Trust & Savings Bank v. County of San Diego, supra.

[3] The instant case, insofar as the vault door is concerned, is controlled by the decision in the San Diego Bank case. In that case a number of vault doors belonging to banking corporations were involved. There was testimony that the bank vaults were not built to allow the installation of one particular door. There was evidence that vault doors, varying in thickness, quality, efficiency and cost, were kept in stock by dealers. The testimony as to the character of the doors, and the means by which they were attached, was substantially the same as the testimony in the instant case pertaining to such matters. In the San Diego case this court held such evidence insufficient to overcome the manifestations of the physical facts. It was pointed out that, concededly, vaults were not trade fixtures and that the vault doors had become integral parts thereof. On pages 150 and 151 of 16 Cal.2d, on page 98 of 105 P.2d it was said:

"The nature of a vault door itself suggests an intent permanently to affix it to a vault which by ordinary tests must be said to constitute an improvement to realty. Vaults alone without doors would not be useful as vaults, and would fail in their intended purpose. Both functionally and physically a vault door is integrated with the vault itself. Certainly vaults and vault doors constitute a unit for use together and are improvements to the realty. (Citations.)

* * * * * *

"The mere fact that said doors can be removed without material damage to the vaults by chipping away with a chisel, jack hammer, or compressed air hammer, the cement grouting which attaches them to the vaults, does not alone establish their character as articles of personalty. * * *

"The existence or period of use of a vault door is measured by the life of the building to which it is annexed unless it becomes obsolete or mechanically defective. In order to make an article a permanent accession to the land its annexation need not be perpetual. It is sufficient if the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose. 26 C.J. 657, § 6."

The principal factor relied upon by plaintiff to distinguish this case from the San Diego Bank case is that the bank which installed the vault door was not the owner of the premises nor a long term lessee thereof. In the San Diego Bank case, some of the vault doors were installed by owners of the buildings while others were annexed by lessees that occupied the premises under leases ranging in duration from approximately ten to fifty years. In one instance the annexor held the premises under a month-to-month tenancy but had occupied the property for more than twenty years. In the instant case, in 1936, when the vault door and other equipment was first installed, the bank had just leased the premises for a period of six years ending July 31, 1942, and at the end of such term the premises were leased to the bank for a new term of five years. This circumstance, in the instant case, does not furnish a sufficient ground upon which to predicate a distinction. To hold otherwise would furnish an easy means of circumvention of taxation. Furthermore, if the initial length of the lease were deemed controlling, the question of just where the line should be drawn would be a matter which would be difficult, if not impossible, to ascertain.

Plaintiff, in stressing the point now under consideration, loses sight of the character of the business engaged in by the lessee. No showing was made that the bank intended to stay for only a limited time or that it had any intention of moving its quarters so long as its business in that location remained profitable. Mr. B. T. Lane, who is assistant vice president of the Bank of America and whose duties include the installation of equipment in branch banks, testified that it was the desire of the bank to keep branches in one place as long as possible regardless of whether the premises are owned or leased and that when the lease for plaintiff's building was entered into and installations made therein, the bank had the intent to maintain a branch at that location and building as long as good business dictated. This witness also testified that except in the event of unusual circumstances the door would be kept where it was until the premises ceased to be used for bank purposes or the door became obsolete or worn out.

An item of property such as the vault door in the instant case—which is rooted into the building in no ordinary manner, which is a necessary adjunct of the business to which the realty is devoted, and which will probably be used there, in the ordinary course of events, for the full length of its economically useful life—must be deemed to be permanently annexed for the purposes under discussion. The fact that office locations are sometimes changed and equipment moved does not alter the situation. In distinguishing permanence from transitoriness, it is not necessary to identify it with perpetuality. Southern Cal. Tel. Co. v. State Board of Equalization, 12 Cal.2d 127, 136, 82 P.2d 422. There is little, if any, resemblance between the nature and the manner of attachment of a vault door installed as an integral part of a vault on the one hand, and the nature and customary manner of attachment of trade fixtures such as used by the bank on the other, and it therefore appears that a distinction in classification for the purposes of taxation is entirely proper.

[4] There is further reason why the length of lease cannot, of itself, be considered controlling in characterizing property. The determination here will indicate to local assessors the course to be followed by them in future years, but uniformity of taxation cannot be attained unless a uniform classification of real or personal property is established. Just as assessors are not bound by private agreements, they should not be frustrated or hindered in

performing their vital functions by the necessity of ferreting out the undisclosed and often secret intentions of lessors and lessees relative to the terms of a lease. For the most part, assessors must be allowed to act on the basis of outward appearances.

[5] We conclude that the findings of the trial court with respect to the vault door and door frame are supported by substantial evidence which places them beyond attack upon appeal.

[6] The appeal by defendants challenges that portion of the judgment of the trial court holding that the equipment installed by the lessee bank, other than the vault door and door frame, constituted personal property exempt from local taxation. Such equipment consisted of tellers' cages, wickets, counters, partitions, coupon booths, and other items having all the characteristics of ordinary trade fixtures. The counter line, with its partitions and wing appurtenances, and the coupon booths were attached to the building by drilling holes in the concrete floor into which were fitted wooden pegs to which a plate board was nailed. The wing, through which there was a swinging door, was steadied by a metal bracket attached to additional pegs fitted into the floor, and the door plates of the coupon booths were likewise set into the floor.

In support of their claim that the above mentioned equipment constituted improvements to the realty, defendants cite the case of Southern Cal. Tel. Co. v. State Board of Equalization, 12 Cal.2d 127, 82 P.2d 422, 428. That case involved the classification of certain central office equipment in a building owned by a telephone company, and equipment in other offices and buildings leased by the company. This court held the central office equipment to be a unit for use and an improvement to realty. It was observed that the system of wire connections there involved was very intricate and that there would be great expense incident to moving most of the equipment as well as that the articles were necessary or convenient to the use of the building for the purpose for which it was designed. At the same time it was ruled that: "In no proper sense can equipment in small leased offices be held an improvement to and part of real property owned by another. The mere attachment of switchboard legs and equipment to floor or walls by screws or bolts does not have that effect." Defendants assert that the property here involved is likewise a unit of use which gives to it the character of realty. However, this case and the telephone company case are obviously not analogous, and we have concluded that the finding of the trial court—that such equipment constitutes trade fixtures—is supported by the record and is unassailable upon this appeal. The manner of annexation of this equipment is of a slight and temporary nature as compared with the annexation of the vault door. Such manner of annexation is comparable to the customary manner of annexing trade fixtures generally, and it does not appear from the physical facts that a long term usage of the equipment was necessarily intended.

[7, 8] Defendants further contend that trade fixtures are a part of the realty until removed and are therefore taxable as improvements. It is argued that "there is no occasion to have a special doctrine of 'trade fixtures' if they are personal property." In truth, however, it is because an article is a "trade fixture" that it retains its character as personal property. (22 Am.Jur., Fixtures, §§ 40, 61.) In the case of a trade fixture there is no intent to make a permanent attachment. (See Civ.Code, §§ 660, 1019; Southern Cal. Tel. Co. v. State Board of Equalization, 12 Cal.2d 127, 134, 82 P.2d 422.

The articles of property other than the vault door having been determined by the trial court to be trade fixtures and therefore to be personal property belonging to a national banking association, were not taxable and the judgment of the trial court is correct insofar as it permits a recovery of taxes paid thereon.

The question remains as to whom the vault door should have been assessed. This question was expressly left undecided in the San Diego Bank case by virtue of

agreement of the parties. The trial court in the instant case found that the vault door was capable of being separately assessed to the lessee national bank but that the law did not require the assessor to assess it separately to the lessee and that it was permissible for the assessor to assess it to the owner of the building. Plaintiff contends that the tax on any of the property that is determined to be a part of the realty should have been assessed to the lessee bank, the owner thereof, and that failure to do so rendered the entire assessment void. It bases this contention upon section 405 of the Revenue and Taxation Code which provides that taxable property shall be assessed to the persons "owning, claiming, possessing, or controlling it," and upon section 602(g) of the same code which is to the effect that the assessment roll shall show the cash value of improvements assessed to any person other than the owner of the land. In addition to its attempt to support the finding and holding of the trial court, defendants cite section 2188 of the Revenue and Taxation Code which provides that "Every tax on improvements is a lien on the taxable land on which they are located, whether they are assessed to the landowner or to some other person" and defendants contend that if there was any mistake it was cured by section 613 of the Revenue and Taxation Code, which provides that "A mistake in the name of the owner or supposed owner of real estate does not render invalid an assessment or any tax sale." Plaintiff's answer to this argument is that what is here involved is not merely a mistake in a name, but a blending in one assessment of the property of plaintiff with other property, whereby it was forced to pay the whole assessment in order to pay the tax on its own property.

We have already held that the vault and vault door composed a unit together and constituted an integral part of the building. Under such circumstances we believe that the entire building, including the vault and vault door, was properly assessed and taxed to the owner of the land. There is nothing in the cited code sections to indicate that a single building should not be assessed as a single improvement. The value of a building is not a summation of the values of the component parts valued separately. The vault door does not now necessarily have the same value that it had when it was segregated, but rather the value of the building in which it has been integrated has become enhanced, and it appears from the record that it was this increase in value that was actually taken into account by the assessor. As shown by the portions of the lease and plaintiff's complaint, set out earlier herein, the right was reserved to the bank to remove all improvements placed in, or on the premises by it, including the vault and vault door. Plaintiff now concedes that the store front and vault, which are improvements installed by the bank, are properly assessed and taxed to plaintiff, and for similiar reasons, hereinabove indicated, we are of the opinion that the vault door was likewise properly so assessed and taxed. An owner of a building may protect himself by contract against any increase in assessment and tax that may result from improvements thereto made by a tenant, and this would seem to be the preferable method of handling the situation rather than to burden the taxing authorities with the necessity of attempting to make multiple assessments upon various items of improvements embraced within a single structure.

[9] Furthermore, we do not believe that plaintiff is in a position to complain of the assessment to it of the vault door for the year here in question. The record reveals that the property statement for the tax year 1941-42, filed by plaintiff as required by sections 441 and 442 of the Revenue and Taxation Code, included the entire building of plaintiff as its taxable property. This was in accord with its practice in previous years in dealing with other tenants when, according to a concession made by plaintiff in its complaint, it "expressly or impliedly * * * obligated itself solely and exclusively to pay all taxes on said land and the improvements constituting the said building erected thereon." The bank filed no property statement returning the vault door, but did notify the assessor of its claim of ownership of the vault door and of its further claim that the vault door

was personalty exempt from taxation. The assessor, however, properly determined that the vault door constituted an improvement to the realty, and we cannot hold that the ensuing assessment to plaintiff was erroneous when such was in accordance with the property statement it had filed, and where such claim of ownership as the bank had made was qualified by a claim that what it owned was personalty.

[10] In any event (assuming but not conceding that the assessment to plaintiff was erroneous), the effect of the above mentioned section 613 of the Revenue and Taxation Code would be at least to preserve the lien for the tax against plaintiff's land. (Rev. & Tax. Code, § 2188.) The assessment was not void. It imposed no personal liability against plaintiff, but was against the property. Klumpke v. Baker, 131 Cal. 80, 82, 63 P. 137, 676; see, also, Webster v. Somer, 159 Cal. 459, 114 P. 575; Palomares Land Co. v. Los Angeles County, 146 Cal. 530, 80 P. 931; Henne v. County, of Los Angeles, 129 Cal. 297, 61 P. 1081; McCracken v. Hummel, 43 Cal.App.2d 302, 110 P.2d 700; Interstate Realty & Imp. Co. v. Clark, 77 Cal.App. 558, 247 P. 244. The case of Kern Valley etc. Co. v. County of Kern, 137 Cal. 511, 70 P. 476, relied upon by plaintiff, is not contrary to the foregoing conclusion as it is clearly distinguishable upon its facts. Furthermore, that case arose upon demurrer and the question of the effect of the provision in regard to mistake in the name of the supposed owner (then contained in section 3628 of the Political Code) was not considered.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, J., did not participate herein.

EDMONDS, Justice.

Assuming that the findings of fact and the conclusions of law made by the trial court characterize the vault frame and door as fixtures within the meaning of section 660 of the Civil Code, as I read the other applicable statutes and apply the principles of construction which I mentioned in detail in San Diego Trust & Savings Bank v. County of San Diego, 16 Cal.2d 142, 155, 105 P.2d 94, 133 A.L.R. 416, these articles may not be assessed to the landowner.



28 Cal.2d 1

COIT v. JEFFERSON STANDARD LIFE INS. CO.

S. F. 17132.

Supreme Court of California, in Bank.

April 9, 1946.

Rehearing Denied May 6, 1946.

1. Insurance ⇐146(3)

Ambiguous policy is construed most strongly against insurer.

2. Insurance ⇐438

A provision in life policy exempting insurer from liability for death from any cause while insured was serving outside the United States in military service of any country at war did not create an absolute exemption because of military service per se, but set up only a partial exemption, the limitation being geographical in character.

3. Insurance ⇐438

Under life policy excluding insurer's liability if death of insured occurred "from any cause" while serving in the military forces outside the United States, death of insured in the military forces in Alaska resulting from an embolism following an appendectomy was not within the coverage of the policy; the quoted phrase meaning without regard to the cause.

See Words and Phrases, Permanent Edition, for all other definitions of "From Any Cause".

4. Insurance ⇐146(1)

A life policy is to be read and construed as a whole, and the caption of the

rider is to be read and construed with the language of the rider itself.

5. Insurance ⇐438

Where language of life policy rider clearly limited liability to return of premiums if death of insured occurred "from any cause" while serving outside the United States in the military forces, the caption "Aviation and War Risk Exclusion Rider" did not qualify the language of the rider itself so as to limit exclusion to death from aviation and war risk.

6. Insurance ⇐146(3)

Where there is no ambiguity in insurance policy, courts will indulge in no forced construction against insurer, and policy will be interpreted according to intention of parties as expressed in policy in light of circumstances surrounding its execution.

CARTER, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by George A. Coit, as administrator, etc., against Jefferson Standard Life Insurance Company to recover face amount of life policy. From a judgment awarding only the return of premiums paid plus interest, plaintiff appeals.

Affirmed.

Prior opinion 161 P.2d 812.

H. F. Chadbourne and Anthony S. Devoto, both of San Francisco, for appellant.

Wm. H. Keesling and Keesling & Keil, all of San Francisco, for respondent.

SCHAUER, Justice.

Plaintiff brought this action on a contract of life insurance to recover $2,500, the face amount of the policy. Judgment was for $71.48, the amount of premiums paid plus interest. Plaintiff appealed. He contends that the trial court incorrectly interpreted a clause of the policy entitled "Aviation and War Risk Exclusion Rider." After decision by the District Court of Appeal, First Appellate District, Division Two, affirming the judgment this court granted a hearing. We have concluded that the opinion of the District Court of Appeal, written by Mr. Justice Goodell, correctly disposes of the cause. We therefore adopt such opinion with indicated deletions and additions as follows:

"* * * On January 19, 1942, Charles T. Parks, then a sergeant in the United States Army, made application to the respondent for insurance in the sum of $2,500. On February 1, 1942, the policy was issued with the insured's wife, Jean M. Parks, named as beneficiary. On October 22, 1942, while serving with troops, the insured died in an army hospital in Alaska of an embolism following an appendectomy. On December 6, 1942, the insured's wife died. The insurer made a tender of $71.48, claiming that under the policy's war risk exclusion rider no more than that was due. The tender was rejected and the administrator of the beneficiary brought this action. The prayer of the complaint was for the reformation of the insurance contract and for $2,500, with interest, but at the trial the pursuit of the remedy of reformation was abandoned and the plaintiff stood, and now stands, on the policy as issued.

"The rider, which was part of the policy when it was issued, * * * [reads in material part as follows:

"'Aviation and War Risk
Exclusion Rider.
"'Attached to and Forming Part of
Policy No. 758,537,
"'Issued on the Life of Charles T.
Parks.

"'This] policy is issued and accepted upon the express agreement that the liability of the Company shall be limited to the amount specified below if the death of the Insured occurs: * * * (2) From any cause while the Insured is serving outside the states of the United States, the District of Columbia, and Dominion of Canada, in the military, naval or air forces of any country at war (declared or undeclared) or within six months after the termination of such service if death be caused from any wounds, injuries or disease received or suffered while in such service; * * * In event the insured's death should occur under any of the conditions defined above, the Company's liability under this policy

shall be a single sum equal to the premiums actually paid on this policy with compound interest at the rate of 3 percent per annum. * * *'

[1] "The trial judge decided that the insured's death from natural causes while serving in Alaska was not a risk assumed by the insurer. The appellant attacks this conclusion and contends that it was the meaning and intent of the contract to insure against death caused by ills common to everyone, whether in the service or not, and that the exclusion or exemption applies only in case of death from a cause connected with war and its hazards and perils. He argues that 'The words "From any cause" when read in connection with the heading of the rider attached to the policy—"Aviation and War Risk Exclusion Rider" mean no more than that the liability of the insurer shall be limited when the death of the insured is occasioned by, incidental to or proximately caused by military activities, and not where it has been due to natural, ordinary or accidental causes.' Further, that such an interpretation is consistent with the universal rule (37 C.J. 546) that where the language of an insurance contract is ambiguous, it is to be construed most strongly against the insurer, who is presumed to have drawn the policy and caused the uncertainty to exist. That rule, of course, is well settled in this state. 14 Cal.Jur. § 24, p. 443; Bayley v. Employers' Liability Assurance Corp., 125 Cal. 345, 352, 58 P. 7; Clarke v. New Amsterdam Casualty Co., 180 Cal. 76, 81, 179 P. 195; Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 229, 120 P.2d 31.

"The question is new in this state. A score of cases have been cited by the appellant and several by the respondent, most of which came before the courts of other states after World War I and arose because of deaths from pneumonia during the widespread influenza epidemic in 1918-1919, with a few cases of deaths by accident not caused by the perils of war or combat. It is agreed by both sides and recognized in the decisions that there is a diversity in the holdings, arising not because one group of states follows one line of decision and another group follows another, but because of the difference in the wording of the policies themselves. The cases fall, broadly, into two groups, one holding that the *status* of the insured as a soldier or sailor is determinative, the other that the *cause of death* is determinative. There is unanimity, however, on the rule that ambiguities in the policy are to be resolved in favor of the insured and against the insurer and in most of the cases relied on by the appellant that rule will be found to have played an important part in reaching the decision. See, generally, 29 Am.Jur., § 911, p. 695; 137 A.L.R. 1263; also A.L.R., vol. 147, p. 1294; vol. 150, p. 1414; vol. 151, p. 1452; and vol. 152, p. 1449.

[2, 3] "We are satisfied * * * [that] paragraph 2 is free from any ambiguity or uncertainty, and that it means precisely what it says. In the first place, it does not attempt to create an *absolute* exemption because of military or naval service per se; it sets up only a partial exemption, the limitation being geographical in character. It is only 'while the Insured is serving outside the states of the United States, the District of Columbia, and Dominion of Canada' that the exemption is operative. Even while serving in time of war *within* that area the insured seemingly would be covered whether death results from natural causes or, for instance, from wounds or injuries received in maneuvers while training or in actual combat. This seems to be the plain and natural meaning of the language. Secondly, the use of the words 'From any cause' makes it doubly clear that death from injuries received in combat, or as a consequence of actual warfare, could not possibly have been contemplated as the sole ground of exemption. Those words show a studied attempt to get away from the constricted meaning for which the appellant contends. No broader or more comprehensive phrase could well have been chosen. Moreover, as will presently appear, these words, 'From any cause' or words of similar import, are not found in any of the policies involved in the authorities relied on by the appellant. Aside then, from whatever light is shed on the present problem by authorities from other jurisdictions, the language, in our opinion,

* * * means just what the trial judge held it to mean, namely, that death 'from any cause,' however remote from, or unrelated to, actual hostilities is within the limitation of liability if it occurs under the conditions named.

"The respondent cites and strongly relies on the recent case of Bending v. Metropolitan Life Ins. Co., 74 Ohio App. 182, 58 N.E.2d 71, 72, where the clauses in the policy were held to be clear and unambiguous and to make the status of the insured in the military or naval service, and not his activities therein, the ground of exemption. The clauses there read: (a) 'provided * * * that death shall not have resulted from bodily injuries * * * sustained while the insured is in the military or naval service in time of war' and (b) 'the insurance under this * * * contract shall be suspended * * * while the insured is in the military or naval service in time of war.' That case is well reasoned. The language of the policy therein subjected to examination is comparable with that under examination herein (but nowhere nearly so explicit, because of the words herein 'From any cause'). The opinion discusses the entire subject and cites most of the authorities with care and discrimination. For these reasons we adopt the discussion therein of the cases on which the appellant herein chiefly relies. In those cases the insured persons died, while in the service, from causes common to all humans, in most cases from influenza or pneumonia (in a few cases by accident) and in most instances at training camps or other places far removed from combat areas. In the Bending case the court says:

" 'The apparent conflict is due in a great measure to the difference in phraseology of the exemption clauses, but the courts in many of these cases, adhering to the well settled rule that in construing an insurance contract which by reason of ambiguities is capable of two reasonable interpretations, that interpretation will be adopted which is most favorable to the insured, have gone to some length in taking a particular word or phrase in the military clause, construing the same as ambiguous, then resolving that ambiguity as meaning activity of a military nature and not status, and holding the insurer liable.

" 'One of those words is "engaged" and it occurs in clauses of which the following is typical: "If within five years from date hereof the death of the insured shall occur while engaged in the military or naval service in time of war, without previously having obtained from the company a permit therefor, the company's liability shall be limited * * *." Boatwright v. American Life Ins. Co., 191 Iowa 253, 180 N. W. 321, 11 A.L.R. 1085.

" 'The court in that case reasons that the word "engaged" connotes "resulting from" or "in consequence of" etc. Consequently the clause was not intended to exempt the company from liability by reason of the soldier's mere status of being in the military service, but the exemption only applied where death occurred from activities of a purely military nature which were not common to soldiers and civilians alike. In that case the insured died in camp of influenza. To the same effect are the cases of Benham v. American Central Life Ins. Co., 1919, 140 Ark. 612, 217 S.W. 462; Long v. St. Joseph Life Ins. Co., Mo.App.1920, 225 S.W 106; Rex Health & Accident Ins Co. v. Pettiford, 1920, 74 Ind.App. 507, 129 N.E. 248; Myli v. American Life Ins. Co. of Des Moines, 43 N.D. 495, 175 N.W. 631, 11 A.L.R. 1097; Kelly, Adm'x v. Fidelity Mutual Life Ins. Co. of Philadelphia, 169 Wis. 274, 172 N. W. 152, 4 A.L.R. 845; Barnett v. Merchants' Life Ins. Co., 87 Okl. 42, 208 P. 271.

" 'The use of the word "risk" in those clauses has also been used as the basis of the construction of the clause as involving "activities" and not "status." The case of Atkinson, Adm'r, v. Indiana National Life Ins. Co., 194 Ind. 563, 143 N.E. 629, 630, is illustrative of this type of construction. The policy there provided: "After one year from the date of issue this policy shall become incontestable if the premiums have been duly paid, except in case of self-destruction within two years, whether sane or insane, and except that military or naval service in time of war without a

permit from the company, is a risk not assumed under this policy at any time."

" 'Due to the use of the word "risk" that clause was held to be ambiguous in that it might mean either activities or status and was therefore resolved against the insurer which was held liable for the death of the insured in a motorcycle accident while on leave of absence from duty.'

"Each of the cases discussed in the foregoing quotation is relied on by the appellant herein. In addition thereto he has cited a number of cases most of which fit into the same category (to quote from the Bending case) putting 'emphasis on the phrases "resulting from," "in consequence of," and "active service" in arriving at a similar construction.' Those cases, with parenthetical quotations from their exemption clauses, are as follows: Gorder v. Lincoln National Life Ins. Co., 46 N.D. 192, 180 N.W. 514, 11 A.L.R. 1080 ('In consequence of such service'); Starr v. Great American Life Ins. Co., 114 Kan. 315, 219 P. 514, 515 ('in consequence of such service'); Johnson v. Mutual Life Ins. Co., 154 Ga. 653, 115 S.E. 14, 15 ('as a result of military or naval service in time of war, * * * nor if such death be caused directly or indirectly, wholly or partly, by * * * war, or any act incident thereto'); Nutt v. Security Life Ins. Co., 142 Ark. 29, 218 S.W. 675 (military or naval service in time of war are 'risks not assumed'); Malone v. State Life Ins. Co., 202 Mo.App. 499, 213 S.W. 877, 880 ('the death of the insured while so engaged * * * as a result of such service'); Farmers' National Life Ins. Co. v. Carman, 76 Ind.App. 700, 132 N.E. 697, decided, without setting forth any facts on the authority of the Rex case, supra; Stephan v. Prairie Life Ins. Co., 113 Neb. 469, 203 N.W. 626, 627 ('If the insured * * * engage in military or naval service in time of war * * * and death shall occur during such engagement or as a result thereof'); Arendt v. North American Life Ins. Co., 107 Neb. 716, 187 N.W. 65, 66 ('death occurring in any part of the world and in any occupation, or from any cause, except military or naval service in time of war'); Illinois Bankers' Life Assn. v. Jackson (2 cases), 88 Okl. 133, 211 P. 508 ('If the insured engages in military or naval service'); Illinois Bankers' Life Assn. v. Davaney, 102 Okl. 302, 226 P. 101, 103 ('death while in the service in the army or navy of any government in time of war is not a risk covered * * *'). Also Welts v. Connecticut Mutual Life Ins. Co., 48 N.Y. 34, 8 Am. Rep. 518, where the policy provided that the insured was not protected against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be. He was a civilian engineer building a bridge for the Union army thirty miles behind the Union lines, and was killed by four hold-up men who were not soldiers in either the Union or Confederate armies. In the cases last cited (just as in the eight cases reviewed in the Bending case) a recovery of the full face of the policy was allowed on the theory that the insured's death from causes not related to hostilities, was not within the terms of the policy's exemption.

"The appellant also cites several cases which do not appear to fit into this category. They are: Railey v. United Life & Accident Ins. Co., 26 Ga.App. 269, 106 S.E. 203, where the insured, a soldier, was killed in the collision with another troopship of the troopship on which he was being transported to the combat area in Europe. It was held to be squarely within the exemption. American Nat. Ins. Co. v. Turner, Tex.Civ.App., 226 S.W. 487, simply involved the question whether the beneficiary could collect attorney fees. The insured, a marine, was killed in battle in France, a risk clearly within the exemption.

"In the Bending case the court says: 'The court in many of the cases above referred to, while holding that the particular clause under consideration was ambiguous and therefore to be construed against the insured [sic], specifically recognized the proposition that a clause might be written making status the ground for exemption and it would be valid.' As an example the court quotes from the Myli case, supra [43 N.D. 495, 175 N.W.

633], where it is said: 'For instance, it might well have been stated, "If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor," etc., then status would clearly have been the test.' A year later, in the Gorder case, 46 N.D. 192, 195, 180 N.W. 514, 515, 11 A.L.R. 1080, supra, Justice Birdzell, the author of the opinion in the Myli case, said: 'There is a vast difference between a death in the active military service [citations] and a death in consequence of such service [citations].' See, also, Olson v. Grand Lodge, 48 N.D. 285, 290, 184 N.W. 7, 15 A.L.R. 1270, where the same court discusses the Myli case. In Long v. St. Joseph Life Ins. Co., Mo.App., 225 S.W. 106, 107, affirmed, (Mo. Sup.) 248 S.W. 923, supra, the court says: 'The insurance company has the right to decide the kind of contract it will enter into. * * * If it chooses, it can say to the insured: "During the period you are an enlisted soldier or sailor I will not be liable for the insurance, should you die in that period, no matter whether such service caused it or not."' In Johnson v. Mutual Life Ins. Co., 154 Ga. 653, 656, 115 S.E. 14, 15, supra, it is said: 'Provisions in policies of life insurance, that the insurer does not assume risk of death which shall occur while the insured is engaged in military service, * * * have been held to exempt the insurer from liability, notwithstanding the fact that death did not result from any hazard peculiar to such service. [Citations.] * * * Under such provisions, when the insured is engaged in military service * * * and he dies in such service, *from any cause,* these authorities hold that there cannot be any recovery. * * * If the insurer had intended that it was not to be liable for this double indemnity if the insured died while in the military service *from any cause whatsoever,* it would have been an easy matter to have written such a stipulation in the policy. Such a provision would have made the insured's status in the military service, at the time he met his death, and not the cause of his death, the ground of the insurer's exemption from liability.' (Emphasis ours.)

"The quotations just given are all taken from cases relied on herein by the appellant.

"A number of authorities which support the decision of the trial court and the position of the respondent herein, construe policies where the language is quite similar to the language employed in the cases upon which the appellant relies. Notably, among such cases, is Bradshaw v. Farmers & Bankers Life Ins. Co., 107 Kan. 681, 193 P. 332, 11 A.L.R. 1091 where the limitation was 'If * * * the insured shall engage in military or naval service in time of war, the liability of the company, in event of the death of the insured while so engaged * * * will be limited * * *.'

The court held that the *status* of the insured as a member of the armed forces was alone sufficient to bring the exemption into operation. Other cases where an exemption is created if the insured shall *engage in* the military or naval service (or equivalent language is used) are Huntington v. Fraternal etc. Assn., 173 Wis. 582, 181 N.W. 819; Olson v. Grand Lodge, 48 N.D. 285, 184 N.W. 7, 15 A.L.R. 1270, supra; Field v. Western Life Ind. Co., Tex.Civ. App., 227 S.W. 530; Mattox v. New England Mut. Life Ins. Co., 25 Ga.App. 311, 103 S.E. 180, and Sandstedt v. American Central Life Ins. Co., 109 Wash. 338, 186 P. 1069. In these cases the courts reached conclusions opposite to those reached in the Benham, Boatwright and Long cases, supra, and held that the words 'engage' or 'engaged in' were simply descriptive of the *status* of the insured, and that the insurer's liability was limited. The same result was reached in Ruddock v. Detroit Life Insurance Co., 209 Mich. 638, 177 N.W. 242, 243, where the exemption read: 'This policy * * * shall be incontestable * * * except for naval or military service in time of war, without a permit, which are risks not assumed * * *.' And likewise in Miller v. Illinois Bankers Life Assn., 138 Ark. 442, 212 S.W. 310, 7 A.L.R. 378, where the language was: '* * * death while in the service in the army or navy of the government in time of war is not a risk covered * * *.'

"In McQueen v. Soverign Camp, 115 S.C. 411, 106 S.E. 32, the exemption read:

'* * * In the event the holder of this certificate shall die while serving in any branch of the United States Army or Navy, either as an officer or enlisted man, outside the boundaries of the United States' the liability of the insurer would be limited. This language is closer to that in the policy involved herein than that of any case we have been able to find. It contains also a geographical limitation. The court held the liability was effectively limited.

"In addition to the Bending case the respondent also relies on the recent cases of Life & Casualty Ins. Co. v. McLeod, 70 Ga.App. 181, 27 S.E.2d 871, and Lindsey v. Life & Casualty Ins. Co., 70 Ga.App. 190, 27 S.E.2d 877. In both cases the clause read: 'Should the insured die while enrolled in such [military or naval] service in war time without such permit, the company's liability will be restricted to the net reserve of this policy.' The clause was held in both cases to preclude a recovery of the face of the policy, and to fasten only limited liability on the insurer.

"From the foregoing discussion it will be seen that the cases on this subject may be grouped about as follows: (1) those holding that language such as 'death in consequence of' or 'death resulting from' military service means that death from natural causes while in the service is not within the exemption; (2) those holding that death 'while engaged in' the service has the same meaning (as group 1); (3) those holding that death 'while engaged in' the service means no more than '*while enlisted in,* or *enrolled in,* the armed forces, hence such death, even from natural causes, *is* within the exemption, and (4) those cases where the war risk clause contains no such language as is found in (1), (2) or (3) but simply states the condition, namely, military, or naval service.

"The clause in this case (as in the Bending, McLeod, Lindsey and McQueen cases) is in the fourth category.

"It is interesting to note, however, that the third paragraph in the war risk rider now before the court *does* contain language somewhat similar to that discussed in group (1). That paragraph is designed to limit the insurer's liability if death occurs: '(3) Within two years after the date of issue of this policy as a result of war (declared or undeclared), or any act incident thereto occurring while the Insured is traveling, residing or stationed outside the states of the United States, the District of Columbia, and the Dominion of Canada.' The words 'as a result of war' and 'any act incident thereto' are in sharp contrast to the language of paragraph 2, here involved, and would indicate that two distinct forms of coverage were intended. * * *

[4, 5] [It is true, as plaintiff contends, that the policy of insurance is to be read and construed as a whole and, more particularly, that the caption of the rider is to be read and construed with the language of the rider itself. (Ogburn v. Travelers Ins. Co., 207 Cal. 50, 52, 276 P. 1004; Narver v. California State Life Ins. Co., 211 Cal. 176, 294 P. 393, 71 A.L.R. 1374.) But this argument makes obvious the antistrophe which defeats it: the language of the rider is explicit and clear; reading that language with the caption effectually resolves any ambiguity in the latter. The words "Aviation and War Risk Exclusion Rider" are only the caption of the rider; they are not in themselves an operative provision of the policy; standing alone they do not exclude any risk whatsoever. Thus, unless the operative language in the body of the rider is to be considered the rider will be wholly ineffectual. But if any of the operative language is to be considered it would seem that we must consider all of it. If such operative language were ambiguous the insured would be entitled to a favorable construction of the ambiguity but, as previously observed, such operative language is explicit and clear.]

[6] "The phrase 'From any cause' which * * * [means] 'without regard to the cause' (see Bohrnstedt v. Travelers' Ins. Co., 123 Or. 539, 259 P. 419, 262 P. 938) * * * [must be given its unequivocal meaning.] 'Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured. * * * Where there is no ambiguity, however, courts will indulge in no forced construction against the insurer, and the insurance policy, like any other con-

tract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the circumstances surrounding its execution. * * *' Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 229, 120 P.2d 31, 32, supra. * * *"

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

I believe that the life insurance policy in the instant case covered the death of the insured. It is conceded that, while the death occurred when the insured was in military service outside the states of the United States, *it was in no way connected with, caused by or the result of that military service or war.* The caption of the rider which requires interpretation states that the rider is a *war risk* exclusion rider. In the body of the rider it is provided, *accepting the construction placed thereon by the majority opinion,* that a death is not covered when it occurs outside the states of the United States while the insured is serving in the military forces. The caption and the clause in the body are *diametrically opposed to each other;* they cannot be harmonized. The words "war risk" are not ambiguous. They can mean only one thing, a risk or hazard incident to or the consequence of war—the proximate result of war. Such risks and *those only* are excluded by the express wording of the caption. It may be that in the application of those words to a particular set of facts it will be difficult to ascertain whether the case is or is not within the definition of those words, but that problem, even if it be considered as making the words ambiguous, *is not an ambiguity in language.* Certainly there is no ambiguity in a clear case such as we have here where there can be no claim that there was any connection between the war and the insured's death. Where no relation exists between the death and the war, the death cannot under any definition of "war risk" be considered as embraced therein. Turning then to the clause in the body of the rider we find it makes no reference to any *war risk.* It purports to exclude risks which occur (1) at a certain place, and (2) when the insured has a certain status—is in the military service. Neither of those factors necessarily has the remotest connection with the risks connected with or are inherent in war. Hence it purports to make an exclusion which is totally foreign to the caption. Thus we have two contradictory clauses in an insurance policy. In that situation the clause most favorable to the insured must be held applicable to the case. It is true that some of the other parts of the body of the rider do pertain to war risks, but how can that validate a clause which is clearly outside the scope of a war risk? It is also of importance that the caption is in large type as contrasted with the small type in the body. The insured in taking the policy would naturally assume that the words "war risk" in the caption meant what they plainly import, a risk caused by and the result of war. He could assume that risks having no connection with war are not excluded. So to permit him to be misled is contrary to justice and the principles applicable to the interpretation of insurance polices.

The foregoing is to me the turning point of the case, yet the majority opinion devotes only one paragraph to it, stating: "It is true, as plaintiff contends, that the policy of insurance is to be read and construed as a whole and, more particularly, that the caption of the rider is to be read and construed with the language of the rider itself. (Citations.) But this argument makes obvious the antistrophe which defeats it: the language of the rider is explicit and clear; reading that language with the caption effectually resolves any ambiguity in the latter. The words 'Aviation and War Risk Exclusion Rider' are only the caption of the rider; they are not in themselves an operative provision of the policy; standing alone they do not exclude any risk whatsoever. Thus, unless the operative language in the body of the rider is to be considered the rider will be wholly ineffectual. But if any of the operative language is to be considered it would seem that we must consider all of it. If such

operative language were ambiguous the insured would be entitled to a favorable construction of the ambiguity but, as previously observed, such operative language is explicit and clear." *It is assumed without discussion that the caption is ambiguous.* It is clearly not ambiguous. Neither is the body of the rider. *They are squarely antagonistic.* So we have two opposing and conflicting provisions, which create an uncertainty or ambiguity as to the nature of the risk excluded. The problem is one of interpretation. Moreover the majority opinion states that the caption is not an operative part of the policy although in the previous sentence it recognizes the rule that it must be construed as part of the policy. Ogburn v. Travelers Ins. Co., 207 Cal. 50, 52, 276 P. 1004; Narver v. California State Life Ins. Co., 211 Cal. 176, 294 P. 393, 71 A. L.R. 1374. When so used it clearly limits the exclusion to only such risks as are war connected.

There are many cases in which provisions closely analogous to the one in the case at bar have been interpreted in favor of extending coverage to the insured. In Arendt v. North American Life Ins. Co., 107 Neb. 716, 187 N.W. 65, 66, the insured was covered for death from any cause "except military or naval service in time of war." Yet a nonmilitary service connected death in time of war was held *not* to be excluded. The policy in Atkinson v. Indiana Nat. Life Ins. Co., 194 Ind. 563, 143 N.E. 629, 630, read: "After one year from the date of issue this policy shall become incontestable * * * except that military or naval service in time of war without a permit from the company, is a risk not assumed under this policy at any time; but the legal reserve hereunder will be due and payable in case of death *while* in such service." The court stated: "Appellant contends that the plain meaning of the military clause is that the insurance company does not assume the risks of or incident to military service. Appellee contends that the limitation intended by the military clause is one of the status of the insured at the time of death, and not a limitation as to the cause of death. In support of its contention appellee argues that the words 'military service,' or 'in the military service,' if not modified by some other words, such as the words 'engaged in military service,' or 'in active military service' have uniformly been held to refer to the status of being in the military service. * * * The language of the first part of the sentence of the military limitation before the court has to do with a military service risk, or a risk of military service, or a risk incident to military service, or a risk occasioned by military service. The second part of that part of the sentence relating to military limitation is incompatible with the first part, and, if the position taken by appellee is to be confirmed, it is sufficient in its strength to control the other part of the sentence, thereby defining the first part of the sentence to mean status only, which carried out logically would mean to say, 'The risk of death while in military or naval service in time of war without a permit reduces the liability of the company to the payment to the beneficiary of the legal reserve only under this policy.'

"The possibility of such a construction of the meaning of the military service clause, in the face of a denial of such construction by the appellee, declares its ambiguity. This very state of conjecture suggests the rule of law, long adhered to, that in construing an insurance contract, which by ambiguities is capable of two reasonable interpretations, that interpretation will be adopted which is most favorable to the insured, and against the insurer." Likewise in the case at bar the caption of the rider refers to war *risk,* that is, a risk peculiar to war rather than merely the status of the insured. In Illinois Bankers' Life Ass'n v. Davaney, 102 Okl. 302, 226 P. 101, the exclusion clause read: "It is expressly provided that death *while in the service* in the army or navy of any government in time of war is not a risk covered *at any time during* the continuance or reinstatement of this policy of any greater sum than the amounts actually paid to the company herein." (Emphasis added.) The insured died of influenza while in the service in time of war. The court in holding the insured was covered relied upon a prior case, Barnett v. Merchants' Life Ins. Co., 87 Okl. 42, 208 P. 271, where the clause excluded those *engaged* in military service

stating: "It is contended that in the Barnett case, supra, this court was dealing with a policy which provided that it was unrestricted as to 'travel, residence, or occupation, except that if at any time the insured shall *engage* in army or naval service in time of war,' etc.

"It is pointed out that the term 'engage' is not used in the policy in the instant case; that the exemption here applied when and wherever the insured is in the service of the army or navy. It is true that in the Barnett case the provision of the policy is 'that if at any time the insured shall engage in army or naval service' and that in the instant case the provision of the policy is, in that respect, 'that death while in the service of the army or navy of any government in time of war is not a risk covered' by the policy, but we are unable to agree with counsel for defendants that the decisions of this court referred to differentiated the provision before the court in those cases from the provision in the case at bar."

Smith v. Sovereign Camp, W. O. W., 204 S.C. 193, 28 S.E.2d 808, 811, considered a policy reading "The double indemnity benefits hereby provided shall not be payable * * * while the member is in the military or naval service in time of war." The insured, a member of the military forces, was injured while on a furlough. His beneficiary recovered. In Young v. Life & Casualty Ins. Co. of Tennessee, 204 S.C. 386, 29 S.E.2d 482, 483, the exclusion clause stated: "No Accidental Death Benefit will be paid * * * if death results from bodily injuries sustained while * * * the insured is in military or naval service in time of war." The death of the insured, a member of the military forces, unconnected with his services therein, was held *not* to be excluded. The court said: "In the case before us, we think it clear that although the policy contains the word 'enroll' and not 'engage,' it was intended by the parties, insured and insurer, that the failure of the insured to obtain the permit and pay the extra premium would reduce the company's liability only in case his death should result from a risk peculiar to the military service. This view is strengthened by the requirement that an extra premium be paid in the event of military service in time of war. It is evident that an extra hazard was in contemplation of the parties as a possible cause of death, and that for this added risk the Company should be compensated. This added risk, in our view, cannot reasonably be referred to status; it relates to the death of the insured caused by or connected with his military duties as a member of the nation's armed forces. This seems to us to be the natural and obvious reading of the clauses quoted."

It has been held in many cases that where the exclusion clause extends to those "engaged" in military service, a death is not excluded unless it is service connected or the consequence of service. Long v. St. Joseph Life Ins. Co., Mo.App., 225 S.W. 106; Nutt v. Security Life Ins. Co. of America, 142 Ark. 29, 218 S.W. 675; Benham v. American Central Life Ins. Co., 140 Ark. 612, 217 S.W. 462; Stephan v. Prairie Life Ins. Co., 113 Neb. 469, 203 N.W. 626; Boatwright v. American Life Ins. Co., 191 Iowa 253, 180 N.W. 321, 11 A.L.R. 1085; Myli v. American Life Ins. Co., 43 N.D. 495, 175 N.W. 631, 11 A.L.R. 1097; Farmers' Nat. Life Ins. Co. of America v. Carman, 76 Ind.App. 700, 132 N.E. 687; Rex Health & Accident Ins. Co. v. Pettiford, 74 Ind.App. 507, 129 N.E. 248; Illinois Bankers' Life Assn. v. Jackson, 88 Okl. 133, 211 P. 508; Barnett v. Merchants' Life Ins. Co., 87 Okl. 42, 208 P. 271. There are some cases to the contrary but the very fact of the conflict shows the necessity of interpreting the clause favorable to the insured. There is no distinction between "engaged" in military service and "in" military service, the words used in the instant case. A person is occupied or employed (engaged) in military service when he is in the service.

It should be noted that none of the policies in any of the cited cases, which hold the exclusion clause applicable have a war risk caption comparable to the one in the case at bar, that is, "Aviation and War Risk Exclusion Rider."

It is conceded by respondent that under the interpretation contended for by it, which has been adopted by the majority of this

court in the case at bar, the insured was not covered during any of the time he was serving with the armed forces of the United States in Alaska; that is, had he met his death even while on furlough as the result of an accident or cause wholly unconnected with his military service, no recovery could be had under the provisions of the policy here involved. This conclusion must necessarily follow from the interpretation placed upon the war risk exclusion provision by the majority opinion.

Many cases involving the interpretation of war risk exclusion clauses in insurance policies have been reported in the American Law Reports, and reference to the annotations to these cases discloses a great diversity of judicial opinion in the interpretation of clauses of this character. See, 157 A.L.R. 1448; 156 A.L.R. 1447; 155 A.L.R. 1449; 154 A.L.R. 1446; 153 A.L.R. 1418; 152 A.L.R. 1449; 151 A.L.R. 1452; 150 A.L.R. 1414; 147 A.L.R. 1294; 141 A.L.R. 1510; 140 A.L.R. 1533; 137 A.L.R. 1263; 15 A.L.R. 1280; 11 A.L.R. 1103; 7 A.L.R. 382; 4 A.L.R. 848. Those courts expressing the more liberal view have allowed recovery in cases like the one now before us where there is a conflict between provisions of the policy which create an uncertainty or ambiguity as to the risks excluded by the policy. Under the interpretation placed on such clauses by the decisions of the courts following the more liberal trend, plaintiff would be entitled to recover in the case at bar. The majority opinion, however, adopts the more conservative view and interprets the conflicting provisions of the policy most strongly against the insured. In my opinion considerations of justice and fairness should compel an interpretation of conflicting provisions of this character most strongly in favor of the insured, and that this court should adopt the liberal view expressed by the courts of other jurisdictions which have allowed recovery in cases of this character. A basic reason in support of this conclusion is that many persons holding policies containing war risk exclusion clauses did not contemplate entering military service at the time such policies were issued to them but were thereafter required to enter such service as the result of the operation of the National Selective Service Act, 50 U.S.C.A.Appendix § 301 et seq. Obviously such persons would not scrutinize the war risk clauses upon receipt of their policies, because of the assumption, after reading the caption "Aviation and War Risk Exclusion Rider" *in large black-faced type,* that such rider limited the liability of the insurance company in cases *only* where death resulted solely from some risk incidental to or connected with war or military service, and for this reason did not read the provisions of the rider which were *printed in very small type.* In other words, such insured had the right to assume that the only risks excluded by the rider were those connected with or incidental to aviation and war. If the rider in the small type had provided that the company would not be liable if the insured's death resulted from an injury received by reason of coming in contact with an aeroplane while engaged in any pursuit connected with aviation or otherwise, could it be said that the insured would not be covered if he was killed as a result of a collision between an automobile in which he was riding and an aeroplane operated by a third person? Obviously any one reading the caption to the rider who was not interested in aviation, and who never intended to have anything to do with aeroplanes, would have the right to assume that the clauses contained in the small type below the caption did not exclude risks which had no connection with aviation; yet, the interpretation placed upon the rider in the case at bar would prevent recovery by the beneficiary of the person killed while riding in the automobile as the result of being struck by an aeroplane. In my opinion the beneficiaries of those who were thus misled should be protected against such an obvious means of deception.

For the foregoing reasons the judgment should be reversed.

Rehearing denied; CARTER, J., dissenting.

74 Cal.App.2d 139

YEAROUT et ux. v. AMERICAN PIPE & STEEL CORPORATION.

No. 3198.

District Court of Appeal, Fourth District, California.

April 23, 1946.

1. Husband and wife ⇐265

A wife, not joining in husband's lease of community realty for over a year or in instrument selling, conveying, or encumbering it, may maintain action within year after recordation of lease of such instrument to restore entire property to community, if husband is living, or to recover wife's half interest therein, if he is dead. Civ.Code, § 172a.

2. Mines and minerals ⇐73

An oil lease transfers to lessee a "profit à prendre in gross," which is right to remove part of substance of leased land, and in effect conveys an interest in realty for a term of years or indefinitely, depending on terms of lease and circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit à Prendre in Gross".

3. Husband and wife ⇐267(3)

An oil lease conveys interest in realty to lessee, besides giving him possession of enough of surface of leased property for his drilling operations, so that such a lease of community property should be signed by both husband and wife. Civ. Code, § 172a.

4. Husband and wife ⇐270(5)

A wife is in privity with her husband as to her interest in their community property, so that husband, as party to action involving such property, fully represents both spouses' interest and wife is not a "necessary party".

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

5. Husband and wife ⇐270(5)
Judgment ⇐693

A wife was not "necessary party" to action against husband to foreclose materialman's lien on community property, so that judgment foreclosing lien was binding on her and neither spouse could maintain action to quiet title to half interest in such property after foreclosure sale thereof to materialman.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by F. A. Yearout and wife against the American Pipe & Steel Corporation to quiet plaintiffs' title to a half interest in certain land. Judgment for plaintiffs, and defendant appeals.

Reversed.

Dechter, Hoyt, Pines & Walsh, of Los Angeles, for appellant.

Dearing, Jertberg & Avery, of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment which quieted plaintiffs' title to an undivided one-half interest in forty acres of land in Fresno County.

Plaintiffs are and have been husband and wife since September 1, 1909. They moved to California in 1918, and on September 5, 1935, acquired, as community property, the one-half interest in the land in question here. The deed of conveyance named "F. A. Yearout, a married man," as grantee.

On April 4, 1940, F. A. Yearout executed an oil lease on the property under the terms of which the lessee agreed to drill for oil. The lessee agreed in writing with the Pettijohn Drilling Company that it would furnish the labor and materials and drill the well. Defendant furnished materials used in the drilling operations and was not paid therefor. It filed its materialman's lien and started suit to foreclose, naming F. A. Yearout as the owner or reputed owner of the property. He answered admitting those allegations. Anna V. Yearout, his wife, was not made a party to the action. It is stipulated that defendant had no actual notice that F. A. Yearout was a married man.

Defendant recovered judgment in the lien foreclosure action which ordered the property sold to pay its lien in the sum

of $2327.46. At the time of the foreclosure sale Anna V. Yearout gave the following notice:

"That the judgment and decree under which this sale is being held is void; that the said Anna V. Yearout is the wife of Floyd A. Yearout, and claims to be the owner of an undivided one-half interest in the said property purportedly to be sold, and which interest will be unaffected by the purported sale."

Defendant became the purchaser and this action was brought to quiet plaintiffs' title to the one-half interest in the forty acres. In a second cause of action Anna V. Yearout sought to quiet her title to a one-quarter interest in the property if she and her husband should be unsuccessful in quieting their title to the one-half interest. Judgment was rendered quieting both plaintiffs' title to the one-half interest. This appeal followed.

Respondents seek to support the judgment under the provisions of section 172a of the Civil Code which requires, in effect, that the wife must join with the husband in executing any instrument by which community real property or any interest therein is leased for longer than one year or is sold, conveyed or encumbered. The section also contains the following provision:

"No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, * * *."

In this connection it should be noted that the record is silent on the question of whether or not the oil lease was ever recorded.

[1] It is now settled that a wife who has not joined in a lease of community real property for a period of more than one year, or in an instrument whereby it is sold, conveyed or encumbered, may maintain an action within one year from the recordation of the instrument to restore the entire property to the community, if her husband is living, or to recover her one-half interest in it if he is dead. Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629; Lynn v. Herman, Cal.App., 165 P.2d 54, and cases cited. The Ballinger case and those following it cleared up considerable confusion on the question found in earlier decisions.

[2] It is now settled that an oil lease transfers to the lessee a profit à prendre in gross which is a right to remove a part of the substance of the land; that this is in effect the conveyance of an interest in real property either for a term of years or indefinitely depending on the terms of the lease and circumstances of the case. See, Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Scheel v. Harr, 27 Cal. App.2d 345, 80 P.2d 1035; Morrow v. Coast Land Co., 29 Cal.App.2d 92, 84 P.2d 301; Lever v. Smith, 30 Cal.App.2d 667, 87 P.2d 66; Pimentel v. Hall-Baker, 32 Cal. App.2d 697, 90 P.2d 588; Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050; Phillips v. Bruce, 41 Cal.App.2d 404, 106 P. 2d 922.

[3] It is at once apparent from the foregoing authorities that an oil lease, besides giving the lessee possession of sufficient of the surface of the property for his drilling operations also conveys to him an interest in real property so that such lease of community property should now be signed by both husband and wife. However, Mrs. Yearout brought no action to directly challenge the lease and to restore the leased land to the community as she might have done. What she is doing here is to challenge a materialman's lien and a decree foreclosing that lien in an action in which she was not made a party although the materialman furnished the materials and the lien arose out of the obligations assumed by the lessee in that lease. Whether the fact of an oil lease requiring the lessee to drill for oil brings into play the lessor-lessee statutory agency theory is not argued and need not be considered. See, English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281; Ott Hardware Co. v. Yost, 69 Cal.App.2d 593, 159 P.2d 663.

Respondents quote the following from 36 American Jurisprudence, at page 156, section 246, where, in discussing the foreclosure of mechanic's liens, it is said:

"Where the property on which a mechanic's lien attaches is owned jointly as community property by a husband and his wife, they are both necessary parties to an action to foreclose the lien, and without the joinder of the wife no decree can be entered affecting the title."

They also cite the following decisions of the courts of the State of Washington holding that the wife is a necessary party to an action to foreclose a lien on community property. See, Northwest Bridge Co. v. Tacoma Ship Building Co., 36 Wash. 333, 78 P. 996; Powell v. Nolan, 27 Wash. 318, 67 P. 712, 68 P. 389; Peterson v. Dillon, 27 Wash. 78, 67 P. 397; Sagmeister v. Foss, 4 Wash. 320, 30 P. 80, 744; Littell etc. Mfg. Co. v. Miller, 3 Wash. 480, 28 P. 1035; Collins v. Snoke, 9 Wash. 566, 38 P. 161.

In the recent case of Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641, the fundamental differences in the conception of community property rights in Washington and California were pointed out and it was held that the Washington rule had no application to the facts of that case.

[4] The case of Cutting v. Bryan, 206 Cal. 254, 274 P. 326, 327, involved a question quite similar to the one confronting us here where the wife was not made a party, but her husband was, in an action involving community property. It was there said:

"The fact that the plaintiff was not expressly made a party to the action which had theretofore been commenced and was being prosecuted in the federal court does not, in our opinion, militate against the application of the foregoing principle, for the reasons set forth in certain of the cases above cited, and for the additional reason that the husband of the plaintiff was the principal party defendant in said action, and as such was representing the community interest of himself and also of his wife in said property, and that as to such interest the plaintiff herein was in privity with her husband, and was represented in said action by him as fully as though she had been expressly made a party thereto. McKay on Community Property, (2d.Ed.) § 1085; 13 Cal.Juris., p. 882; Estate of Clark, 190 Cal. 354, 212 P. 622; Lichty v. Lewis, C.C., 63 F. 535; Id., 9 Cir., 77 F. 111, [23 C.C.A. 59]."

Mr. Associate Justice Preston wrote a concurring opinion in the Cutting case and referred generally to the fact that the "Washington courts have declared the wife a necessary party in any action respecting the community real property, and that a judgment against the husband alone is void," and concluded those cases were not controlling in California, thus showing that the Washington rule was called to the attention of the Justices. It is significant that they refused to follow it and did not consider it of sufficient importance to discuss it in the majority opinion.

The same question was before the court in Secondo v. Superior Court, 105 Cal.App. 179, 286 P. 1089, 1090, where it was said:

"As to her community interest, the wife is in privity with her husband, who, in actions involving the property, fully represents both their interests, and she is not a necessary party thereto. Cutting v. Bryan, 206 Cal. 254, 274 P. 326; 31 Cor. Jur., Husband and Wife, § 1270, p. 160."

[5] Under this rule we must hold that Anna V. Yearout was not a necessary party to the action to foreclose the materialman's lien on the community property as she was represented there by her husband. Therefore the judgment foreclosing the lien was binding on her and neither she nor her husband can successfully maintain this action.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

PEOPLE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13085.

District Court of Appeal, First District, Division 2, California.

April 22, 1946.

Hearing Granted June 20, 1946.

1. States ⇐191(1)

The state may not be sued without its consent, and such consent is not given in a statute expressed in general words. Const. art. 20, § 6.

2. States ⇐112

The state is not liable for the negligence or misfeasance of its officers and agents, in the absence of a statute assuming responsibility.

3. Statutes ⇐220

Where statutes relating to remedies against the state and its political subdivisions had been amended frequently subsequent to judicial decisions holding that in the absence of a statute assuming responsibility, the state is not liable for negligence or misfeasance of its officers and agents, without having been changed in that respect, it would be assumed that intention of Legislature was to let the rule of those cases stand.

4. States ⇐112

The general rule of nonliability of the state for injuries arising out of the torts of its officers applies to the operation of equipment on the State Belt Railroad, on the theory that it is not engaged in a proprietary function. Harbors and Navigation Code, §§ 1690, 3150 to 3165.

5. Railroads ⇐1½

The State Belt Railroad is not operated by the state in a proprietary capacity or as a mere business enterprise but exists for the purpose of promoting commerce for the benefit of the people. Harbors and Navigation Code, §§ 1690, 3150 to 3165.

6. States ⇐112

The state is immune from liability for the torts of its officers or employees in the administration of the State Belt Railroad, in absence of statute assuming responsibility, even if it should be considered that the state is engaged in a private business enterprise. Harbors and Navigation Code, §§ 1690, 3150 to 3165.

7. Prohibition ⇐3(3)

Prohibition would lie, at instance of state, requiring Superior Court to desist from further proceedings as to the state in a pending case wherein court had no jurisdiction to proceed to trial against the state, notwithstanding state's remedy by appeal from adverse judgment.

Prohibition by the People of the State of California against the Superior Court of the State of California in and for the City and County of San Francisco to require the Superior Court to desist from further proceedings as to the state in a case before the court.

Writ granted.

Robert W. Kenny, Atty. Gen. and Harold B. Haas, Deputy Atty. Gen., for petitioner.

Emmett R. Burns, of San Francisco, for C. V. Pierpont.

NOURSE, Presiding Justice.

On May 20, 1945, plaintiff C. V. Pierpont filed an action in the Superior Court of San Francisco for personal injuries against Southern Pacific Company, State Belt Railroad, State of California (petitioner herein), General American Transportation Corporation and certain fictitious defendants. The amended complaint alleged that on May 25, 1944, the State of California was operating the State Belt Railroad in a proprietary capacity; defendant Southern Pacific Company delivered a certain tank car owned by defendant General American Transportation Company to defendant State for delivery to a spur track; in the scope of his employment plaintiff was required to climb a ladder on the side of the car to a platform which the defendants had negligently allowed to be in a dangerous and defective condition. As a result the equipment tipped, throwing plaintiff to the ground and causing injury. It is not alleged that the

plaintiff was an employee of any one of the defendants real or fictitious; hence the suit does not involve the relation of master and servant or the question of compensation for injuries occurring during the course of employment. The complaint further alleged that the Board of Control of the State of California had rejected plaintiff's verified claim of damages prior to the institution of the suit.

On December 7, 1945, the defendant State of California filed a demurrer to the amended complaint, one of the grounds being that the court had no jurisdiction of the person of defendant or of the subject of the action as to defendant State. The demurrer was overruled with leave to answer.

The State of California now petitions this court for a writ of prohibition requiring the Superior Court to desist from further proceedings as to petitioner. The petition states that the respondent court will enter a default against the State unless it answers, and that if it files an answer the court will proceed to trial in excess of its jurisdiction. Such procedure by respondent would subject the petitioner to other actions without its consent (some of which are now pending) and would consume its funds and the time of its employees.

Petitioner emphasizes that the action was not brought against any officer or employee of the State as provided in Government Code, sections 2000–2002 but against the State itself. It is petitioner's contention (1) that the State has not consented to be sued in an action for an alleged tort of an officer or employee in the operation of any properties under the control of the Board of State Harbor Commissioners, except such as might occur in the course of operations of motor vehicles, Vehicle Code, sec. 400; and (2) that the only statute referring generally to actions against the State for negligence, Government Code, sec. 16041, formerly Political Code sec. 688, does not authorize suits for injuries arising out of torts of all its officers, that the doctrine of nonliability of the State applies to the operation of the equipment of the State Belt Railroad. Hence it is argued that any trial on the complaint and answer herein and any further proceedings taken by the trial court would be in excess of respondent's jurisdiction.

Plaintiff in the tort action argues in behalf of the respondent court that when the State acts in a proprietary capacity it voluntarily waives its sovereign character and hence should be held liable for the negligence of its employees. It is said that the case is one of first impression in California but that Ch. 45, p. 57 of the Statutes of 1893 (now Government Code, sec. 16041), although not giving a right of action, provides a remedy where none existed prior thereto. Finally it is argued that the writ should not be granted because petitioner's remedy by appeal is a plain, speedy and adequate remedy at law.

[1] It is a fundamental principle that the State may not be sued without its consent (Const. Art. XX, sec. 6; State v. Royal Consolidated Min. Co., 187 Cal. 343, 202 P. 133; Estate of Bloom, 213 Cal. 575, 2 P.2d 753) and that the consent of the State is not given in a statute expressed in general words. Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am.St.Rep. 451. In the Mayrhofer case the court said:

"The government was created and shaped by the constitution. It is not an end in itself, but a mere instrumentality for public service. Its powers and funcfions exist only for the people. One of its functions is to enact laws for the government of the inhabitants within its limits, thereby affording them protection and advancing their general welfare. The property it holds is simply to enable it to perform the service required of it. It is as much devoted to public use as are the streets and highways, though in a different way, and it is generally held by a different tenure.

"* * * One cannot sue the state, unless expressly authorized by statute, and this principle is embodied in our constitution. General statutes creating new remedies for individuals have never been held to authorize such suits."

The right to sue the State was first recognized in the Statutes of 1893, Ch. 45, pg. 57, wherein it was stated: "All persons *who have, or shall hereafter have, claims* on contract or for negligence against the State

* * * are hereby authorized, * * * to bring suit thereon against the State * * *." (Emphasis added.) That statute has been amended and revised in certain particulars but its language is essentially the same in reference to negligence. The provision as it appears today is found in the new Government Code, sec. 16041 as follows: "Any person who has a claim against the State (1) on express contract, (2) for negligence * * * shall present the claim to the board in accordance with Section 16021. If the claim is rejected or disallowed by the board, the claimant may bring an action against the State on the claim * * *." The statute having been reenacted since 1893 in substantially the same terms the construction placed on it prior to its reenactment continues (23 Cal.Jur. 795). It will be noted that the statute merely provides a remedy for those who have a claim against the State. It assumes a claim which is litigable by some express statutory provision.

[2] The cases are unanimous in holding that in the absence of a statute assuming responsibility, the State is not liable for the negligence or misfeasance of its officers and agents. Melvin v. State, 121 Cal. 16, 53 P. 416; Rauschan v. State Comp. Ins. Fund, 80 Cal.App. 754, 253 P. 173. It has been held from the beginning that the Statute of 1893 "did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted." Denning v. State, 123 Cal. 316, 319, 55 P. 1000, 1001, citing Chapman v. State, 104 Cal. 690, 38 P. 457, 43 Am.St.Rep. 158 and Melvin v. State, 121 Cal. 16, 53 P. 416. See also Walker v. Department of Public Works, 108 Cal.App. 508, 516, 291 P. 907.

[3] Denning v. State, supra, presented a situation much like the one involved herein. The plaintiff there was employed by a board of state harbor commissioners on a tugboat; he climbed a ladder which was insecurely fastened and fell causing injuries. The judgment in favor of plaintiff was reversed on the ground that the State was not liable for the negligence of the board of state harbor commissioners, whereby an employee was injured. The Statute of 1893 created no liability. The court distinguished Chapman v. State, supra, on the ground that there the action was for damages for breach of contract where the liability exists on the occurrence of the breach. It may be observed that the cited cases are of early date, but no recent decision on the subject appears. It should also be observed that the statutes relating to remedies against the State and its political subdivisions have been amended frequently since these cases were decided and, since the Legislature has not changed their effect in this respect, it must be assumed that its intention has been to let the rule of those cases stand.

[4, 5] It would also appear that the general rule of non-liability of the State for injuries arising out of the torts of its officers applies to the operation of equipment on the State Belt Railroad on the theory that it is not engaged in a proprietary function. The railroad is operated under sections 3150 to 3165 inclusive of the Harbors and Navigation Code by the Board of State Harbor Commissioners, sec. 1690, for San Francisco Harbor. Although the board is allowed to impose tolls and charges, such imposition can be made only for repayment of the costs of construction, Harbors and Navigation Code, sec. 3153, and for maintenance of the commerce of the port, sec. 3162. The railroad is not operated in a proprietary capacity by the State or as a mere business enterprise but exists for the purpose of promoting commerce for the benefit of the people. Denning v. State, supra, 123 Cal. at 322, 55 P. 1000. In Sherman v. United States, 282 U.S. 25, 29, 51 S.Ct. 41, 75 L.Ed. 143, 145, it was stated that the State Belt Railroad "is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative."

[6] However, even if it should be considered that the State is engaging in a pri-

vate business enterprise in the operation of the railroad, that would not destroy its immunity from liability for the torts of its officers or employees in the administration of the affairs of the enterprise. This was held in Rauschan v. State Comp. Ins. Fund, supra. On the specific question of the nonliability of the State for the torts of its officers and employees the court said: (80 Cal.App. at page 760, 253 P. at page 175) "It is a proposition placed beyond the realm of doubt—indeed, it is elementary—that the state cannot be sued without its consent, 'and all the authorities are united upon the proposition that it is a general principle of law that a state is not liable for the torts of its officers, agents, or servants, and that it can be made so liable only upon its clear and definitely given consent.' Western Assur. Co. v. Drainage Dist., 72 Cal.App. 68, 75, 237 P. 59, 62, in which a hearing was denied by the supreme court; see, also, notes to vol. 13 A.L.R. * * * Upon this proposition we may well present excerpts from a few of the authorities. In Gibbons v. United States, 8 Wall., U.S., 275, 19 L.Ed. 453 (see, also, Rose's U .S. Notes), Mr. Justice Miller said:

" 'The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for the unauthorized wrongs inflicted by their officers on the citizens, though occurring while engaged in the discharge of official duties.'

"In his work on Agency, § 319, Judge Story declares that:

" 'The government does not undertake to guarantee to any person the fidelity of any of its officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests.' See, also, Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 97, 53 P. 401; Sels v. Greene, C. C., 81 F. 555, affirmed in 88 F. 127."

The same rule is tersely stated in Robertson v. Sichel, 127 U.S. 507, 515, 8 S.Ct. 1286, 1290, 32 L.Ed. 203, as follows: "The government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guaranty to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests. (Citing cases)."

The cases citing section 688 of the Political Code, upon which the new Government Code section 16041 is based, relate mainly to eminent domain proceedings and actions arising ex contractu (to which the section concededly applies). As stated by petitioner herein the language of some of the cases appears contrary to the decisions outlined above but a careful reading of the opinions indicates that they do not apply to the precise question involved on this petition. Maurice v. State of California, 43 Cal.App. 2d 270, 110 P.2d 706, holds the state liable for injuries to an employee of the State Belt Railroad on the ground that the railroad is in interstate commerce and is therefore subject to the Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq. The federal cases, United States v. State of California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, and State of California v. Anglim, 9 Cir., 129 F. 2d 455, are also based on the theory that in the operation of the railroad the State voluntarily brought itself under the interstate commerce clause to federal regulation. State of California v. Superior Court, 14 Cal.App. 2d 718, 58 P.2d 1322, relates to suits authorized by section 1714½ of the Civil Code, Vehicle Code, sec. 400, and holds that in actions for the tort of an employee of the state under that enabling section the procedure provided by section 688 of the Political Code, Government Code, sec. 16041, is applicable. Welsbach Co. v. State of California, 206 Cal. 556, 275 P. 436, does not relate to tort actions but to the recovery of taxes paid under protest; it was held that the action was maintainable under the Statute of 1893 because it was in form a common law action in assumpsit upon an implied contract. These cases do not overrule the long line of decisions on the particular subject of actions against the State for the tort of an employee.

The respondent cites Sanders v. City of Long Beach, 54 Cal.App.2d 651, 129 P.2d

511, and similar cases to the proposition that "The liability of public corporations engaged in proprietary activities for the negligent conduct of its employees or the unsafe condition of its property appears to be the same as that of a private corporation." The argument is not appropriate to the present proceeding. Liability of "public corporations" and liability of the sovereign state are two widely different propositions. The precise question is ably discussed in Riddoch v. State, 68 Wash. 329, 123 P. 450, 452, 42 L.R.A.,N.S., 251, Ann.Cas.1913E, 1033, as follows: "The analogy, however, does not hold. Municipal corporations enjoy their immunity from liability for torts only in so far as they partake of the state's immunity, and only in the exercise of those governmental powers and duties imposed upon them as representing the state. In the exercise of those administrative powers conferred upon or permitted to them solely for their own benefit in their corporate capacity, whether performed for gain or not, and whether of the nature of a business enterprise or not, they are neither sovereign nor immune. They are only sovereign and only immune in so far as they represent the state. They have no sovereignty of their own; they are in no sense sovereign per se. Their immunity, like their sovereignty, is in a sense borrowed; and the one is commensurate with the other."

A similar line of reasoning was adopted in Dillwood v. Riecks, 42 Cal.App. 602, 184 P. 35, where the distinction was drawn between the liability of a municipal corporation and that of a county. Counties are merely political subdivisions, or agencies of the State, said the court, and their obligations are strictly limited as the law prescribes. In holding that the county, as a political subdivision of the State, is not liable for the negligence of its employees unless such liability is expressly imposed by statute, the appellate court relied upon Huffman v. San Joaquin Co., 21 Cal. 426, an action involving injuries arising from want of proper repairs to a county bridge. There the Supreme Court said: (21 Cal. at page 430) "If any remedy exists for injuries resulting from neglecting to keep such bridges in repair, it must be sought either against the Road Overseers or Supervisors personally."

Respondents cite Burke v. State, 64 Misc. 558, 119 N.Y.S. 1089, and Arnold v. State, 163 App.Div. 253, 148 N.Y.S. 479, and Cooley v. State, 114 Misc. 717, 186 N.Y.S. 228, as holding to the contrary. But those cases were covered by specific statutes whereby the State of New York assumed liability under the special circumstances there present, as this State has assumed liability under section 400 of the Vehicle Code. Amstein v. Gardner, 134 Mass. 4, is cited to the same effect; but in that case the employee of the state railroad was held to be subject to liability, and not the State in its sovereign capacity. The same is to be said of Western & Atlantic Railroad v. Carlton, 28 Ga. 180.

As heretofore indicated Maurice v. State of California, supra; State of California v. Anglim, supra; Sherman v. United States, supra, and United States v. State of California, supra, are not helpful to respondent. All involved the question of the liability of the State under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and the Federal Safety Appliance Act and all held that when the State engaged in interstate commerce, as in the operation of the belt line railroad, it made itself amenable to the provisions of federal laws covering operations in interstate commerce such as those enacted for the safety of employees.

We conclude that the State Belt Railroad is operated by the State for the promotion of commerce; that there is no liability upon the State for the torts of its officers or employees unless it has clearly given its consent to be liable; that the State has not authorized the maintenance of actions against it for the torts of its employees of the harbor board, and that, therefore, the respondent court has no jurisdiction to proceed to trial in this action as against the petitioner.

[7] Finally it is argued that the writ of prohibition should not issue because the State would have an adequate remedy by appeal from an adverse judgment. The same argument was raised in Davis v. Superior Court, 184 Cal. 691, 696, 195 P. 390, where the Superior Court had refused to dismiss a cause under section 581b Code of Civil Procedure and threatened to proceed to trial. The Supreme Court, in granting the writ, said that since further proceed-

ings would be void the writ should issue so that the parties would not be put to further vexation and useless expense. The same theory was applied in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 717; and see 21 Cal.Jur. 583.

Let a writ of prohibition issue as prayed.

GOODELL and DOOLING, JJ., concur.



74 Cal.App.2d 120

MERLINO et al. v. FRESNO MACARONI MFG. CO. et al.

Civ. 3501.

District Court of Appeal, Fourth District, California.

April 22, 1946.

1. Costs ⇐15

An action for dissolution of a corporation, though relief sought is equitable in character, is a "special proceeding" within statute providing that costs are allowed of course to plaintiff on judgment in his favor in a special proceeding and to a defendant on judgment in his favor in special proceedings. Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding".

2. Costs ⇐76

Orders, in action for dissolution of corporation, wherein defendants elected to buy plaintiffs' stock under statute either by fixed agreement between parties or as appraised by three commissioners, directing payment by defendants on account of fees and expenses of commissioners, with proviso that defendants reimburse themselves by filing the usual cost bill if successful in the action, contemplated a final order for costs in favor of the prevailing party. Civ. Code, § 404(e); Code Civ.Proc. § 1032.

3. Costs ⇐32(2)

A special proceeding is "successful", within meaning of statute providing that costs are allowed of course to plaintiff on judgment in his favor in special proceedings and to defendant on a judgment in his favor in special proceedings, when it terminates in accomplishment of what is wished or intended or aimed at. Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Successful Proceeding".

4. Costs ⇐32(2)

Where defendants in action for dissolution of corporation elected to buy plaintiffs' stock at its fair cash value either by fixed agreement or as appraised by commissioners, and, to establish inability of parties to agree, within meaning of statute, defendants made an offer of $110 a share for plaintiff's stock which was refused, and commissioners appraised stock at $273.94 a share, and court denied dissolution of corporation and ordered plaintiffs to transfer their stock to defendants on payment by defendants of stock's appraised value, defendants were the "successful parties" within meaning of statute imposing costs. Civ. Code, § 404(E); Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Successful Parties".

5. Appeal and error ⇐1033(10)
Costs ⇐32(1)

Where action was a special proceeding, terminating in a judgment in defendants' favor within meaning of statute imposing costs, defendants were entitled to recover from plaintiffs their costs as a matter of course, and plaintiffs could not complain because trial court only charged them with one-half of costs. Code Civ.Proc. § 1032.

6. Corporations ⇐607

Court did not err in allowing fees to commissioners who appraised stock which defendants in action for dissolution of corporation sought to purchase from plaintiffs for its fair cash value, of $50 a day for hearings and work done outside county and $40 a day for hearings and work done within county, over contention of plaintiffs that

commissioners were in fact referees and entitled only to $5 a day under statute dealing with fees of referees. Code Civ.Proc. § 1023.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Domenico Merlino and Anastasia Merlino against the Fresno Macaroni Manufacturing Company, a California corporation, and Alfonso Borrelli and Theresa Borrelli for dissolution of the corporation and for appointment of a receiver, wherein Alfonso Borrelli and Theresa Borrelli served notice of election to buy plaintiffs' stock at its fair cash value, either by fixed agreement between the parties or as appraised by three commissioners, and for an order that plaintiffs transfer their stock to defendants on payment of its value so ascertained. Judgment was entered directing plaintiffs to transfer their stock to defendants and directing defendants to pay, on such transfer, the sum determined by the commissioners as the fair cash value of the stock. From the portion of the judgment reciting that defendants recover from plaintiffs one-half of costs as previously taxed and paid by defendants, the plaintiffs appeal.

Judgment and order affirmed.

Morgan J. Doyle, Walter M. Gleason, and A. Dal Thomson, all of San Francisco, and William B. Backlund, of Fresno, for appellants.

Matt Goldstein and Frederick W. Docker, both of Fresno, for respondents.

GRIFFIN, Justice.

This action was brought for dissolution of the defendant Fresno Macaroni Manufacturing Company, and for the appointment of a receiver. Alfonso Borrelli and Theresa Borrelli, hereinafter referred to as the defendants, in their answer, after denying the allegations of wrong-doing in the complaint, served notice of their election to buy the plaintiffs' stock at its fair cash value, pursuant to section 404 subdivision (E) of the Civil Code, either by fixed agreement between the parties or as appraised by three commissioners. The defendants also demanded, as further affirmative relief, that the plaintiffs be ordered to transfer their stock to the defendants upon payment of its value so ascertained.

On a former appeal, Merlino v. Fresno Macaroni Manufacturing Company, 64 Cal. App.2d 462, 148 P.2d 884, to which case reference should be made for a more complete statement of the factual background, this court held that the defendants, other than the company, had a right to purchase the plaintiffs' stock upon the terms set forth in their answer. We also held that as a prerequisite to the assertion of the remedy of the purchaser it was necessary that a showing be made that the parties were unable to agree upon the fair cash value of the plaintiffs' shares. The defendants, in order to establish an inability of the parties to agree, made a cash offer of $110 per share for the plaintiffs' shares. Plaintiffs ignored the offer and thereupon the defendants made a motion in the court below for an order appointing three commissioners to appraise the plaintiffs' stock and ascertain its fair cash value. The order was made in which it was found, among other things, "that the parties are unable to agree upon the fair cash value of the shares of stock owned by the plaintiffs" and therein appointed three commissioners to appraise the plaintiffs' stock. Plaintiffs thereafter unsuccessfully attempted to dismiss the action. The trial court ordered the proceeding to continue. Thereafter, this court denied a petition by the plaintiffs for a writ of prohibition based on the attempted dismissal. Merlino v. Superior Court, (not reported). An application by the plaintiffs to the Supreme Court for a rehearing of this court's order denying a writ of prohibition was denied. In the course of the proceedings, the commissioners made two applications to the court below for an order fixing the reasonable amount of their fees and expenses and directing payment thereof. The trial court made orders, on both applications, directing payment by the defendants on account of the fees and expenses of the commissioners, both of which contain the same provision, to wit: "That defendants reimburse themselves by filing the usual cost bill *if successful in said action.*" (Italics ours.)

The record shows that no objection was made by counsel for any of the parties to the reasonableness of the fees so awarded and directed to be paid, to wit, $50 per day for hearings and work done outstide of Fresno, and $40 per day for hearings and work done within Fresno County, and $5 per hour for conferences of the commissioners. The second of the two orders, dated February 28, 1945, recites that counsel for the respective parties concurred in the reasonableness of the fees so awarded provided it contained a provision permitting defendants to reimburse themselves if successful. After filing the commissioners' report the court made findings of fact and conclusions of law affirming and approving it and judgment was entered directing that the plaintiffs take nothing by their complaint and that the defendants were entitled to the affirmative relief prayed for in their answer and to exercise the election of purchasing the plaintiffs' stock at its fair cash value which was appraised by the commissioners at $273.94 per share for the 337½ shares owned by the two plaintiffs. Judgment was entered directing the plaintiffs to transfer their stock to the defendants and also directed defendants to pay, upon such transfer, the sum determined upon as the fair cash value. The portion of the judgment appealed from recites that defendants recover from plaintiffs one-half of their costs as taxed, the total amount of said costs being $2,147.89, and one-half thereof being $1073.95. A large part of the cost bill consists of the commissioners' fees and expenses. It is only from the part of the judgment concerning the apportionment of costs that this appeal has been taken. The various items specified therein were objected to in the trial court.

As we understand the force of plaintiffs' argument, they contend that in view of the terms of the court orders, made prior to the confirmation of the report, and during the course of the trial, reciting that the defendants pay the fees and expenses of the commissioners and that they "reimburse themselves by filing the usual cost bill, *if successful* in said action," that they were final orders in respect to the payment of such expenses, and that since plaintiffs were the prevailing parties in said action upon the issue finally presented, the court erred in apportioning such costs equally between plaintiffs and defendants. In this connection it is also argued that even though the plaintiffs originated the litigation as an action for dissolution and the defendants succeeded in avoiding such dissolution, that since the former decision on appeal in this case, the case developed into one where the sole controversy was what defendants should pay for stock, which the plaintiffs were bound to sell; that since the plaintiffs ignored defendants' offer of $110 per share, the subsequent finding and judgment of the court establishing the price of $273.94 per share constituted a finding that plaintiffs were the successful and prevailing parties in the action and that the trial court could not act as a court of review over itself and continue to make varying and conflicting decisions as to costs; that therefore the first orders assessing costs were conclusive and not subject to subsequent change, citing Winger v. Elmore, 14 Cal.App.2d 241, 57 P.2d 1369; Code Civ.Proc. Sec. 1025.

[1, 2] An action for dissolution of a corporation is a special proceeding (St. Clair Estate Co. v. Superior Court, 41 Cal. App.2d 389, 392, 107 P.2d 45), although the relief sought is equitable in character. Havemeyer v. Superior Court, 84 Cal. 327, 362, 24 P. 121, 10 L.R.A. 627, 18 Am.St. Rep. 192. Section 1032, subdivisions (a) and (b) of the Code of Civil Procedure provides in part that "costs are allowed of course: (a) To plaintiff upon a judgment in his favor * * * in a special proceeding" and "To the defendant upon a judgment in his favor in special proceedings"; that in an action other than those mentioned in subdivisions (a) and (b) "costs may be allowed or not, and, if allowed, may be apportioned between the parties * * * in the discretion of the court." It is apparent that the code specifically awards costs as of course, to the prevailing party in a special proceeding. 7 Cal.Jur. 264, sec. 6. The two orders here made prior to judgment in relation to costs, contemplated a

final order for costs in favor of the prevailing party.

[3] In Moore v. Otto Gas Engine Works, 136 App.Div. 713, 121 N.Y.S. 631, 633, it is said: "That only can be said to be successful which 'terminates in the accomplishment of what is wished or intended.'" "Successful" is defined in 60 C.J. 983, as "the obtaining or terminating in the accomplishment of what is desired, intended, or aimed at." To determine whether defendants were, in fact, the prevailing or successful parties, it is necessary to further recite some of the steps taken in this proceeding. Plaintiffs and defendants were each collectively the owners of one-half of the defendant corporation stock.

[4] Plaintiffs took the position from the time the complaint was filed, that the plaintiffs were entitled to a dissolution of the corporation and the appointment of a receiver, and that the court below was without jurisdiction to hear the matter pertaining to and fixing the value of the stock. This position plaintiffs maintained from the beginning and did not retreat therefrom until shortly before the termination of the litigation. They opposed the order appointing the commissioners upon that same ground. They attempted to dismiss the action for the same reason and unsuccessfully sought a writ of prohibition in this court restraining the Superior Court from proceeding to fix the value of the stock. The Supreme Court denied a hearing of this application. Plaintiffs thereafter progressively resisted every step in the litigation.

The statute under which plaintiffs were proceeding, nowhere compelled either the plaintiffs or defendants to make an offer or to place an asking price upon the stock of plaintiffs who were only seeking dissolution of the corporation and the appointment of a receiver. It provides that if the parties "are unable to agree" with respect to the fair cash value of the stock the court may proceed to appoint commissioners to fix it.

Plaintiffs, by their complaint, specifically sought a dissolution of the corporation; asked that a receiver be appointed to take over its affairs; and for a general liquidation.

Defendants denied generally the allegations of the complaint, opposed the dissolution and the appointment of a receiver, and by way of affirmative relief offered to purchase plaintiffs' stock and moved the court to ascertain and fix its value, and upon payment to plaintiffs of the amount fixed, to order plaintiffs to deliver to defendants their shares, properly endorsed, and for costs.

The trial court specifically found that "plaintiffs should take nothing by their complaint, and that defendants are entitled to the affirmative relief prayed for in the answer"; ordered each party to file their bill of costs; and that plaintiffs recover one-half of their costs, so allowed ($50.25) from defendants; and that defendants recover one-half of their costs so allowed, from plaintiffs ($1,073.95). An item of $8.30 was stricken from plaintiffs' cost bill on a motion to retax. Plaintiffs appealed only from the portion of the judgment compelling them to pay one-half of defendants' costs and from the order taxing those costs. The implied finding that defendants were the successful or prevailing parties in the action is fully supported. Plaintiffs failed to obtain what they sought in their complaint and defendants obtained the affirmative relief prayed for in their answer.

[5] Assuming that the action was a special proceeding, terminating in a judgment in defendants' favor, they would be entitled to recover from plaintiffs their costs as a matter of course. Sec. 1032, Code Civ.Proc., subd. (b). Under such circumstances, plaintiffs should not be heard to here complain because the trial court only charged them with one-half of such costs. Defendants are not appealing from the judgment.

Defendants argue and contend that the action was a purely equitable action and that under such circumstances the court had the right to apportion the costs in accordance with the provisions of section 1032, subdivision (c) of the code of Civil Procedure, and that no abuse of discretion ap-

pears, citing Estrin v. Fromsky, 53 Cal. App.2d 253, 127 P.2d 603. Under either theory, plaintiffs' argument that one-half of defendants' costs were not taxable against them is without merit. There is nothing contained in the cases cited by plaintiffs to the contrary. The facts related might have justified a full recovery of defendants' costs from plaintiffs.

[6] It is next argued that the court erred in allowing fees to the commissioners as above indicated; that the commissioners so appointed were in fact referees and entitled only to the sum of $5 per day under section 1023 of the Code of Civil Procedure. The commissioners were appointed by the court and their fees fixed by written order. The second order recites that counsel for defendants appeared in response to notice and that counsel for defendants stated in open court that he had no objection to the reasonableness of the fees requested by the commissioners and that counsel for plaintiffs "concurred". No objection was made by the plaintiffs to the fees awarded to the commissioners for their services until after those fees had been paid by the defendants. The section relied upon by plaintiffs is limited by its terms to *referees* and nowhere mentions commissioners or appraisers. The duties of the commissioners in the instant case were not those of a referee. Their duties were to appraise the value of the stock. The section specifically so provides. They employed many factors in arriving at the value of that stock. Nowhere in the proceedings in the instant case were the commissioners ever designated as "referees." The order appointing them declares them to be "commissioners." Their report was entitled "Report of Commissioners." To designate them as referees for the sole purpose of depriving them of reasonable compensation for their services would work a grave injustice upon the commissioners and upon the defendants who, in good faith, paid them the fees fixed by the court with the acquiescence of the plaintiffs. If the legislature had intended that the commissioners appointed under section 404, subdivision (E) of the Civil Code should be paid fees of $5 per day as provided by section 1023 of the Code of Civil Procedure it would have said so. We believe that the plaintiffs' objection thereto finds little support in law or equity.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.



74 Cal.App.2d 215

PEOPLE v. ORECK et al.

Cr. 2370.

District Court of Appeal, First District, Division 1, California.

April 29, 1946.

Rehearing Denied May 14, 1946.

Hearing Denied May 27, 1946.

1. Criminal law ⇐1166½(12), 1169(3)

Alleged errors in admission of evidence and trial judge's comments were not prejudicial where defendant, testifying in his own behalf, demonstrated as a matter of law as well as of fact that defendants were guilty of the offense charged.

2. Criminal law ⇐395

In bookmaking prosecution, documents taken from safe which police officers broke open without defendant's consent and without a warrant, even if illegally secured, were admissible. Pen.Code, § 337a, subds. 1, 2, 4, 6.

3. Gaming ⇐79(1)

A "lay off" man, with whom bookie rebets the whole or a part of his customers' bets at better odds than bookie gives customers, is a "principal" in that lay off man directly aids or abets bookie in violating the bookmaking law. Pen.Code, §§ 31, 337a.

See Words and Phrases, Permanent Edition, for all other definitions of "Lay Off" and "Principal".

4. Gaming ⇐67

A "bet" is a "wager" or agreement between two or more persons that a sum of money or other valuable thing contributed by those taking part, shall become the property of one or the other of them,

depending on the happening of some future event, at present uncertain.

See Words and Phrases, Permanent Edition, for all other definitions of "Bet" and "Wager".

5. Gaming ⇐79(1)

A lay off man buying the whole or a piece of original bet made by bookie with customer is a principal to the original bet and the customer is a "third party creditor beneficiary" of contract between bookie and lay off man. Pen.Code, § 337a.

See Words and Phrases, Permanent Edition, for all other definitions of "Third Party Creditor Beneficiary".

6. Gaming ⇐79(1)

A bookie is an "agent" of or a mere intermediary for the lay off man as to those bets or portions of bets with bookie's customers transferred to the lay off man, and the lay off man is the undisclosed principal. Pen.Code, § 337a.

7. Gaming ⇐73

Transactions by which bookies rebet with defendants acting as lay off men, the whole or a part of bookies' horse racing bets with bookies' customers, were "bets" or "wagers" within statute prohibiting bookmaking, and hence defendants were as a matter of law guilty of violating such statute. Pen.Code, § 337a, subds. 1, 2, 4, 6.

8. Constitutional law ⇐250

The prosecution of persons engaged in horse race betting and the alleged failure to prosecute persons running other types of illegal betting establishments is not a "discrimination" constituting a denial of equal protection of the laws. Pen.Code, § 337a.

See Words and Phrases, Permanent Edition, for all other definitions of "Discrimination".

9. Constitutional law ⇐250

The prosecution of one guilty person while other persons equally guilty are not prosecuted is not a denial of equal protection of the laws.

10. Constitutional law ⇐250

In prosecution for engaging in bookmaking with respect to horse race betting, proffered evidence that police did not raid certain establishments specializing in election and other types of bets, did not show a discrimination constituting a denial of equal protection of the laws and was inadmissible. Pen.Code, § 337a.

11. Statutes ⇐109

Where body of act embraces provisions germane to the general subject stated in the title, or where the title suggests the field of legislation which is included within the text of the act, the title is sufficient. Const. art. 4, § 24.

12. Statutes ⇐109

The title of an act should be liberally construed so as to uphold the act if a reasonable reference to the subject matter included therein may be ascertained from the language employed. Const. art. 4, § 24.

13. Statutes ⇐109

The title need not embrace every detail of statute or catalogue contents of statute. Const. art. 4, § 24.

14. Statutes ⇐118(3)

The title of statute "relating to gaming and gambling by pool selling, bookmaking, bets and wagers," was broad enough to include the subject of keeping, occupying or owning the premises or paraphernalia by or in which such acts were carried on. Pen.Code, § 337a, subds. 2, 5; Const. art. 4, § 24.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Edwin Oreck and Ben Kuhl were convicted of violating Section 337a, subs. 1, 2, 4, 6 of the Penal Code, relating to bookmaking. From the judgment of conviction and from the order denying their motion for a new trial, they appeal.

Judgment and order affirmed.

See, also, 158 P.2d 940.

Stern & Grupp, of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., David K. Lener and Alberta Gattone, Deputy Attys. Gen., and Edmund G. Brown, Dist. Atty.,

and Thomas Lynch, Asst. Dist. Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

Edward Oreck and Ben Kuhl, together with two others, were charged by information with violating § 337a, Subs. 1, 2, 4 and 6, of the Penal Code. They were found guilty after a trial by jury. From the judgment of conviction and from the order denying their motion for a new trial they appeal.

Section 337a relates to "Pool-selling, bookmaking, bets and wagers. Penalty." Sub. 1 prohibits pool-selling or bookmaking; sub. 2 prohibits the keeping of premises for the purpose of recording bets or wagers; sub. 4 prohibits the recording of bets and wagers; while sub. 6 prohibits the laying, making, offering or accepting of any bets or wagers. The information charges that the two appellants, together with Louise Borland and Louis Lichtenstein violated these various subdivisions on December 6, 1944. The court advised a verdict in favor of Louise Borland, while Louis Lichtenstein was called as a witness for the people under § 334 of the Penal Code, and, as a result, the prosecution was dismissed against him.

[1] On this appeal the appellants raise several questions as to the admissibility of certain evidence, charge that certain comments of the trial judge were prejudicially erroneous, allege that evidence was erroneously admitted of other offenses, and make certain other contentions. None of these objections need be considered for the reason that appellant Oreck took the stand on his own behalf, and we are of the opinion that from his evidence alone the appellants demonstrated, as a matter of law as well as of fact, that they were guilty of the offenses charged. Even if errors were committed, such errors would not be prejudicial. See People v. Hamet, 69 Cal.App. 2d 546, 159 P.2d 702.

The evidence produced by the prosecution need not be reviewed in detail. On the afternoon of December 6, 1944, two police officers entered the suite of rooms numbered 1202 in the building known as 625 Market Street. Admittedly, the premises were leased to Oreck under a fictitious name. When the police officers entered they found all the defendants, with the exception of Oreck. This appellant arrived at the premises some time later. In the inner room were seven telephones, all with separate numbers. It is admitted that Oreck secured these telephones under various fictitious names. While the officers were there the telephones were ringing and the officers took down the conversations. All the conversations had to do with placing bets or lay offs on horse races, or with asking information about horse races being run that day. Appellants challenge the admissibility of such conversations as hearsay. For reasons already stated this contention need not be discussed.

[2] After Oreck arrived the officers, without Oreck's consent and without a warrant, broke open a safe located on the premises and discovered various documents all customarily used by bookmakers. Assuming this evidence was illegally secured its admissibility is no longer open to question. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Kelley, 22 Cal.2d 169, 137 P.2d 1. Included within the documents so secured were run down sheets, scratch sheets, betting pads, betting records, etc., many of them dealing with races being held on December 6, 1944. Lichtenstein, called under § 334 of the Penal Code, testified that he worked on the premises for Oreck and that it was his job, and the job of the other employees to register bets and commissions on horse races coming in over the telephones. He testified that on December 6th the betting pads, daily bulletins and scratch sheets, etc., were out of the safe until the police knocked on the door when they were hurriedly hidden in the safe. On cross-examination he admitted that the bets he took on December 6th were all so-called "lay off" bets.

As already stated, Oreck took the stand on his own behalf. He frankly admitted that he operated the establishment and that appellant Kuhl was one of his employees. He admitted that the sole purpose of the establishment was to deal in transactions relating to horse races. But it

was his contention on the trial, and it is the main contention of appellants on this appeal, that the transactions in question do not violate § 337a of the Penal Code. He testified that his transactions were entirely with bookies, that the place was not open to the public, and that bets with the public were never taken in that office. He testified that he operated what is known as a "lay off" business, and that such business is not a bookie business at all, but involves transactions wherein the lay off man merely underwrites or insures the bookie against losses on those portions of the bookie's bets that the bookie desires to lay off. He described the nature of his business as follows: That bookies were small operators with limited capital who could not afford to stand too large a loss; that in such event the bookie would lay off the whole or any portion of any bets taken by him on any horse with the lay off man; that as to such lay off transactions the agreement between the lay off man and the bookie was that if the horse in question won, the lay off man would pay the bookie the total amount of the losses of the bookie on the whole or part of the bet or bets so placed with the lay off man; that if the horse lost, the bookie would pay the lay off man a portion of his winnings, usually 50 per cent, as a commission for having underwritten the bet; that as a lay off man he had no interest of any kind in the amount of any bet made by the bookie with one of his customers; that the arrangements with the bookies were on a monthly basis; that at the end of each month the amounts would be accumulated to see who had to pay; that if the losing horses left a balance on the books the bookie would pay him 50 per cent of that amount as a premium; that if the balance was in favor of winning horses he, as the lay off man, would pay the bookie all of such losses.

Sergeant Dyer, one of the arresting officers, and a police expert on bookmaking, testified that there was no difference between a bet and a lay off because the lay off mainly involves the transfer, in whole or in part, of the original bet to another. When asked by appellants' counsel if it were not the fact that the lay off man was merely acting as an underwriter for the bookies, he replied (R. T. p. 65): "No, I wouldn't say that. He is making a pool, he is gathering a pool from many sources, and he is engaging in gambling, in a bet with these various sources, and he can lose, and according to his records that we seized he did lose on certain of those and he won on other days, and at the end of the month amounts of money showed in these records we seized that the place had won. There is no underwriting. It is gambling simply on how the horses were going to run." He was then asked what was the distinction between a bet and a lay off and answered as follows (R.T. p. 65): "A lay off is simply a bet that the man who received it can't afford to hold, because there is too much involved. The usual reason is that if a horse paid a long price he would not be able to pay it, so rather than hold it he passes it off to somebody who can take the risk, who handles more money and bigger money and who has a bigger pool to draw from." He was then asked if a bet was the same thing, and testified (R.T. p. 66): "That is a lay off of the bet, that is passing the bet on to somebody else that can afford the risk. * * * You want to know the difference between a bet and a lay off. A bet is directly a bet between Mr. Lynch, say, and myself. If Mr. Lynch decides afterwards his means are not sufficient to take care of the bet he may lay it off with say Officer Overstreet or any other person, or lay any part of it off. The original bet with me still stands, but he may keep part of it or lay part of it or all of it off—pass part of the hazard on to someone else." He was then asked: "And all he passes on is the hazard in that case?" "A. Or part of it." There was considerable more testimony, both from Oreck and Dyer, as to the general nature of a lay off, but enough has been said to indicate the nature of the establishment that was being operated by appellants.

[3, 4] With utmost seriousness and at considerable length the appellants urge that the transactions admittedly entered into by them do not constitute bets or wagers within the meaning of § 337a of the Penal Code. It is their contention that in order to constitute a bet within the meaning of

that section there must be two parties to the transaction who are on opposite sides of the hazard, that is, one person must lose and one person must win; that in a lay off transaction both parties, the bookie and lay off man, are on the same side of the hazard; that if one loses the other loses; that if one wins the other wins; that the bookie deals with the bettors who are his customers; that the lay off man never deals with the bettor; that the bookie is not obligated to lay off all or any of the bets taken by him, but may lay off as many bets or as much of any one bet as he decides. These arguments seem to us so unsound and so unrealistic that but little discussion is necessary to demonstrate their fallacy. It is perfectly obvious that unless the small operator could "underwrite" his losses he could not operate. The lay off man makes it possible for the bookie to stay in business. For that reason the lay off man is a principal under § 31 of the Penal Code in that he directly aids or abets the bookie in violating the law. Moreover, a bet is a wager or agreement between two or more persons that a sum of money or other valuable thing, contributed by those taking part, shall become the property of one or the other of them, depending on the happening of some future event, at present uncertain. 12 Cal.Jur. p. 1088, § 1. Tested by this standard the transactions between the bookies and appellants, as a matter of law, were bets. A practical example will demonstrate that this is so. If a customer of a bookie bets $5 on horse X to win a certain race, and the track odds are 5—1, if that horse wins the bookie must pay the customer $25, while if it loses the bookie wins $5. Now, if before the race, the bookie lays off that $5 bet with a lay off man, what is the result? If the horse wins, the bookie must pay the customer $25, but he is reimbursed to the extent of $25 by his bet with the lay off man. In a very real sense the bookie has won that bet with the lay off man, and the lay off man has lost. But if the horse loses, the bookie wins $5 from his customer, but he must pay the lay off man $2.50. In a very real sense the bookie has lost and the lay off man has won on that transaction. From a realistic as well as a legalistic standpoint what is really involved in a lay off is that the bookie is rebetting the whole or a part of his customer's bets with the lay off man at much better odds than he gives his own customers. The term "lay off" is defined in Webster's Dictionary, in so far as it relates to horseracing, as "to hedge a bet."

[5, 6] Another way at looking at the transaction is that the lay off man is simply buying the whole or a piece of the original bet, and thus becomes a principal to the original bet. It could also be argued that the customer becomes the third party creditor beneficiary of the contract between the bookie and lay off man. In another sense, the bookie can be considered as an agent or a mere intermediary for the lay off man as to those bets or portions of bets transferred to the lay off man, and the lay off man becomes the undisclosed principal.

[7] It is thus quite apparent that no matter how the transactions described by appellant Oreck be considered, as a matter of law they constitute bets or wagers within the meaning of § 337a of the Penal Code. Appellants by their own testimony have demonstrated that they are guilty of the offenses charged.

[8-10] The appellants next contend that the trial court erroneously sustained objections to certain questions aimed at showing that the police discriminated against horse race betting in that the police did not raid certain establishments specializing in election and other types of bets. Appellants did not offer to prove that they were being prosecuted because of their race, color, religion, or political beliefs. They simply sought to show that others equally guilty were not being prosecuted. They contend that under the rules announced in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Willliams v. Mississippi, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012; and the dissenting opinion in People v. Darcy, 59 Cal.App.2d 342, 354, 139 P.2d 118, such facts, if proved, would demonstrate that they had been denied equal protection of the laws. In the cases cited it was claimed that the persons involved were being prosecuted because of their race, color, religion or political beliefs. Here the claimed discrimination is that those

engaged in horse race betting are being prosecuted while those who run other types of illegal betting establishments are not. Such type of discrimination, if discrimination it be, is not within the rule of the above cases. It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not. This is clearly pointed out in the majority opinion in the Darcy case, and likewise in the dissent in that case. In 59 Cal.App.2d at page 358, 139 P.2d at page 128, in the dissent in it is stated: "It is, of course, the law that a person committing a crime cannot claim an unlawful discrimination upon a mere showing that other persons or classes of persons have committed the same offense and have not been prosecuted therefor. The cases cited in the majority opinion clearly and properly establish that principle." See People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437; Ah Sin v. Wittman, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142. The proffered evidence for these reasons was inadmissible.

[11-14] Appellants next contend that subdivisions 2 and 5 of § 337a of the Penal Code are void in that they define offenses not included within the title of the statute in violation of Art. IV, § 24, of the Constitution. The title to the statute reads as follows: "An act to amend section three hundred and thirty-seven a of the Penal Code relating to gaming and gambling by pool-selling, bookmaking, bets and wagers, and providing the punishment for the violation thereof." Stats.1911, Chap. 7, p. 4. It is the theory of appellants that subdivisions 2 and 5 of the section (one of the charges against appellants is a violation of sub. 2, but they are not charged with a violation of sub. 5) do not refer to the offenses of gaming, pool selling, bookmaking, or making bets and wagers, but refer to a completely separate subject, that is, the keeping, occupying, or owning the premises used for these purposes or having therein the various paraphernalia used for such purposes. The point is obviously without merit. Where the body of the act embraces provisions germane to the general subject stated in the title, or when the title suggests the field of legislation which is included within the text of the act, the title will be held to be sufficient. People v. Jordan, 172 Cal. 391, 156 P. 451. The title should be liberally construed so as to uphold the statute if a reasonable reference to the subject matter included therein may be ascertained from the language employed. Hecke v. Riley, 209 Cal. 767, 290 P. 451; Pierce v. Riley, 21 Cal.App.2d 513, 70 P.2d 206. It is not necessary to embrace in the title every detail of the enactment. It is not necessary that the title should catalogue the contents of the statute. People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 55 P.2d 908; People v. Buyle, 20 Cal.App.2d 650. Tested by these standards the title is clearly sufficient. The title refers to gaming and gambling by pool selling, bookmaking, bets and wagers. Obviously, such a title is broad enough to include the subject of keeping, occupying, or owning the premises or paraphernalia by or in which these acts are carried on. The title is sufficient.

The judgment and order appealed from are affirmed.

KNIGHT and WARD, JJ., concur.



74 Cal.App.2d 92

CLOUD et al. v. MARKET ST. RY. CO. et al.

Civ. 12917.

District Court of Appeal, First District, Division 2, California.

April 22, 1946.

Rehearing Denied May 22, 1946.

Hearing Denied June 20, 1946.

1. Appeal and error ⇐931(1), 1010(1)

Where there is any substantial competent evidence to support judgment, on appeal that evidence must be accepted and every reasonable favorable inference to be drawn therefrom must be indulged.

2. Evidence ⇐591

Testimony of adverse party, although given under code section authorizing a litigant to examine an adversary in litigant's

case in chief as though under cross-examination without being bound by such testimony, was nonetheless evidence to be weighed with all the other evidence in determining the issues of fact. Code Civ. Proc. § 2055.

3. Evidence ⇐588

Credibility of testimony of defendant streetcar motorman on the ground that neither in his report, his previous testimony, or otherwise prior to the trial he had ever mentioned facts testified to, was for trial judge to consider in weighing the testimony, and judge in his discretion was entitled to believe motorman's testimony given at the trial.

4. Evidence ⇐571(1)

Expert testimony given in support of plaintiff's theory that decedent, an employee of defendant, off duty, and a prospective passenger on defendant's streetcar, was lying on track at station when killed by streetcar in violation of defendant's duty to exercise highest degree of care for safety of passengers, in light of contradictions failed to establish conclusively that because of alcoholic content in his blood decedent could not have been ambulatory when struck.

5. Evidence ⇐570, 574

Expert testimony is not conclusive and may be controverted by lay testimony establishing inconsistent facts.

6. Negligence ⇐88

An ambulatory person in a state of intoxication can be guilty of contributory negligence and is held to the standard of care of an ordinarily prudent person.

7. Street railroads ⇐114(16)

Evidence authorizing inference that decedent, although intoxicated, while standing or walking near streetcar tracks, permitted streetcar, which he must or should have seen slowly approaching, to strike him, authorized finding that decedent was guilty of contributory negligence precluding recovery for his wrongful death.

8. Evidence ⇐537

Persons who may qualify as experts on physiological questions are not limited to physicians and surgeons.

9. Evidence ⇐537

Generally, any practicing or duly qualified physician or surgeon is competent to state his inference or judgment, but it is not essential that a person testifying on a question of health or physical condition should be a medical practitioner.

10. Evidence ⇐536

The common law does not require that the expert witness on a medical subject shall be a person duly licensed to practice medicine.

11. Appeal and error ⇐971(2)
Evidence ⇐546

The qualification of a witness to testify as an expert is a matter within sound discretion of trial court, and, where there is no showing of a clear abuse of that discretion, ruling will not be disturbed on appeal.

12. Evidence ⇐536

Where witness has disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of degree of his knowledge goes more to weight of evidence than to its admissibility.

13. Evidence ⇐537

Witness, who was a graduate chemist, a toxicologist, lecturer of toxicology at school of medicine of the state university, and toxicologist to coroner of San Francisco, and who had much experience, was qualified to testify as an expert as to whether a person with a specific alcoholic content in his blood could be ambulatory.

14. Jury ⇐28(5)

Where plaintiffs filed a memorandum to set cause for trial in which memorandum it was stated that "a jury trial is not demanded," jury trial was waived. Code Civ. Proc. § 631, subd. 4.

15. Infants ⇐84, 90

The rule that a guardian ad litem cannot prejudice substantial rights of a minor by any admissions, waivers, or stipulations cannot deprive guardian ad litem or his attorney of power to bind minor in the merely procedural steps incident to conduct of litigation.

16. Infants ⇐84

Guardian ad litem of a minor has power to waive a jury trial. Code Civ. Proc. § 631, subds. 4–7.

17. Jury ⇐28(17)

Trial court, in exercising its discretion to refuse a jury trial after a waiver thereof, was entitled to consider, with the evidence of lack of funds, averment of plaintiff's affidavit that at time case was set for trial plaintiff believed that defendant had too much success with juries as indicative of an intentional waiver rather than one by force of circumstances. Code Civ.Proc. § 631.

18. Jury ⇐28(17)

Where plaintiff waived jury trial intentionally as a matter of trial tactics, refusal of trial court to relieve plaintiff of the waiver and allow a jury trial was not an abuse of discretion. Code Civ.Proc. § 631.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Isabel B. Cloud and another against Market Street Railway Company and others for wrongful death of named plaintiff's husband, who was killed when struck by one of defendant's streetcars. Judgment for defendant, and plaintiffs appeal.

Affirmed.

A. Don Duncan, of San Francisco, for appellants.

Cyril Appel and Ivores R. Dains, both of San Francisco, for respondent.

DOOLING, Justice.

In an action for wrongful death tried to the court without a jury judgment went for the defendants. The plaintiffs, the widow and nine year old child of the decedent through her guardian ad litem, have taken this appeal.

Decedent was a conductor employed by the respondent Market Street Railway Company (hereafter called the company). He was off duty at the time of his death and was killed at about 3:42 a. m. on March 21, 1939 by being crushed under the front end of a street car of the respondent company at the terminal of its No. 5 and No. 7 lines near the ocean beach in San Francisco. At that point the cars of the two lines run around separate loops and the company maintains a shelter or station for intending passengers. It is equipped to be lighted at night by overhead lights but it was the practice of the company to extinguish these lights at about 2 a. m. and the lights were extinguished at the time that decedent met his death. The night was dark and the place of the casualty was not illuminated in any way. The car which struck decedent was a No. 7 car and was just coming to a stop when the impact with his body was felt by the motorman. His body was found under the front end of the car lying across the rails and the front wheels of the car had not passed over it.

The headlights of the car did not illuminate the tracks ahead of it as the car proceeded around the loop, being thrown off to the outer side. The motorman testified that in addition to the headlights the car was equipped with "dash lights" which did illuminate the rails for a distance of about ten feet in front of the car, that he was watching the track ahead of the car and saw nothing, that he heard a slight bump at the left front door of the car and almost simultaneously felt a bump under the front platform and brought the car to a stop.

A post mortem examination of decedent's blood showed the presence of .35 of one per cent of ethyl alcohol. Dr. Carr, pathologist at the San Francisco coroner's office, testified that a person with that percentage of alcohol in his blood would be stuporous, comatose and unable to move, that there are people who could be ambulatory with that amount of alcohol in the blood, although the witness had never seen one. Mr. Swim, toxicologist to the coroner, who had made the examination of decedent's blood, testified under the circumstances hereinafter noted, that most people with that amount of alcohol in the blood would be ambulatory, although some would be comatose and unable to move.

Decedent had a pass, as an employee of the company, which entitled him to transportation on any of its cars.

Appellants' main contention is that the evidence does not support the judgment, or to put it affirmatively that the evidence is such as to require a judgment for plaintiffs as a matter of law. Briefly put appellants contend that the evidence compels the following findings: That decedent at the time of his death was a passenger to whom the company owed the highest care; that he was lying on the track so incapacitated from drink that he could not move and was completely helpless and unconscious; and that the failure to have the station lighted or to observe decedent's position of peril establishes defendants' negligence as a matter of law.

[1] It is an integral part of their argument that the competent evidence before the court will support no other finding of decedent's condition than the one that he was so overcome by the effects of liquor at the time of his death as to be deprived of his senses and his ability to move, that he was lying on the track senseless and helpless. In assaying this contention we must, of course, apply the accepted rule on appeal that if there is any substantial, competent evidence to support the judgment of the trial court that evidence must be accepted and every reasonable favorable inference to be drawn therefrom must be indulged. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Juchert v. California Water Service Co., 16 Cal. 2d 500, 503, 106 P.2d 886.

[2] If the testimony of the motorman was believed by the trial court decedent was not lying on the track ahead of the car before the impact, the motorman's testimony being that he was watching the track which was illuminated for ten feet ahead of the car by the "dash lights" and did not see the decedent at any time before the impact. These facts plus the motorman's testimony of a bump at the left front gate will support the inference that decedent was at the side of the car in a standing position and was thrown by collision with the gate under the slowly moving car. While the motorman's testimony was given under Code Civ.Proc. sec. 2055, it was none the less evidence in the case to be weighed with all the other evidence in determining the issues of fact. Smellie v. Southern Pacific Co., 212 Cal. 540, 559, 299 P. 529; Joseph v. Vogt, 35 Cal.App.2d 439, 441, 95 P.2d 947; Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 15 A.L.R. 192.

[3] Appellants attack the credibility of the motorman's testimony that he heard a bump at the front gate, on the ground that neither in his report, his previous testimony or otherwise prior to the trial had he ever mentioned this fact. These were matters for the trial judge to consider in weighing the testimony and the judge in his discretion was entitled to believe the motorman's testimony given at the trial.

[4, 5] Appellants' position is that Dr. Carr's testimony establishes conclusively as a scientific fact that decedent could not have been ambulatory at the moment of collision. To this there are several answers. In the first place Dr. Carr testified that some persons in decedent's physical condition could be ambulatory. In the second place the motorman's testimony, as we have shown, will support a finding that decedent was in fact ambulatory. Expert testimony is not conclusive and may be controverted by lay testimony establishing inconsistent facts. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163. Finally the testimony of Dr. Carr as an expert was contradicted substantially by that of Mr. Swim, hereinafter more fully discussed.

[6] If there is any doubt whether a person who is dead drunk and unable to move can be guilty of contributory negligence (see Coakley v. Ajuria, 209 Cal. 745, 290 P. 33), there is none that an ambulatory person in a state of intoxication can be guilty of contributory negligence and is held to the standard of care of an ordinarily prudent person. Emery v. Los Angeles R. Corp., 61 Cal.App.2d 455, 461, 143 P.2d 112; Brkljaca v. Ross, 60 Cal. App. 431, 438, 213 P. 290; 38 Am.Jur. 883; 45 C.J. 997.

[7] The trial court found that decedent was guilty of negligence which proximately

contributed to his injuries and death. If, as the trial court was entitled to infer, decedent while standing or walking near the track permitted the car, which he must or should have seen slowly approaching, to strike him, this finding is fully supported by the evidence. Since there was no question of last clear chance in the case this finding alone is sufficient to support the judgment and we need not discuss the questions of decedent's status as a passenger or defendants' negligence.

Appellants called as their witness Mr. Swim, the toxicologist to the coroner of the City and County of San Francisco. On direct examination Swim testified that he made an examination of the decedent's blood which showed the presence therein of 0.35 of one per cent of ethyl alcohol. On cross-examination Swim was asked: "What does that indicate to you, when you make that test and you determine that there was 0.35 of one per cent of ethyl alcohol in the blood?" After objection that this was not proper cross-examination the respondents made Swim their own witness. After some preliminary questions as to his qualifications respondents' counsel asked Swim:

"Will you tell us what effect—what is the effect of 0.35 of one per cent of ethyl alcohol in the blood stream, as found in this particular case, as found in the living person?"

Over objection "that the proper foundation has not been laid" the witness was allowed to answer:

"0.35 of one per cent to the average individual—when I say that is the general rule—when I say the average individual, the man is under the influence of alcohol to the point where he is considered drunk."

It may be here pointed out, in view of appellants' arguments upon this question, that this was the only opinion answer given by the witness before he was taken over for cross-examination by counsel for appellants, and that in this answer the witness did not purport to designate the extent or degree of intoxication which would be induced by the presence of 0.35 of one per cent of ethyl alcohol in the human blood.

On cross-examination counsel for appellants asked the witness: "As a matter of fact, a man with that much alcohol is dead drunk, isn't he? * * * I mean dead drunk so that he can't even walk." This elicited the answer:

"My answer to that, first, is no, for this reason: as a general statement that would hold true, but 0.35 of one per cent some people may be under the influence of alcohol and drunk to such an extent they are down. The general rule, however, is that a man having 0.35 of one per cent is not comatose. He is able to get around. Of course he is dazed. He falls down a good deal; he is belligerent; he is ill. Although on occasions you will find some that are affected just a little bit more."

After an extended cross-examination which developed testimony of the witness that there is a wide variation in individuals as to their tolerance to alcohol and that "at .4 or .3 you will find 95 per cent of the people drunk; and the five or four per cent of people that are not drunk at that point. * * * At .30 of one per cent they are 96 to 97 per cent of people in, as this chart represents it, dazed and dejected condition. About, I should say about 95 to 96 per cent of the people respond in that manner. * * * You can't say every one is going to respond in this manner. * * *," the witness was asked on redirect:

"In your experience have you observed the people having a content of .35 of one per cent of alcohol in their blood as being ambulatory, able to walk around?"

Over objection the witness was permitted to testify:

"I have records that show over a period of quite a number of cases, that they were ambulatory in that figure. Those are city records."

This answer was stricken out on motion of counsel for appellants on the ground that "the records are the best evidence."

Thereafter objections were sustained to questions by counsel for respondents as to whether in specific instances persons observed by the witness were ambulatory with .35 of one per cent of alcohol in the blood and the court finally said: "I will

obviate your objection, I will ask him one question: Q. Mr. Swim, in your opinion, is a person whose blood contains 0.35 of one per cent of ethyl alcohol ambulatory?" Without objection the witness answered: "He is ambulatory in the majority of cases." Afterwards, on further cross-examination, counsel for appellants returned to the subject of specific occasions when the witness had observed persons who were ambulatory with .35 of one per cent of alcohol in the blood and elicited testimony that some were represented by city records and some were persons whom the witness had observed drinking and from the amount of liquor consumed could estimate that there was that quantity of alcohol in the blood; that he had not tested the blood of these persons; that he had given lesser quantities of alcohol to human beings experimentally but not up to the point where there was .35 of one per cent in the blood stream, but that he had performed such experiments on animals.

[8-10] Appellants first argue that only physicians and surgeons may qualify as experts on physiological questions. This is not the rule. "As a general rule, any practicing or duly qualified physician or surgeon is competent to state his inference or judgment, but it is not essential that a person testifying on a question of health or physical condition should be a medical practitioner." 32 C.J.S., Evidence, § 537, p. 262. "The common law, it may be added, does not require that the expert witness on a medical subject shall be a person duly licensed to practice medicine * * *." II Wigmore on Evidence, 3d Ed., 667. The California cases are to the same effect. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 391, 392, 104 P. 986; In re Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83.

[11, 12] It is further argued that the witness was not, in any event, shown to be sufficiently qualified to give an opinion as to the effect of .35 of one per cent of alcohol in the blood. "The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a clear abuse of that discretion the ruling of that court will not be disturbed on appeal. Where the witness has disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility." 10 Cal. Jur. 963; II Wigmore on Evidence, 3d Ed., 641; 32 C.J.S., Evidence, § 458, pp. 99–101.

[13] The evidence shows that the witness is a graduate chemist, a toxicologist, a lecturer on toxicology at the School of Medicine of the University of California, and toxicologist to the coroner of San Francisco; that he has made over 3,500 tests for the alcoholic content of the blood of deceased persons, and that he has had access to the official reports showing the conduct of such persons prior to death; that he has made experiments on animals with alcohol up to .35 of one per cent of alcohol in the blood; that he has made experiments with human beings with alcohol but not as high as that percentage of alcohol in the blood; and that he has observed persons drinking liquor where from their weight and the amount consumed he could estimate quite accurately that .35 of one per cent of alcohol was present in their blood and has observed their conduct under those circumstances. We can find no abuse of discretion in the trial court's ruling permitting the witness to testify as an expert.

Some point is attempted to be made of the witness' testimony as to specific instances of individual conduct under intoxication. Such testimony as was allowed to stay in the record on this subject was all elicited by appellants' counsel on cross-examination of the witness. It may also be observed, as pointed out above, that the first evidence that a person could be ambulatory with .35 of one per cent of alcohol in his blood was also brought out by counsel for appellants.

[14] On or about May 5, 1942, appellants served and filed a notice of motion to be relieved from their waiver of a jury trial and on June 3, 1942, this motion was denied. Appellants urge that the order denying their motion was an abuse of dis-

cretion. On September 16, 1940, appellants had filed a memorandum to set the cause for trial in which it was stated that "a jury trial is not demanded." Pursuant to this memorandum the cause was set upon the trial calender for trial without a jury. On December 9, 1940, a similar memorandum to set was filed by appellants again reciting that "a jury trial is not demanded" and the case was again set for trial without a jury. Under sec. 631, subd. 4, Code Civ.Proc. a jury trial is waived if the parties fail to demand a jury at the time the cause is first set for trial. Mutual Bldg. & Loan Ass'n v. Corum, 220 Cal. 282, 30 P.2d 509; Stern v. Hillman, 115 Cal.App. 156, 300 P. 972.

[15] Appellants first argue that the minor plaintiff could not legally waive her right to trial by jury, nor could such waiver be legally made for her by her guardian ad litem or attorney. The precise question appears to have arisen in very few cases. It is settled in this state that a guardian ad litem cannot prejudice the substantial rights of a minor by any admissions, waivers or stipulations. Kidwell v. Ketler, 146 Cal. 12, 79 P. 514; Gackstetter v. Market Street Ry. Co., 130 Cal.App. 316, 20 P.2d 93. This rule is not, however, carried to the extent of depriving the guardian ad litem or his attorney of the power to bind the minor in the merely procedural steps incident to the conduct of the litigation. In Western Lumber Co. v. Phillips, 94 Cal. 54, 29 P. 328, the supreme court expressly held that a minor acting through his guardian could waive findings. The general rule is thus stated in Kingsbury v. Buckner, 134 U.S. 650, 680, 10 S.Ct. 638, 648, 33 L.Ed. 1047:

"It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian ad litem cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian ad litem or prochein ami from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved."

Appellants rely on Lieserowitz v. West Chicago St. R. Co., 80 Ill.App. 248, which involved a suit in equity to set aside a collusive judgment taken in favor of the minor for a small amount. In that case the court said at page 253 of 80 Ill.App.:

"Plaintiff, being a minor, could not herself waive a jury and consent to a judgment. [Atchison, T. & S. F.] Railroad Co. v. Elder, 50 Ill.App. 276; 2 Pomeroy's Eq.Juris. 815; Daingerfield v. Smith, [83 Va. 81], 1 S.E. 599.

"Much less could she be bound by any waiver or consent of her next friend."

This case, so far as we can learn, stands alone for the proposition that a minor acting through his guardian or next friend cannot waive a jury trial. Several cases have been called to our attention in which it has been held that a minor can waive a trial by jury in a criminal case (Mickens v. Commonwealth, 178 Va. 273, 16 S.E.2d 641; Lee v. State, 86 Tex.Cr.R. 203, 215 S.W. 856; Mince v. State, 86 Tex.Cr.R. 327, 216 S.W. 884; Ex parte Gordon, 89 Tex.Cr.R. 125, 232 S.W. 520), and in Wiley v. Edmondson, 43 Okl. 1, 133 P. 38, 41, the supreme court of Oklahoma stated: "We think it is clear that the attorney appearing for the minor, who sued by her guardian, is authorized to waive the right to a jury trial."

The weight of Lieserowitz v. West Chicago St. R. Co., supra, as an authority, even in Illinois, is weakened by the fact that the same court in O'Malley v. Marquardt, 170 Ill.App. 278, 282, 283, indicated its opinion that a minor appearing by a next friend could legally waive a jury trial. It is weakened by the further fact that the question actually before the court was as to the power to consent to the entry of a judgment. The language of the court in the Lieserowitz case is in the conjunctive: "Plaintiff, being a minor, could not herself waive a jury and consent to a judgment," and the two cases cited in support of this statement involved consent judgments against minors and did not discuss or consider the waiver of a jury trial.

[16] The question whether to demand a jury trial or waive one and try the case to the court is one of trial tactics and procedure only, and the waiving of a jury trial does not in any sense affect the substantial rights of a party. If the guardian ad litem of a minor has not the legal power to waive a trial by jury it would follow that the trial court must insist on the calling of a jury in every case in which a minor is a party even though no demand for a jury trial is made and the guardian refuses or fails to deposit the jury fees as expressly required by the code. Code Civ. Proc. § 631, subds. 5, 6, 7. We are satisfied that the guardian ad litem of a minor has the legal power to waive a jury trial.

The motion to be relieved from the waiver of a jury was supported by the affidavit of appellant, Isabel B. Cloud. The material parts of that affidavit read as follows:

"That when this affiant retained an attorney to prosecute the above entitled action, she did not have any funds to prosecute the same, and her agreement with her attorney did not provide for said attorney to advance any costs of said cause. At the time said Memorandum of Motion to Set was filed, and at the time said case was set for trial, this affiant not only was without funds to pay the costs of a jury, but from her information regarding the previous juries trying personal injury cases in which the Market Street Railway was involved, it seemed to this affiant that the defendant Market Street Railway had too much success with juries.

"That since plaintiff's waiver of a jury trial by failing to announce that a jury was required at the time the cause was first set, this affiant on her own behalf and on behalf of her minor daughter has been able to accumulate sufficient funds to pay for a jury trial, and is now informed that in the interest of justice she should on her own behalf, and on behalf of her minor daughter have the above entitled cause tried by a jury."

On the hearing of the motion appellant, Isabel B. Cloud, testified orally that when the attorney was employed she did have funds to pay the costs of said action but before the case was first set for trial she had lost her money and could not put up the jury fees; and that she had since made a new agreement with her attorney whereby the attorney agreed to advance the costs, including the jury fees.

Sec. 631, Code Civ.Proc., provides that: "The court may, in its discretion upon such terms as may be just, allow a trial by jury to be had although there has been a waiver of such trial."

[17, 18] In exercising its discretion the court was entitled to consider with the evidence of lack of funds the averment of appellant's affidavit that at the time the case was set for trial "from her information regarding the previous juries trying personal injury cases in which the Market Street Railway was involved, it seemed to this affiant that the defendant Market Street Railway had too much success with juries." In view of the fact that if plaintiffs were so destitute as to be unable to advance the jury fees they would be entitled to a jury trial upon showing that fact to the court by proceeding in forma pauperis (Martin v. Superior Court, 176 Cal. 289, 298, 168 P. 135, L.R.A.1918B, 313) and the further fact that they were able to procure a new contract from their attorney in which he agreed to pay the jury fees, the trial judge may reasonably have concluded that the true reason that a jury was originally waived was not lack of funds but solely the affiant's belief that it would be wiser to try the case before the court without a jury. If the court so found, as we must assume in support of its order, the case presented was no different than any other in which a plaintiff after first waiving a jury because he had decided that it was preferable to try his case to a court, afterwards changed his mind and sought relief from his waiver. If the denial of the motion under such circumstances is an abuse of discretion, then every litigant who changed his mind about a jury trial after first waiving one would equally be entitled to be relieved upon a like motion.

The judgment appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

On Petition for Rehearing.

PER CURIAM.

In their petition for rehearing appellants argue that the statement in the opinion that the motorman heard a slight bump at the left front door of the car is not supported by the record. It is true that the motorman did not use the word "bump" in his testimony of this incident. His exact language, as it appears in the transcript, is here quoted:

"I heard something like something hit the front gate * * * like something hit the gate; just made a little noise of some kind. Anything that hit that gate, the gate is loose, and anything that touches it causes it to hit the bar there."

Petition for rehearing denied.

Hearing denied; CARTER, J., dissenting.



74 Cal.App.2d 144

OAKS et ux. v. RENSHAW et al.
Civ. 7233; Sac. 5753.

District Court of Appeal, Third District, California.

April 24, 1946.

1. Stipulations ⇐14(4)

Where defendant's attorney in suit to quiet title and in ejectment conceded that issue of title by acquiescence was not involved, and evidence regarding an "agreed boundary" was limited to purpose of showing "the witness' knowledge of the corners and lines", issue of title by acquiescence was not involved.

2. Quieting title ⇐10(1)

In suit to quiet title to realty, plaintiffs must rely on the strength of their title and not on the weakness of defendants' title.

3. Boundaries ⇐48(6)

Title by acquiescence creates an equitable estoppel against adjacent owners of realty from disputing an agreed boundary line, the true location of which is in doubt, where they occupy, cultivate, or improve the realty to that agreed location for a period of more than five years.

4. Estoppel ⇐115

Generally, one who relies upon equitable estoppel as a cause of action or as a defense must allege and prove the necessary elements of his claim.

5. Estoppel ⇐116
Quieting title ⇐44(1)

Where a defendant in suit to quiet title admits plaintiff's ownership of the fee, but seeks to defeat plaintiff's title to a portion of the land by asserted fraud or estoppel, burden is ordinarily on defendant to allege and establish his claim.

6. Trial ⇐391

Where defendants in suit to quiet title conceded that issue of title by acquiescence or agreement was not involved, trial court was not required to adopt findings on that subject.

7. Appeal and error ⇐882(3)
New trial ⇐10

Where defendants in suit to quiet title conceded that issue of title by acquiescence or agreement was not involved, and case was not tried on that theory, it was too late for defendants to raise that issue on appeal or even on motion for new trial not based on newly discovered evidence.

8. Boundaries ⇐37(1)

In suit to quiet title, wherein controversy involved boundary between plaintiffs' and defendants' lands, evidence sustained findings for plaintiffs.

Appeal from Superior Court, Shasta County; C. A. Paulsen, Judge.

Suit to quiet title and for ejectment by G. E. Oaks and Marjorie Oaks, his wife, against Leonard Renshaw, Della Renshaw, Corporation, a corporation. From a judg- his wife, and the Federal Farm Mortgage ment in favor of the plaintiffs, Leonard Renshaw and Della Renshaw, his wife, appeal.

Judgment affirmed.

Richard W. Young, Morton G. Hoffmann, and Norman J. Ronald, all of Berkeley, for appellants.

L. C. Smith, of Redding, for respondents.

THOMPSON, Justice.

The defendants, Leonard and Della Renshaw, husband and wife, have appealed from a judgment quieting title to forty acres of farm land in Shasta County. The appellants hold a contract to purchase from Federal Farm Mortgage Corporation the forty acre tract adjoining plaintiffs' land on the east. The chief issue is the proper location of the boundary line between the parties. The answer admitted that plaintiffs own "the SW¼ of the SE¼ of Section 32" described in the complaint, but contend that the description by metes and bounds of that sixteenth portion of the section which is added to the description is incorrect. The appellants contend that their western boundary line is substantially 200 feet west of plaintiffs' eastern line as it appears in the description by metes and bounds. The controversy was over the 200-foot strip of land along plaintiffs' eastern boundary. The findings determined that plaintiffs own the entire forty acre tract described in the complaint. The judgment quiets title in plaintiffs to that tract of land. Judgment by default was entered against the Federal Farm Mortgage Corporation. That company has not appealed.

The appellants concede in their opening brief "that the government line is that which is described in respondents' complaint, because the evidence as to the location thereof was conflicting." But they contend that the findings and judgment are erroneous for failure to determine whether defendants' asserted western boundary line is not the true line since they, "without objection * * * introduced evidence of the agreed boundary, and that evidence stands undisputed in the record."

The complaint is couched in two counts. The second cause of action is for ejectment. The first count seeks to quiet title in plaintiffs to forty acres of land in Shasta County described as follows:

"The SW¼ of SE¼ of Section 32, Township 31 N., R. 5 W., M.D.B.&M., and more particularly described as follows: Beginning at the south quarter corner of section 32, Township 31 N., R. 5 W., M.D.B.&M., said point being marked by a stone monument, and running thence N. 1° 37' 27" E. on and along the midsection line 1362.16 feet; thence S. 89° 42' 40" E. 1322.28 feet, thence S. 3° 03' 23" W. 1366.50 feet, thence N. 89° 35' 29" W. on and along the section line 1287.97 feet to the point of beginning."

The answer specifically admits that plaintiffs own the "SW¼ of the SE¼ of Section 32," but denies the correctness of the metes and bounds description added thereto. The answer makes no reference to a claim of title by acquiescence or agreement to the 200 foot strip of land. An amendment to the answer alleges that appellants own that 200 foot strip of land and describes it by metes and bounds, but fails to allege that it was acquired by agreement of the parties. The amendment prays that title thereto be quieted in appellants. It was stipulated that said amendment may be deemed to have been controverted.

It is apparent from the pleadings and from the record that the only issue which was tried was the determination of the correct eastern boundary line of the southwest quarter of the southeast quarter of section 32, township 31 north, range five west, M.D.B.&M. The answer specifically admits that that tract of land belongs to the plaintiffs, regardless of where a correct description of that subdivision of the section discloses the eastern line to be located. The court determined that issue adversely to the appellants. The record shows, without conflict, that, while there were some statements of witnesses regarding an agreed line, both the court and the attorney for appellants assumed there was no issue involved regarding a claim of title to any portion of plaintiffs' land by acquiescence or agreement. On cross-examination of the plaintiff Grover E. Oaks, he was asked if, when he purchased his land from Mrs. Nancy Webb, he did not agree with her that the dividing line extended between two stakes which had been previously referred to. He emphatically denied that fact. The judge then said:

"This may be permissible on where the lines are but there is no question raised in the pleadings as to the agreed boundary.

* * * I will let it go in on the question of the witness's knowledge of the corners and lines and things like that. There is no issue in the pleadings as to agreed boundary. * * *."

To that statement Mr. Buchtel, appellants' attorney, replied, "No, that is not involved here as such, your Honor."

[1] It will be observed that appellants' attorney conceded that an issue of title by acquiescence was not involved. The evidence regarding an "agreed boundary" was limited to the purpose of showing "the witness's knowledge of the corners and lines and things like that." It was not then nor afterward, during the trial, contended that defendants desired to attempt to prove title by acquiescence. It may not therefore be said that the case was tried on the theory that title by acquiescence was involved in the issues.

[2-5] In a suit to quiet title to real property, it is true that when the defendants deny the material allegations of the complaint, plaintiffs must rely upon the strength of their title and not upon the weakness of their adversaries' title. Williams v. City of San Pedro, 153 Cal. 44, 94 P. 234; 22 Cal.Jur. sec. 58, p. 190. But in this case the defendants specifically admitted plaintiffs' ownership of the fraction of section thirty-two, and merely challenged the accuracy of the location of the eastern line of that subdivision as described by metes and bounds. Title by acquiescence has been held to create an equitable estoppel against adjacent owners of real property from disputing an agreed boundary line, the true location of which they are uncertain, when the parties occupy, cultivate or improve the land to that agreed location for a period of more than five years. As a general rule, one who relies upon equitable estoppel as a cause of action or as a defense must allege and prove the necessary elements of his claim. When a defendant admits plaintiff's ownership of the fee, but seeks to defeat his title to any portion of the land by asserted fraud or estoppel, the burden is ordinarily on the defendant to allege and establish his claim. Honaker v. Heatly, 21 Cal.App. 327, 131 P. 759; Reilly v. Wright, 117 Cal 77, 48 P. 970; 51 C.J., § 227, p. 248. In the Honaker case, supra, the plaintiff and the defendant settled on separate adjoining quarter sections of government land. The government monuments marking the subdivision corners had disappeared. A land company subsequently made a private survey and purported to reestablish the lost markers. Misled by that erroneous survey, the defendant, with the consent of plaintiff, constructed an irrigation ditch and made other improvements of a strip of land which afterward proved to be on plaintiff's property. To the complaint for ejectment the defendant answered, denying the material allegations thereof and "pleaded affirmatively certain facts which he claims constituted an equitable defense." Judgment was rendered for plaintiff. On appeal the defendant claimed, as the defendants do in the present case, that the court erred in failing to adopt findings upon the alleged equitable defense. The court said:

"It is clear that any acts or conduct of the parties from which an agreement might be inferred were due to a mutual mistake of fact. Under such circumstances, plaintiff was not precluded or estopped from claiming his estate in accordance with the true line when the same was ascertained."

The court further determined that the allegations contained in the answer were insufficient to raise the issue of an equitable defense, and that the trial court did not err in failing to adopt findings thereon. It said in that regard:

"Moreover, the pleading is insufficient in that it fails to state other facts constituting essential elements of estoppel."

But it is not necessary to determine whether a defense of title by acquiescence must be affirmatively alleged and proved in a suit to quiet title, since it was conceded by the defendants in this case that it was not an issue. The evidence, which is asserted on appeal to apply to that subject, was definitely limited by the court to proving "the witness's knowledge of the corners and lines and things like that." That limitation of the evidence was not objected to by the defendants. Their attorney then stated "That [agreed boundary] is not involved here as such."

[6, 7] From the foregoing we must assume that the appellants conceded that the issue of title by acquiescence or agreement was not involved in the trial of this case. It follows that the court was not required to adopt findings on that subject. The case was not tried on that theory. It is too late to raise that issue upon appeal or even upon the motion for new trial. The motion for new trial was not based upon newly discovered evidence.

[8] The findings and judgment are adequately supported by the evidence. The plaintiffs resided in the vicinity of the land in question for twenty-four years and were familiar with the property. Mr. Oaks located the northeast corner of the southwest quarter of the southeast quarter of section 32. It was marked by an iron pipe set in a copper disc. Plaintiffs purchased their forty acre tract from Nancy W. Webb sometime subsequent to 1932 and prior to 1940. There is evidence that a man by the name of Spencer formerly occupied a portion of that property under a homestead claim which he had filed. A dilapidated building extends partly across plaintiffs' eastern line, in the vicinity of which an old well with crumbling brick walls exists on their land at the northwest corner of the building. They have not been used for many years. The defendants offered some evidence that there was formerly a wire fence extending at least part way along the western line of the disputed 200 foot strip claimed by them, the evidence of which is a wire deeply embedded in the body of a tree. Mrs. Webb testified that her father built the fence thirty-five years ago and pointed to a stake saying to her "There is your southeast corner right down the gully." Mr. Oaks testified that there was no evidence of the existence of that fence during the twenty years he was familiar with the property. He denied that he ever went upon the land with Mrs. Webb or that he agreed with her upon the dividing line between their properties. The defendants contracted to purchase their adjoining forty acre tract from Federal Farm Mortgage Corporation in 1942. John P. Maggard was formerly the owner of the land which the defendants contracted to buy. In 1940 Mr. Oaks employed George L. Pearl, an experienced, licensed Civil Engineer, who had been familiar with the property and with the government survey thereof for thirteen years, to survey the lines of his forty acre tract of land. He located the government section corners and the witness trees adjacent thereto, with the exception of one corner. He testified that the accepted corners "fit perfectly with the witness trees and they are there. They fit with the United States Land Office, ties with the trees and the trees are there." He surveyed the tract and made a map and description thereof, which he said was in accordance with the government field notes. He found that plaintiffs' tract contained 40.87 acres of land. Mr. Oakes and his son then built a fence, in 1940, along his eastern line in accordance with that description. Some dispute arose between Mr. Oakes and John Maggard over the location of that fence. Oakes wrote him a letter saying that since there had been an uncertainty regarding that eastern boundary line, he had employed a surveyor to run the lines, and was constructing a fence in accordance with that survey. He said that he would be glad to have Maggard employ a licensed surveyor "to check this work." That was not done.

The surveyor's map, which was received in evidence, shows that the southern line of the two combined adjoining forty acre tracts is 2575.94 feet in length and that plaintiffs' ascertained portion thereof was just about one-half thereof, or 1287.97 feet in length. It is significant, in the determination of the correct dividing line between those properties that, if defendants' western boundary is 200 feet west of the surveyed line plaintiffs would lose about six acres of land, and their southern line would then be only 1087.97 feet in length, while plaintiffs' southern line would be about 1487 feet in length. That seems very improbable unless there was an implied conveyance of that easterly 200 foot strip of land by acquiescence, which we have previously held was not an issue in the case.

For the reasons previously stated, the judgment is affirmed.

ADAMS, P. J., and PEEK J., concur.

74 Cal.App.2d 191

JOSHUA HENDY IRON WORKS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13031.

District Court of Appeal, First District, Division 1, California.

April 29, 1946.

1. Workmen's compensation ⇐1939

Where issue before District Court of Appeal on review of Industrial Accident Commission's award of compensation to claimant, was sufficiency of evidence to support a finding, court disregarded all conflicts in the evidence and stated the facts most favorable to the Commission's finding.

2. Workmen's compensation ⇐624

Act of employee in lighting rag soaked with solvent, in order to show plant supervisor that solvent would not burn, and act of employee, when rag flamed up, in hurriedly taking up a bucket of solvent in mistaken belief that it was water, and throwing it on flaming rag, were part of "res gestæ" and hence if injury caused by original act of lighting rag would have been compensable, throwing of bucket of solvent on flames would not break causation flowing from original act for purpose of determining whether original act arose out of and in course of employment within meaning of compensation act. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

3. Workmen's compensation ⇐626

Employee is entitled to compensation as for injury "arising out of and in course of employment," when injury was received in performance of work for his employer outside scope of usual duty, but which employee had been expressly ordered to do by some one authorized to direct him as to his work, or by some one who he believed was authorized. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out Of and In Course of Employment".

4. Workmen's compensation ⇐626

Where employer or person in authority over employee acquiesces in employee's particular actions with knowledge of their dangerous character, employee acts "in course of employment", within meaning of compensation act, on ground that employer impliedly authorized employee's actions. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "In Course of Employment".

5. Workmen's compensation ⇐626

In determining whether employee's act was within course of employment within meaning of compensation act, because done under order of some one allegedly authorized to direct employee as to his work, it is recognized that authority in industrial plants does not necessarily flow in a direct vertical line but that in practice coemployees in different departments or on the horizontal plane do exercise control over the individual employee in the employer's interests. Labor Code, § 3600.

6. Workmen's compensation ⇐626

Where plant supervisor who was not directly in charge of employee, asked employee if solvent used by employee was inflammable, and employee answered that it was not, and in his foreman's presence he soaked a rag in solvent and lit it and rag flamed up, burns sustained by employee in attempting to put out fire were compensable injuries "arising out of and in course of employment". Labor Code, § 3600.

7. Workmen's compensation ⇐799

Where plant supervisor who was not directly in charge of employee, asked employee if solvent being used by him was inflammable, and employee answered that it was not and, in his foreman's presence, he soaked a rag in solvent and lit it, and rag flamed up, and employee was burned in attempting to put out fire, he was not precluded from recovering compensation on ground that his injury was intentionally self-inflicted.

Proceeding by the Joshua Hendy Iron Works, employer, and the Industrial Indem-

nity Exchange, insurance carrier, petitioners, against the Industrial Accident Commission and Manuel Miguel, claimant, respondents, to annul an award of the Commission to claimant for temporary total disability.

Award affirmed.

Leonard, Hanna & Brophy, of San Francisco, for petitioners.

R. C. McKellips, of San Francisco, for respondent Industrial Acc. Commission.

Henry G. Sanford and J. H. Sapiro, both of San Francisco, for respondent Miguel.

WARD, Justice.

The petitioners, the employer and the insurance carrier, seek to annul an award to Manuel Miguel of compensation for temporary total disability. The sole question to be decided concerns the sufficiency of the evidence before the commission to sustain the finding that "Manuel Miguel * * * sustained injury arising out of and occurring in the course of his employment." Although the original application before the commission, which was filed by the employer, alleged the basic issue to be "horseplay," the evidence before the referee and upon rehearing presented the fundamental jurisdictional issue above noted. The commission found against the employer on the "horseplay" issue even if it could be said that there was any evidence in the record to sustain a finding in the employer's favor had it been made. There is no merit, in view of the rehearing referee's report, in the petitioners' contention that the award of the commission rests on an erroneous view of the burden of proof when the employer files the application.

[1] Disregarding all conflicts in the evidence and stating the facts most favorable to the commission's finding, as is the rule in a review of an award of the Industrial Accident Commission in which the issue is the sufficiency of the evidence to support a finding, Associated Indem. Corp. v. Industrial Acc. Com., 18 Cal.2d 40, 42, 112 P.2d 615, the return to the alternative writ shows that the injury to Manuel Miguel occurred in the following manner: Miguel's specific job on the day of the accident was to clean iron castings with a petroleum product called a solvent by spraying the castings with the solvent to cut the grease thereon and then to wash them. These castings were diesel bases, approximately twelve feet by four feet by two and one-half feet, and the solvent was sprayed from five gallon buckets through the use of compressed air suction hoses which were removed from the buckets when the operation was completed or when the buckets needed refilling. The buckets were unmarked and no petroleum odor emanated from the solvent until it was sprayed onto the castings. Miguel completed this spraying and was talking seriously to his immediate foreman, White, and a plant inspector, Grant. Grant worked for a separate department, but his job was to inspect the castings when they had been sprayed and washed in order to determine if they were clean enough to go to the paint shop. While the three were standing talking, Grant said: "Isn't it (the fumes and this solvent) dangerous? Isn't it dangerous in case of fire?" Whereupon Miguel said: "No, it will not burn." Miguel then picked up a rag, either from his pocket or the floor, dipped it in a bucket of solvent and placed the rag on the concrete floor. He then lighted a match and held it to the rag. Neither Grant nor White made any effort to stop him. White testified that it all happened so quickly he didn't know what was going on. The rag burst into flames and Miguel attempted to stamp it out with his feet. Although it was not a big fire it made a cloud of smoke. Whereupon Miguel, without thinking, took what he thought was a bucket of water and threw it on the flames to put the fire out. In fact he threw a bucket of solvent onto the flames which flared up, catching his clothes and severely injuring him. His clothes were saturated with the solvent by reason of his spraying job. The employees doing Miguel's work were not forbidden to smoke on the job. It is not clear in the record whether Miguel was waiting for the inspector to inspect his work or for his co-employee to finish his part of the diesel base job. The accident happened close to the end of the working day.

[2] Preliminarily it must be stated that the issue before the court concerns the industrial causation of the original lighting

of the rag. In view of the conclusion hereinafter reached, it is unnecessary to consider the commission's contention that Miguel's attempt to put out the fire, in the event his act in lighting the fire did not as a matter of law arise out of and occur in the course of his employment, started a new chain of events solely in the employer's interest for which compensation should be given. The lighting of the rag and the spontaneous reaction to the emergency created were all part of the res gestæ. Zolkover v. Industrial Acc. Com., 13 Cal.2d 584, 588, 91 P.2d 106. If an injury caused by the original act would have been compensable, the thoughtless throwing of the bucket of solvent, thinking it was water, on the flames would not break the causation flowing from the original act for the purposes of determining whether the original act "arose out of and in the course of" Miguel's employment.

Having thus limited the issues, it is necessary to determine what inferences the commission could draw from the facts proven which would support their finding. It can be inferred that Miguel's superior knew what Miguel was about to do and did nothing to stop his lighting the rag; in other words, Miguel's superior acquiesced in Miguel's actions and in fact was a participant in the experiment. Although Miguel testified that White and Grant did not know what he was about to do, and White testified that it all happened so quickly he couldn't stop it, the mere recital of events leading up to the lighting of the rag—the deliberate soaking of the rag, the placing of it on the concrete floor and the lighting of the match—shows that what Miguel was going to do must have been apparent to bystanders who were his superiors. It is to be noted that Grant did not occupy a vertically superior position to Miguel in the plant hierarchy, but it may be inferred that his position as inspector of Miguel's work was superior in point of responsibility and in fact he could have controlled Miguel's actions. Whether or not in the scheme of delegated authority he had an absolute right to, Grant's remark led to Miguel's actions, which fact lends further support to the inference that he could influence Miguel. From the whole recital an inference may be drawn that Miguel's actions were done within the control of his employers and were precipitated from a spirit of cooperativeness and desire to inform, in response to an inquiry, his superiors concerning the non-dangerous character of the solvent. From the fact that Miguel's clothes were saturated with the solvent, it also appears, assuming the solvent was inflammable, that neither the risk of the type of injury nor the risk of the extent of the injury was foreign to the nature of Miguel's ordinary employment.

[3-6] With these facts and the inferences to be drawn therefrom in mind the specific issue can be restated: Does an employee who experiments outside of the ordinary course of his duties, but with the acquiescence and approval of his superiors, and who is injured from a hazard inherent in the nature of his work, forfeit his coverage under the workmen's compensation laws? The general rules governing this situation are stated in the annotation in 33 A.L.R. 1335, 1336: "It is clear that the employee is entitled to compensation as for an injury arising out of and in the course of his employment, when such injury was received in the performance of work for his employer outside the scope of his usual duty, but which the employee had been expressly ordered to do by someone authorized to direct him as to his work; and, even in the absence of such an order, he has been allowed compensation in some cases where he acted in the belief that such an order had been given by someone authorized to do so." In California where the employer or person in authority over a particular employee acquiesces in particular actions of employees with knowledge of their dangerous character, a finding that the employees are within the course and scope of their employment is sustained on the basis that the employer has impliedly authorized the employee's actions. Department of Pub. Works v. Indus. Acc. Commission, 128 Cal. App. 128, 131, 16 P.2d 777; Pacific Indemnity Co. v. Industrial Acc. Commission, 105 Cal.App. 535, 539, 288 P. 129; Payne v. Industrial Acc. Commission, 84 Cal.App. 657, 660, 258 P. 620; Standard Lumber Co. v. Industrial Acc. Commission, 60 Cal.App. 331, 337, 212 P. 720. Further, the Califor-

nia courts have recognized that authority in industrial plants does not necessarily, in fact, flow in a direct vertical line, but that in practice co-employees in different departments or on the horizontal plane do exercise control over the individual employee in the employer's interests. Pacific Indemnity Co. v. Industrial Accident Commission, 202 Cal. 521, 524, 261 P. 987. With these principles and authorities in veiw, on the facts of the instant case there is ample evidence to sustain the commission finding which was based on the rehearing referee's view of the evidence stated as follows: "It would seem that the demonstration made by the employee was certainly something that was invited by the remark of Grant * * * it is also very apparent that White who was the employee's immediate superior and who was present during the entire episode * * * took no steps whatever to dissuade the employee. * * * Some attempt has been made to explain this on the ground that everything happened so fast that White did not have a chance to halt the proceedings. However, it is clear that when Grant asked whether the solvent was inflammable, White, the employee's superior, did not give any answer on the subject and did not in advance take any steps to suggest that an experiment be made elsewhere." The facts of the case come squarely within the reason for the requirement that injuries to be compensable must "arise out of and occur in the course of the employment" as stated in Ruff v. Industrial Acc. Commission, 123 Cal.App. 168, 169, 11 P.2d 17, as follows: "The essential element of this character of cases is that, when the employee is engaged in voluntarily doing something outside the scope of his employment, he is temporarily beyond the directions and control of the employer, and the liability of the latter attaches only when that relation exists." Here the employee's acts were directly under the control of his immediate superior.

[7] But the petitioners seem to contend that the acts of Miguel were of such an unusual character, increasing the hazards of his employment to such an extent, that his acts took him outside the scope of his employment—that the lighting of the rag amounted to an intentionally self-inflicted injury. In Associated Indem. Corp. v. Industrial Acc. Commission, 18 Cal.2d 40, 46, 112 P.2d 615, 619, the court says:

"Petitioner contends, however, that Macfie in riding on the switch engine adopted such an unreasonable and hazardous method of traveling from the depot to the dock that it constituted an abandonment of his employment. * * * The doctrine urged by petitioner must be applied with extreme caution for the reason that it is barely distinguishable from the rules of contributory negligence and assumption of risk which are not applicable in compensation cases. Indeed it may well be asserted that the doctrine of 'added risk', that is, where an employee assumes a risk greater than that usually incident to his employment, he cannot recover, cannot be followed in California because it is in effect nothing more than contributory negligence. Campbell, Workmen's Compensation, vol. 1, § 238; California Const., art. XX, § 21. The circumstances giving rise to the doctrine are pertinent in determining the issue as to whether the injury arose out of or in the course of employment. In California Casualty Indem. Exch. v. Industrial Acc. Commission, 5 Cal.2d 185, 187, 53 P.2d 758, 759, a traveling salesman was asphyxiated while staying overnight at an auto camp as the result of leaving a gas heater burn overnight and failing to provide ventilation. In reply to the contention that such conduct was so unreasonable and unauthorized as to remove him from the scope of his employment this court said:

"'It is practically impossible to distinguish this contention from a claim that the death of the employee was caused by his negligence. We must conclude that petitioner refrains from admitting this fact because it is so well known that negligence of the employee is no defense to a compensation claim of the kind presented in this case.' * * * It is worthy of note that by the weight of authority, even the fact that an injury was received by an employee while violating an instruction or rule of this employer, does not necessarily prevent the injured employee from recovering on the ground that the injury did not arise out of or occur in the course of the employment. See cases collected 119 A.L.R.

1409; 83 A.L.R. 1211; 58 A.L.R. 198; 26 A.L.R. 166; 23 A.L.R. 1161."

The petitioners here in support of their position rely mainly on two cases, Dalsheim v. Industrial Acc. Com., 215 Cal. 107, 8 P.2d 840, and Williamson v. Industrial Acc. Commission, 177 Cal. 715, 171 P. 797. In the Dalsheim case, an award of compensation to an employee was annulled on the grounds that the injury did not arise out of and in the course of his employment where it appeared that an employee was injured when he, during the lunch hour, intentionally threw a lighted cigarette and then a flaming piece of paper into cleaning fluid to show his co-workers that the liquid was non-inflammable. The award was annulled on the grounds that the injury was the result of "horseplay" or "skylarking." Whatever the merits of the respondent commission's contention that this case has been impliedly overruled by Pacific Emp. Ins. Co. v. Ind. Acc. Commission, Cal.Sup., 158 P.2d 9, it is clear that no inference of authorization by the employer could have arisen on the facts before the court in that case.

In the Williamson case, supra, the court held that death sustained in the cleaning of a lightwell which was outside the usual scope of an employee's duties was not within the course and scope of her employment where it appeared that she had been warned of the dangers by a fellow employee, and with full knowledge of the dangers, she embarked on a course of conduct solely calculated to please her paymaster although specifically told it was not one of her duties. Whether this case is still the law is not necessary to decide because here Miguel clearly had no knowledge of the dangers inherent in his actions. Suffice it to say that in view of the language in Associated Indem. Corp. v. Ind. Acc. Commission, supra, the holding in the Williamson case [177 Cal. 715, 171 P. 798] should be limited to its precise facts, particularly in view of the earlier court's own language that the case was decided in "the formative period of the law relating to industrial accident cases," and "must be decided upon its own peculiar state of facts."

Finally, it might be noted that there is no question of wilful misconduct presented in view of the absence of "no smoking" rules by the employer and Miguel's lack of knowledge of the danger involved in what he was doing. Both respondents and petitioners seem to concede that there is no issue of wilful misconduct involved.

For the foregoing reasons the award is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



LOS ANGELES COUNTY v. SOUTHERN CALIFORNIA TELEPHONE CO.

Civ. 14915.

District Court of Appeal, Second District, Division 1, California.

April 19, 1946.

Hearing Granted June 18, 1946.

1. Constitutional law ⇐92
Telegraphs and telephones ⇐10(5)

The right conferred by statute granting telephone and telegraph companies the use of all public highways is a vested one but the county still has control over matter of its exercise. Civ.Code, § 536.

2. Telegraphs and telephones ⇐10(10)

Acceptance by telephone company of provisions of the statute granting telephone and telegraph companies the use of all public highways creates a contractual relation between the company and the state. Civ.Code, § 536.

3. Contracts ⇐170(1)

The practical construction placed on a contract by parties by their conduct and action in executing it is strong evidence of what was intended by its provisions.

4. Statutes ⇐219

Where telephone company's acceptance of provisions of statute granting telephone corporations use of public highways cre-

ates contractual relationship between company and state and practical construction adopted by state departments called on to construe the statute and its relation to Constitution had been uniform and consistent with validity of statute, the principle that construction placed on contract by parties is strong evidence of what was intended by its provisions was applicable. Civ.Code, § 536; Const. art. 4, §§ 22, 31.

5. Courts ⇐90(4)

A decision upholding validity of a statute does not preclude the same court from later declaring the statute unconstitutional on grounds other than those urged in the first case.

6. States ⇐119
Telegraphs and telephones ⇐10(4)

The statute granting telephone and telegraph companies the use of all public highways does not grant valuable franchise without any consideration in violation of Constitution prohibiting gift of public property, and county could not require telephone company to procure a franchise from county. Civ.Code, § 536; Const. art. 4, §§ 22, 31.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action in equity by the County of Los Angeles against the Southern California Telephone Company for an accounting for the usable value of defendant's alleged unauthorized occupancy of highways for the operation of its system and for an injunction restraining the defendant from occupying highways unless it procures a county franchise. From an adverse judgment, plaintiff appeals.

Affirmed.

Harold W. Kennedy, County Counsel, S. V. O. Prichard, Asst. County Counsel, and A. Curtis Smith, Deputy County Counsel, all of Los Angeles, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, and John W. Holmes, Lawler, Felix & Hall, and Oscar Lawler, all of Los Angeles, for respondent.

DORAN, Judge.

This is an action in equity by which the county seeks an adjudication that the Telephone Company must procure a franchise from the county in order to make use of the highways for the operation of its system in unincorporated areas of the county. The action seeks, for the past, an accounting for the usable value of the defendant's alleged unauthorized occupancy of such highways, and for the future, an injunction to restrain the Telephone Company from occupying the highways unless it procures a county franchise. The complaint denominates the defendant's occupancy of county highways as "obstructing the free passage and use in the customary manner by the plaintiff", etc. and as constituting "a public and common nuisance injuriously affecting the property of the plaintiff", etc.

The answer denies obstruction and nuisance, and alleges that the defendant and its predecessors have continuously maintained telephone and telegraph lines throughout the eight southernmost counties since 1889, making use of the highways in connection therewith by virtue of the express provisions of Section 536 of the Civil Code. Estoppel and laches are also pleaded by alleging facts showing recognition by the appellant county of the telephone company's rights, over a long period of years. At the trial appellant's attorney renounced any "intention of proving or attempting to prove that * * * the structures are so located that they constitute a nuisance in fact", basing the county's claim upon the theory that the respondent's use of the highways for its poles, wires, etc. was unauthorized.

The primary question, according to appellant's brief, relates to the constitutionality of Section 536 of the Civil Code. In addition to maintaining that this section is valid and constitutes a state franchise authorizing use of the highways, respondent contends that with the appellant's renunciation of the nuisance theory adopted in its complaint, no judicial controversy remained. Respondent further asserts that this suit in equity cannot be converted into a quo warranto proceeding and that appel-

lant is not authorized to maintain such a proceeding. It is the respondent's position that by Section 536 "the State has left nothing to be granted by a county in respect to franchises to corporations for telegraph and telephone purposes".

Section 536 of the Civil Code, as amended in 1905, reads as follows: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

The section was originally placed in the Civil Code in 1872, applied only to telegraph corporations. It is conceded by the appellant that if Section 536 grants a valid franchise, the respondent company has done those things necessary to the procurement of such franchise. During the trial the court rendered an opinion upholding the constitutionality of this section; thereafter evidence was introduced, and the present appeal is from a judgment in favor of the telephone company.

The appellant county maintains that Section 536 is invalid in that it amounted to a legislative "grant" of a valuable franchise "without any consideration whatsoever except the operation of a private enterprise for private profit * * * in violation of sections 22 and 31 of Article IV of the State Constitution. It follows that the purported 'grant' was a nullity, that the Telephone Company has had no 'franchise' and that it needs a franchise from the County under the Broughton Act."

Section 22 of Article IV of the Constitution of 1879 provided that "no money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a State institution, *nor shall any grant or donation of property ever be made thereto by the state;* * * *". (Italics added.)

Section 31 of Article IV of the Constitution makes the further limitation that the legislature shall have no "power to make any *gift, or authorize the making of any gift,* of any public money *or thing of value,* to any individual, municipal or other corporation whatever; * * *." (Italics added.)

The respondent asserts that the above constitutional provisions were not intended to "forbid the lending of the use of the public highways for and in consideration of the establishment of a public service", and that the decisions of this state over a period of more than forty years, have clearly recognized the validity of Section 536 of the Civil Code granting telephone and telegraph corporations the use of all public highways. In reference to these California decisions it is the appellant's contention that "nowhere in the opinion of any one of those cases did the Court before which the case was pending pass upon the constitutionality of section 536 in the light of sections 22 and 31 of Article IV of our State Constitution. * * * The validity of section 536 * * * was apparently conceded by every party and assumed by the Court."

Among other cases cited by respondent is Western Union Telegraph Company v. Hopkins, 160 Cal. 106, 118, 116 P. 557, 562, where the court said: "In the light of what we have said, it appears that the case of Western Union Tel. Co. v. Visalia, 149 Cal. 744, 87 P. 1023, does necessarily decide that section 536, Civil Code, was effectual to grant this right as to all highways lying outside of municipalities, * * * section 536 * * * has, however, never been confined in terms to highways outside of municipalities, but always purported to apply to all public highways in the state." And on page 119 of 160 Cal., on page 563 of 116 P., it is said: "It is earnestly urged * * * that section 536, Civil Code, is either unconstitutional or cannot be construed as it was in the Visalia case, * * *. Assuming that section 536, Civil Code, was a grant of the right to such use of the streets, we are of the opinion that it must be held, to use the language of the United States circuit court of appeals in Sunset Tel. & Tel. Co. v. Pomona,

9 Cir., 172 F. [829], 837, 97 C.C.A. 251, that the maintenance and operation of such system 'was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation.'"

[1] Although this and other cases hold that the right conferred by Section 536 is a "vested" one, it should be noted that this is not an *unqualified* right; the County still has control over the manner of its exercise. Said the court in the Western Union Telegraph Company v. Hopkins case, 160 Cal. at page 121, 116 P. at page 563: "Of course, the liability of plaintiff to all such reasonable regulations as is warranted in the proper exercise of the police power cannot be disputed. In fact, this is expressly stipulated by the provisions in section 536, Civil Code, that the system of the telegraph company must be conducted 'in such manner and at such points as not to incommode the public use of the road or highway.'"

The franchise to use the public highways, granted by Section 536, has been held taxable for state and county purposes in the County of Los Angeles. Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 P. 557; Western Union Tel. Co. v. Los Angeles County, 160 Cal. 124, 116 P. 564; Postal Tel. Cable Co. v. Los Angeles County, 160 Cal. 129, 116 P. 566; See also Postal Telegraph-Cable Co. v. City of Los Angeles, 164 Cal. 156, 128 P. 19.

The case of City of Beverly Hills v. City of Los Angeles, 175 Cal. 311, 165 P. 924, has been particularly commented upon by both parties. Prior to the incorporation of Beverly Hills, the City of Los Angeles had acquired the right to construct a water pipe-line along public roads subsequently included in the city limits of Beverly Hills, by accepting the grant made by the Act of April 10, 1911 (Stats.1911, page 852) of the right to so use roads situated in unincorporated territory. At page 315 of 175 Cal., at page 926 of 165 P. in the Beverly Hills case, the court says: "*No doubt exists as to the power of the state to make the grant,* which, when accepted as we have seen, constituted an inviolable contract the extent of which is measured by the purpose for which it was intended, and in the exercise of which right defendant was limited alone by the language used in the grant." (Italics added.) See also State v. Marin Municipal Water District, 17 Cal.2d 699, 111 P.2d 651.

Appellant's contention that the telephone company is obliged to obtain a county charter under the provisions of the Broughton Act, warrants consideration of the case of County of Inyo v. Hess, 53 Cal. App. 415, 424, 200 P. 373, 377, where the court says: "Our conclusions are * * * third, that under and by virtue of the provisions of section 536, Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and *unrestricted by the provisions of the Broughton Act,* * * *." (Italics added.) A petition for hearing in the Supreme Court, was denied.

Section 536 also received consideration in Postal Telegraph-Cable Co. v. Railroad Commission, 200 Cal. 463, 472, 254 P. 258, 261, where the court held that "This section constitutes a grant of a franchise which the state offered, and petitioner accepted by the construction of its lines. The rights acquired * * * are vested rights which the Constitutions, both state and federal, protect. They cannot be taken away by the state, even though the Legislature should repeal the section, or by the people through a constitutional provision." The Railroad Commission could not, therefore, demand a certificate of public convenience and necessity from petitioner before it could carry on its intrastate business.

In a recent case not cited by either party hereto,—City of Salinas v. Pacific Tel. & Tel. Co., January, 1946, 72 Cal.App.2d 494, 497, 164 P.2d 905, 907, the court again adhered to the views expressed in earlier California cases and said: "The purpose of the 1905 change was to add telephone lines and telephone corporations to the section (Civil Code, Sec. 536). * * * The section has been construed as a continuing offer by the state to all telegraph

and telephone companies to use without compensation such public highways as may be convenient or necessary for the operation of their lines. Postal Telegraph-Cable Co. v. Los Angeles, 164 Cal. 156, 128 P. 19."

A survey of the cases previously mentioned and others cited by appellant and respondent clearly indicates that, as stated by the trial judge in the instant case, "the Supreme Court of California, consistently whenever opportunity has presented itself, has dealt with section 536 of the Civil Code as a valid, constitutional enactment." And, in the language of respondent's brief, —"Appellant not only asks the court to turn its back upon these settled doctrines, but to reverse a series of its own decisions covering more than forty years. * * * Therein statutes have been recognized and acted upon as valid and Constitutional and thereunder untold millions have been expended in the establishment and maintenance of indispensable public services."

In Miller & Lux v. Enterprise Canal & Land Co., 142 Cal. 208, 215, 75 P. 770, 773, 100 Am.St.Rep. 115, answering an assault upon the constitutionality of a code provision, the court said: "And although the point of the unconstitutionality of the section may not heretofore have been expressly raised and decided, still we think the *principle* of the rule of *stare decisis* should apply, * * *". The court held that the power there in question "has been continuously recognized and declared by this court for too long a period of time to be now questioned." There is similar expression by Justice Brewer in voicing a concurring opinion in Western Union Tel. Co. v. Pennsylvania R. Co. 195 U.S. 540, 593, 25 S.Ct. 133, 150, 49 L.Ed. 312, 1 Ann.Cas. 517: "When this court has construed a statute * * * and that construction has remained for more than a quarter of a century, neither changed by any judicial decisions nor set aside by any Congressional legislation, it ought not to be disturbed except for the most cogent reasons."

[2-4] Since acceptance by the telephone company of the provisions of Section 536 of the Civil Code has been held to effect a contractual relation between company and state (Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 P. 557, and other cases previously cited), the familiar principle, often announced, and stated again recently in Hill v. Fowble, 65 Cal.App.2d 25, 30, 149 P.2d 862, 865, may be noticed; namely that "The practical construction placed on a contract by the parties, by their conduct and actions in executing it, is often considered strong evidence of what was intended by its provisions." The trial court in the instant case correctly held that "This principle applies with extraordinary force and appropriateness to Section 536, Civil Code, in respect to which, since the adoption of the Constitution, and until the preliminaries of filing of the instant suit, the practical construction adopted by the state in all departments called upon to construe the section and its relationship to the Constitution has been uniform, and consistent with the validity of the section." Not only this, but the appellant county has apparently acquiesced in this view by way of its answers filed in the Western Union cases hereinbefore mentioned, and otherwise. Respondent further calls attention to the fact, not denied in appellant's brief, that "As late as 1935 efforts of appellant to have it (Section 536) repealed were turned down by the legislature". These matters, it should be noted, are not referred to as bearing upon estoppel or laches alleged by appellant to bar consideration of the constitutional question, the decision of which question is not deemed necessary herein. They are merely mentioned in reference to the practical construction of Section 536 over a period of many years, as shown by the acts of the parties in connection therewith. While not controlling in reference to the present controversy, such construction is not without value.

[5, 6] Although it is doubtless true, as urged in appellant's brief, that a decision upholding the validity of a statute does not preclude the same court from later declaring the statute unconstitutional upon grounds other than these urged in the first case, such doctrine standing alone cannot support appellant's present contention. Indeed, no pertinent case has been cited which would justify this court in declaring Section 536 invalid. On the contrary, what authority there is, fully supports the

finding of the trial court. As said in Lacy v. Gunn, 144 Cal. 511, 514, 78 P. 30, 32, "the question would seem to be foreclosed by the previous decisions of this court *recognizing the validity* * * *. *While its constitutionality has not been discussed, section 1 of the act has been treated as valid, and its provisions enforced by the court* * * *. These decisions have been generally considered and acted on as judicial recognitions of the validity of the section, * * *." (Italics added.)

In view of the opinion expressed herein, and of the appellant's frank concession that "it has no case at all if section 536 is constitutional", there is no need to consider the other issues in the case.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



74 Cal.App.2d 109

WHITTEMORE et al. v. SEYDEL et al.

Civ. 7226.

District Court of Appeal, Third District, California.

April 22, 1946.

1. Municipal corporations ⇐108
Statutes ⇐35½

The power of referendum is one reserved to the people, and, in order to protect the people in the exercise of such power, statutory and charter provisions dealing with such powers are liberally construed in favor of the powers. Const. art. 4, § 1.

2. Municipal corporations ⇐108

Petitions for referendum against city ordinance were adequate, though affidavits of solicitors of signatures did not comply with provision of election code, with respect to dates between which all signatures of petition were secured, where signers themselves affixed dates of signing on the petition, affidavits were filed within statutory period, and there was no contention that petitions were not signed within statutory period by requisite number of qualified electors. Elections Code, § 45; Const. art. 4, § 1.

3. Statutes ⇐35½

The fact that provision of Election Code that affidavits of persons listing signatures for referendum petition must set forth dates between which all signatures of petition were secured, was eliminated two years after it was added indicated that in Legislature's opinion the matter was superfluous, and it must be assumed that the legislature did not consider that the omission from affidavit of such dates would render petition invalid and defeat right of referendum. Elections Code, § 45.

4. Municipal corporations ⇐108

Any doubt as to the validity of a referendum petition against an ordinance must be decided in favor of the people who signed the petition, rather than in favor of city council. Const. art. 4, § 1.

5. Statutes ⇐35½

Provision of election code that affidavits accompanying referendum petition must set forth dates between which all signatures of petition were secured was invalid as violative of constitutional provision which makes no requirement as to dates, and which provides that "no other affidavit thereto shall be required". Elections Code, § 45; Const. art. 4, § 1.

6. Municipal corporations ⇐108

That section of the Elections Code dealing with referendum petition and affidavit thereto is not applicable to municipal referendums. Elections Code, §§ 45, 1601, 1708, 1723.

7. Statutes ⇐225½

Specific statutory provisions relating to a particular branch of a subject must govern that branch as against general statutory provisions in other parts of the statute.

Original mandamus proceeding by T. H. Whittemore and the T & D Jr. Enterprises, Inc., a corporation, petitioners, against F. W. Seydel and others as members of the City Council of the City of Chico, Califor-

nia, respondents, to compel respondents to repeal a city ordinance fixing a license tax on admissions to places of amusement within the city or to submit them to the voters.

Writ of mandate issued as prayed.

Peters & Peters, of Chico, L. S. Hamm, of San Francisco, and Mull & Pierce, of Sacramento, for petitioners.

Grayson Price, of Chico, for respondents.

ADAMS, Presiding Justice.

Petitioners herein sought a referendum against Ordinance No. 349 adopted and published by the Council of the City of Chico on June 29, 1945. The ordinance was one fixing a license tax upon admissions to places of amusement within the city. Chico is a charter city, the charter having been approved by the legislature in 1923, St.1923, p. 1436, and section 116 of the charter provides that the laws of the State of California providing for the initiative referendum and recall in cities are made a part thereof and that all actions thereunder shall be taken in accordance with said laws.

Within thirty days after the adoption of this ordinance, to wit, on or about the 25th day of July, 1945, there was filed with the city clerk a referendum petition consisting of several parts, protesting the ordinance and requesting its repeal by the council or its submission to a municipal election for approval or rejection. Each portion of the petition referred to the ordinance as an "ordinance of the City of Chico, County of Butte, State of California, entitled 'An Ordinance Amending Chapter X of the Municipal Code of the City of Chico, by Adding Thereto a New Article and Sections Providing for the Licensing and Carrying on of Certain Businesses, Trades, Callings and Occupations in the City of Chico, California, for the Purpose of Raising Municipal Revenue and Providing for Penalties for Violations Thereof,' adopted by said City Council on June 29, 1945, being Ordinance No. 349 of the Said City of Chico, * * *."

Each signer of the petitions stated after his name the date of his signing, and the circulator of each portion of the petition affixed thereto his affidavit which recited that he was a voter of the city, that he personally circulated the petition attached thereto and that he personally saw written the signatures appended thereto, and that according to his best information and belief each signature was the genuine signature of the person whose name it purported to be, and that each of the signers was a voter of the City of Chico, County of Butte, State of California. The City Clerk attached to the petition a certificate in which he averred that the petition to which his affidavit was attached was filed in his office on July 25th, and consisted of 46 sections all of which were filed at the same time; that each section contained signatures and dates purporting to be, respectively, the signatures of qualified electors of the city, and the dates upon which such electors had respectively signed said petition. He further certified that after said petition was filed he had examined the affidavits of registration in Butte County and the records relating thereto, current and in effect at the respective purported dates of such signing, to determine therefrom what number of qualified electors signed said petition and respectively affixed thereto the purported dates of their signing; and that from said examination he had determined that said petition was "and is" signed by 579 qualified electors of said city, each of whom had affixed to said petition a date purported to be the date when such elector had signed the petition, and each of whom was a registered qualified elector of said county on said date.

The petitions and the certificate of the city clerk were duly presented to the City Council which, on or about August 7th, refused to act thereon on the sole ground that the affidavits of the circulators did not set forth the dates between which the signatures upon the petitions were obtained by them.

On October 1, 1945, petitioners herein delivered to the City Clerk amended affidavits of the several circulators of the several parts of the referendum petition, requesting the clerk to file said affidavits and attach them to the respective pages of the petition, but the City Clerk refused to accept same.

Thereafter, petitioners filed in this court their petition for a writ of mandate to compel the City Council to repeal the ordinance or submit same to the voters. The petition alleged, among other things, the adoption of the ordinance, the filing of the petitions for referendum signed by the requisite number of qualified voters, and that each signer had set forth after his name the date of his signing. We issued an alternative writ of mandate in response to which respondents filed a demurrer to the petition, together with an answer thereto. The answer admitted the significant allegations of the petition but alleged by way of defense that "the purported referendum petition, including all of the several parts thereof, referred to in petitioners' application for Writ of Mandate were at the time of the filing of the same with respondent City of Chico, and for more than thirty days after the adoption of the ordinance complained of, defective and invalid in that none of the affidavits of the purported circulators of the several parts of said petition set forth the dates between which the signatures upon said respective parts thereof were obtained by the several circulators as required by Section 45 of the Elections Code of the State of California. That by reason thereof the respondent City Council of the City of Chico was without jurisdiction to call an election as therein demanded."

The sufficiency of the referendum petitions themselves is not attacked, but, as aforesaid, the contention of the council is that the city was without jurisdiction to act upon the referendum petitions solely because of the failure of the circulators thereof to allege in their affidavits the dates between which all signatures were secured by them. It is not denied that the said signatures were all secured within the time provided by statute, and it is apparent upon the face of the petitions themselves that such signatures were so secured.

Section 45 of the Elections Code, which section is found among the general provisions thereof, between 1943 and 1945, and at the time of the proceedings herein involved, provided:

"Wherever, by the Constitution or laws of this State any * * * referendum * * * petition or paper * * * is required to be signed by voters, only a voter who is a registered qualified voter at the time he signs the petition or paper, is entitled to sign it. Each signer shall at the time of signing the petition * * * himself affix thereto his place of residence, giving street and number, and if no street or number exists, then a designation of his place of residence which will enable the location to be readily ascertained; provided, however, that each signer of any municipal * * * referendum * * * petition * * * shall in addition to the other requirements of this section, at the time of signing the petition or paper affix thereto the date of his signing. * * * The date of signing shall appear opposite each name, but if successive signers sign on the same date, marks may be used to indicate that the dates are the same.

"Wherever, by the Constitution or laws of this State, any such petition or paper is required to be accompanied by the affidavit of the person soliciting signatures thereto, that affidavit shall set forth the dates between which all signatures on the petition or paper were secured by him."

This section was amended in 1945, at which time the last paragraph was dropped from it and the word "municipal" in the preceding paragraph was deleted.

During the significant period here, Division IV, Chapter 3, of the Elections Code providing for "Municipal Elections" provided, sec. 1770, that no ordinance enacted by an incorporated city pursuant to this chapter should become effective until thirty days from and after the date of its passage, with an exception not pertinent here; that, sec. 1771, if a petition signed by not less than 10 per cent of the voters of the city, protesting against the adoption of an ordinance were presented to the legislative body of the city within 30 days of its adoption, the effective date of the ordinance should be suspended, and the legislative body should reconsider the same and that in order to be acceptable for filing the petition must on its face purport to have appended to it signatures of voters in the required number; that, sec. 1772, if the legislative body did not entirely repeal the ordinance against

which the petition was filed, it should submit the same to the voters, either at a regular municipal election or a special election to be called for the purpose; that, sec. 1773, the provisions of this chapter relating to the form of petitions, the duties of the city clerk, and the manner of holding elections when an ordinance was proposed by initiative petition, should govern the procedure when a protest was filed against an ordinance.

Sections 1708 to 1723 pertaining to initiative petitions are thus made applicable to referendum petitions. Section 1708 provided that each separate paper of a petition should have attached an affidavit made by a voter of the city, which affidavit should state that the affiant circulated that particular paper and saw written the signatures appended thereto, and that according to the best information and belief of affiant each was the genuine signature of the person whose name it purported to be, and that the signer was a voter of the city. It is to be noted that this section, though enacted in 1939, did not require that such affidavit set forth the dates between which signatures on the petition were secured by the circulator thereof. Section 1709 of the said code provided that within 10 days from the date of filing the petition the clerk of the legislative body should examine it, and from the records of registration ascertain whether or not it was signed by the requisite number of voters, and that he should attach to the petition his certificate showing the result of his examination.

Petitioners' contentions are that the last paragraph of section 45 of the Elections Code, as it existed from 1943 until its repeal in 1945, was not applicable to a municipal referendum petition; that the requirement of that paragraph was in violation of Article IV, section 1, of the state Constitution; that it was not necessary that section 45 be strictly complied with as the requirement of same was merely directory; that the provisions of section 45 were substantially complied with; that the duty of passing upon and determining the sufficiency of the petition was vested by law in the clerk and not in the Council, and the latter had no power to redetermine the question of the sufficiency of the petition after the clerk had certified to such sufficiency; and, finally, that the subsequent amendment of the affidavits by the circulators cured any defect there might have been therein.

[1] Assuming for the moment, without deciding, that the provisions of section 45 were applicable to initiative and referendum petitions in incorporated cities, and that the circulators of such petitions were required, at the time of the filing of the petitions herein involved, to allege in their affidavits thereto the dates between which the signatures were secured by them, the question arises whether the failure to so allege is fatal to the referendum. The Constitution itself provides in Article IV, section 1, that the section is self-executing; and that while legislation may be enacted to facilitate its operation, it may not be enacted to limit or restrict in any way, the provisions of the section or the powers therein reserved. And our courts have frequently stated that the power of referendum is one reserved to the people, and that in order to protect the people in the exercise of this power statutory and charter provisions dealing with such powers are always to be liberally construed in favor of the power. Ley v. Dominguez, 212 Cal. 587, 593, 299 P. 713; Chester v. Hall, 55 Cal.App. 611, 617, 204 P. 237; Osborn v. Board of Supervisors, 27 Cal. App. 85, 89, 148 P. 970.

The only purpose which the requirement that the affidavits state the dates between which the signatures to the petitions were obtained could serve would be to furnish evidence from which it could be determined that subscribers signed during the thirty day period following the effective date of the ordinance. However, as each individual signer was required to and did set forth the date of his signing (which requirement has been said to be for the purpose of facilitating the work of the clerk in determining the one essential thing to make a referendum effective—that the petition be signed by the requisite number of qualified voters), the additional averment in the affidavit would appear to furnish nothing that was not already shown. Such affidavits are not a part of the petitions themselves, but only an ac-

companiment to them, and it is hardly reasonable to say that the failure of the affidavit to aver something which was required to be and was set forth in the petition itself, should have the effect of invalidating a petition which it is not denied was signed by the requisite number of qualified electors who had themselves complied with all statutory requirements to make their petition effective. To construe the provision of section 45 regarding the affidavit so as to render the whole proceeding void, as respondent contends it should be construed, would be not only illiberal, but would be a case of the tail's wagging the dog. Here the petition and the affidavits furnished evidence sufficient to satisfy the city clerk of these matters, and he certified to the Council that he had determined that the requisite number of qualified electors had signed. Under such circumstances the wishes of said electors should not be defeated by omissions of the affidavits to state matters which, if stated, would obviously only serve to confirm that which was already apparent.

[2] In the instant case, as above stated, the petitions referred to the ordinance by title and number and stated the date of its enactment. It is apparent therefrom that the signatures were not and could not have been secured prior to that date. Furthermore, the signers themselves affixed the dates of signing, all of which were within the statutory period; the affidavits were filed within the thirty days; and there is also the presumption that the ordinary course had been followed. And finally it is not contended by respondent that the petitions were not signed within the statutory period by the requisite number of qualified electors; those facts are conceded. Under those circumstances we are satisfied that the petitions were adequate to require the City Council to proceed in accordance therewith.

In Chester v. Hall, supra, it was admitted that the requisite number of qualified electors had signed an initiative petition, but the clerk contended, in a mandamus proceeding, that the dates of signing had not been affixed by some of the signers but by some other person and were false, and that the petition was, therefore, void. The court said that the petition was apparently sufficient to enable the clerk to satisfy himself that the petitioners were qualified electors at the time they signed, and that as for those signers who did not affix the dates of their signing, it might logically be inferred that any such signature was made within the dates of signatures immediately preceding and following them; that it was possible that sections of the petition might have been prepared and signed at times other than the dates affixed, but that no attempt had been made to prove that such was the case. And it added that courts cannot base their decisions upon speculations contrary to the presumption that the ordinary course has been followed; that the manifest purpose of the law requiring the signers to affix their date of signing is to guard against signatures of persons who are not qualified electors; but that the pleadings admitted the signing by a sufficient number of qualified electors and that, under the circumstances, to hold the petition insufficient would be to follow the letter of the law in disregard of the spirit.

In Carter v. Green, 97 Cal.App. 564, 276 P. 120, the court held that where the officer whose duty it was to determine the sufficiency of the petition had found the same to be signed by the requisite number of qualified electors, the fact that the dates of signing were not affixed by them but by another would not render void the proceedings based thereon, though at that time section 1083a of the Political Code required signers to affix the dates of signing. In that case the clerk did not certify to the Board that the petition was signed by the requisite number of qualified electors; but in the case before us he did. The court said that the purpose of the requirement that signers give dates was to guard against signatures by persons who are not qualified electors at the time of signing. Also it said that where prerequisite facts exist and are established by sufficient proof, the duty of the Board to call an election is mandatory and may be compelled. Here the fact is conceded—at least not denied—that a sufficient number of qualified electors signed.

[3, 4] As hereinbefore stated, the portion of section 45 of the Elections Code requiring the affidavit of the solicitor to set forth the dates between which all signatures were secured by him, was added in 1943 and eliminated in 1945—which indicates that in the opinion of the legislature the inclusion of such matter in the affidavit was superfluous in view of the requirement that each signer himself affix the date of his signing. It must therefore be assumed that the legislature did not intend or consider that the omission of such matter from the affidavit should or would render otherwise valid petitions invalid, and thus defeat the right of referendum, which, after all, was the right of the people who signed said petition, and in whose favor, rather than that of the City Council, doubts should be resolved under the constitutional provision.

[5] Furthermore, while the Constitution, Art. IV, sec. 1, provides that each section of a petition shall have attached thereto the affidavit of the person soliciting signatures to the same, it further provides that in such affidavit there shall be stated the qualifications of the solicitor and that the signatures were made in his presence and that to the best of his knowledge and belief each signature is the genuine signature of the person whose name it purports to be, and that "no other affidavit thereto shall be required." The affidavits in the instant case contained all the matter required by this section, which is all that is required by section 1708 of the Elections Code; and even assuming that the legislature intended section 45 to apply to municipal referendums, the additional matter therein required to be stated in the affidavit was in excess of that required by the constitution, and violated the foregoing restriction. Doubtless for that reason said provision was repealed in 1945.

Respondents cite Wright v. Engram, 186 Cal. 659, 201 P. 788, and Conn v. City Council, 17 Cal.App. 705, 121 P. 714, 719, but we find nothing in those cases in conflict with the contentions of petitioners herein. All that the former case held was that the acts of the city clerk in determining the sufficiency of a recall petition were not judicial and that they were, therefore, not reviewable by writ of certiorari. In the Conn case a writ of mandamus was sought to compel the City Council of Richmond to fix a date for a recall election, the petition for the writ alleging that the petitions for the recall were sufficient and had been so certified to the Council. It was urged by respondent that some of the signers of the petitions had not signed their names in full, but had given only their initials, and that others had failed to add their places of residence giving street and number, and that they had thus failed to conform to requirements of the city charter, and for these reasons the petitions were insufficient on their faces to confer jurisdiction upon either the clerk or the council. But the court said that the petitions upon their faces in form and substance conformed to the spirit and letter of the city charter, and as there was no controversy before the council or elsewhere as to the sufficiency of the petitions the duty of the council was ministerial; and the clerk having submitted proper petitions together with his certificate as to their sufficiency it became the plain duty of the council to fix a date for the election. It is true that in the Conn case the Supreme Court, in denying a hearing, said that certain language of the opinion of the district court of appeal to the effect that the certificate of the clerk that the signatures to the petitions were genuine and sufficient to require the recall election was conclusive and controlling was not approved; that it did not appear that there was any evidence offered to impeach the accuracy of the clerk's certificate and the statement was not necessary to the decision; that signatures might be forged yet the petitions be supported by false affidavits or by a false certificate, in which cases the clerk's certificate would not be said to be conclusive. We do not find anything in that decision adverse to the position of petitioners herein.

[6] Regarding the contention of petitioners that section 45 of the Elections Code is not applicable to municipal referendums and was not intended to be so applicable, it finds strong support in the statutes themselves. Division 4, chapter 2, of the Elections Code is entitled "County and

Township Elections," and provides rules for the initiative and referendum in counties. Division 4, chapter 3, is entitled "Municipal Elections," and provides for the initiative and referendum in incorporated cities. The section thereof providing what the affidavits of solicitors for signatures to petitions in cities shall contain (sec. 1708) was codified in 1939 and was based upon an act of 1911 Ex.Sess., p. 131 (amended in 1915, ch. 155, p. 319, sec. 1) entitled "An act to provide for direct legislation by cities and towns, including initiative and referendum." The provision of the later measure regarding the affidavit to be attached to a referendum petition was the same as in the former. It is also identical with the requirement of section 1601 pertaining to counties. And it is significant that neither of these sections was changed in 1943 when section 45 was amended. This justifies an inference that it was always the intention of the legislature that the special provisions of Division 4, chapters 2 and 3, and not the general provisions of section 45, should apply to counties and cities. A like inference may be drawn from the fact that Article IV, section 1, of the Constitution in a separate paragraph provides that "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, * * * city * * * of the State to be exercised under such procedure as may be provided by law"; also from the provision in section 1723 that "This article does not apply to any State-wide initiative measure," which was enacted in 1939 (based upon former Pol.Code, sec. 1083d, second sentence, as added by Stats.1937, ch. 719, sec. 1, p. 2003).

[7] And the rule that specific provisions relating to a particular branch of a subject must govern that branch as against general provisions in other parts of a statute, is applicable here. See Turner v. Wilson, 171 Cal. 600, 606, 154 P. 2; Harrigan v. Home Life Ins. Co., 128 Cal. 531, 537, 538, 58 P. 180, 61 P. 99; Healy v. Superior Court, 127 Cal. 659, 662, 60 P. 428; King v. Armstrong, 9 Cal.App. 368, 371, 99 P. 527; Frandzen v. San Diego County, 101 Cal. 317, 321, 35 P. 897; Brill v. Los Angeles County, 16 Cal.2d 726, 732, 108 P.2d 443; Key System Transit Co. v. City of Oakland, 124 Cal.App. 733, 738, 13 P.2d 979.

In view of our conclusion that the petitions were sufficient and that the Council should have repealed the ordinance or submitted same to the voters as provided by law, it is unnecessary to determine whether the circulators thereof should have been permitted to amend their affidavits to include the allegations the omission of which the Council held was fatal to the petition. But it may be said in passing, that such contentions find support in Hinkley v. Wells, 57 Cal.App. 206, 207, 206 P. 1023.

It is ordered that a writ of mandate issue as prayed.

PEEK and THOMPSON, JJ., concur.



74 Cal.App.2d 56

CHILDERS v. CHILDERS.

Civ. 15214.

District Court of Appeal, Second District, Division 2, California.

April 17, 1946.

Rehearing Denied May 1, 1946.

Hearing Denied June 6, 1946.

1. Appeal and error ⇐846(5)

Where findings of fact and conclusions of law are waived, every intendment is in favor of the judgment and appellate court will assume that trial court found every fact essential to the support of the judgment, and findings will be implied in favor of the successful litigant on all of the issues raised. Code Civ.Proc. § 1959.

2. Appeal and error ⇐846(5)

Where a transcript of the evidence was before the appellate court, although findings of fact and conclusions of law were waived, appellate court would not indulge in an assumption as to the sufficiency of the evidence to support the implied findings, but question would be determined from an examination of the evidence itself. Code Civ.Proc. § 1959.

3. Appeal and error ⇐846(5)

Only where findings are waived and a transcript of the evidence is not furnished to the appellate court will it be assumed that the evidence supports such implied findings as are necessary to sustain the judgment. Code Civ.Proc. § 1959.

4. Courts ⇐92

Statements in opinions of Supreme Court that, where findings and conclusions were waived, court would presume that every fact essential to the support of the judgment was proved, was not binding on district court of appeal under the doctrine of stare decisis to the extent of assuming what facts were proved when the evidence was before the court, where such statements were unnecessary to the decisions.

5. Courts ⇐92

A fundamental rule of the doctrine of stare decisis is that a decision is not authority for what is said in the opinion but only for the point actually involved and actually decided.

6. Courts ⇐90(1)

The rule of "stare decisis" is a rule of public policy that for the preservation of harmony and the stabilization of the law the courts will ordinarily follow precedents when the same points arise in subsequent litigation, although they will not persist in an absurdity or perpetuate a manifest error.

See Words and Phrases, Permanent Edition, for all other definitions of "Stare Decisis".

7. Courts ⇐92

The statement of a principle not necessary to the decision is mere "dictum" and will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed.

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

8. Courts ⇐92

Expression of dictum is not binding on a court inferior to that which renders the decision.

9. Appeal and error ⇐903, 907(3)

When it is claimed on appeal that the evidence does not sustain the findings or judgment, the court will either examine the evidence if it is in the record, or assume its sufficiency if it is not, but will not resort to an assumption of evidence when the transcript is present.

10. Divorce ⇐130

Evidence as to conduct of defendant's husband was sufficient to sustain the implied finding that charges of cruelty were true, so as to support judgment awarding wife divorce on that ground.

11. Divorce ⇐286

Award of $100 per month permanent support for wife who had an infant child upon granting her divorce would not be disturbed where evidence established necessity for support and that husband's income was about $3,600 a year.

McCOMB, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Wilma Flora Childers against John E. Childers for divorce, wherein defendant filed a cross-complaint. From a judgment awarding plaintiff a divorce, defendant appeals.

Affirmed.

Prior opinion, 166 P.2d 601.

Courtney A. Teel, of Los Angeles, for appellant.

Harvey W. Guthrie, of Los Angeles, for respondent.

WILSON, Justice.

At the conclusion of the trial of this action, which was had before the court without a jury, findings of fact and conclusions of law were waived by both parties, whereupon an interlocutory judgment of divorce was awarded to plaintiff. Defendant has appealed on the judgment roll and a transcript of the evidence introduced at the trial. The only point raised is that the evidence is insufficient to sustain the findings that must be implied in support of the judgment.

[1, 2] 1. *Assumptions and implications when findings are waived.* Since findings

of fact and conclusions of law were waived every intendment is in favor of the judgment. It will be assumed that the trial court found every fact essential to the support of the judgment, and findings will be implied in favor of the successful litigant upon all of the issues raised by the pleadings. Gray v. Gray, 185 Cal. 598, 599, 197 P. 945; Miller v. Pacific Freight Lines, 40 Cal.App.2d 451, 453, 104 P.2d 1069; Green v. Darling, 73 Cal.App. 700, 703, 239 P. 70; Jensen v. Burton, 117 Cal.App. 66, 68, 3 P.2d 324. But since a transcript of the evidence is before this court the assumption goes no further, and we are not required to and we do not indulge in an assumption as to the sufficiency of the evidence to support the implied findings. The question will be determined from an examination of the evidence itself.

In two cases entitled Gordon v. Mount, 125 Cal.App. 701, 708, 13 P.2d 932, and Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421, it is said that where findings of fact and conclusions of law are waived "it is presumed* that every fact essential to the support of the judgment was proved and found by the court." [125 Cal.App. 701, 708, 13 P.2d 935] It is the word "proved" that gives rise to this discussion. In each of said cases the entire evidence was before the reviewing court; it was discussed and held to be sufficient to sustain the judgments in the respective cases. Since the evidence was adequate, it was not necessary to assume that sufficient facts were *proved* to support the implied findings or to sustain the judgment. The opinion in the Gordon case cites Gray v. Gray, supra, and the Bekins case cites the Gray and Gordon cases and Miller v. Pacific Freight Lines, supra, as authorities for the statement above quoted. The Gray case, in stating that upon the waiver of findings the presumption arises that the trial court found all facts necessary to support the judgment, cites Antonelle v. City Hall Comrs., 92 Cal. 228, 28 P. 270, and Bruce v. Bruce, 16 Cal.App. 353, 116 P. 994. In the Antonelle case findings were waived and the appeal was on the pleadings and judgment. In the Bruce case findings were waived and the evidence was not furnished to the appellate court. The Miller case states the same presumption as that in the Gray case and cites three cases: Stewart v. Langer, 9 Cal.App.2d 60, 61, 48 P.2d 758, High v. Bond, 107 Cal.App. 153, 154, 290 P. 145, and Benjamin Moore & Co. v. O'Grady, 9 Cal.App.2d 695, 698, 50 P.2d 847. In each of said three cases the evidence was taken up on appeal and the only presumption stated was that the trial court made all findings necessary to support the judgment. There was no reference to a presumption of evidence to sustain the implied findings. In both the Gray and Miller cases the only point raised was the sufficiency of the evidence to support the implied findings, and in each case the court discussed the evidence at length and held that it was sufficient. Neither the Gray nor the Miller case holds that any fact will be presumed to have been *proved.* Such a statement would have been uncalled for in view of the fact that the evidence in each case was found sufficient.

It thus appears that whatever was said in the Gordon and Bekins cases concerning a presumption of proof when the evidence was before the court was not only dictum but it has no foundation either in the decisions cited therein or in the cases which are referred to in the Gray and Miller opinions. None of the cases sustain the dictum.

[3] It is where findings are waived and a transcript of the evidence is not furnished to the appellate court that it will be assumed that the evidence supports such implied findings as are necessary to sustain the judgment. Credit Bureau v. Horeth, 60 Cal.App.2d 47, 49, 139 P.2d 962; Whitney v. Redfern, 41 Cal.App.2d 409, 413, 106 P.2d 919; Cuthbert Burrel Co. v. Shirley, 64

* The terms "presume" and "presumption" are deemed to have been used in the cases cited herein synonymously with "assume" and "assumption" and do not import presumptions defined in the Code of Civil Procedure. Section 1959. In practical effect it would be more accurate to say that the absence of findings or of evidence, or of both, from the record on appeal is a waiver of the right of the appellant to question their sufficiency.

Cal.App.2d 52, 54, 148 P.2d 85; Harmon v. De Turk, 176 Cal. 758, 761, 169 P. 680.

In 24 Cal.Jur. p. 956, sec. 194, and in other reference works, we find a repetition of the same presumption as that hereinbefore quoted from Gordon v. Mount and Bekins Van Lines v. Johnson. No distinction is made between the cases there cited in which the evidence was before the appellate court and those in which it was not. An examination of the citations will demonstrate that they support the text only when the evidence is not brought up on appeal, but have no relevancy when the appellate court has the evidence before it. We have already pointed out that in Gray v. Gray the evidence was taken up on appeal and no assumption was indulged as to whether it supported the implied findings, and that in Harmon v. De Turk, Antonelle v. City Hall Comrs., and Bruce v. Bruce, the appeals were on the judgment roll alone and both findings and evidence were assumed in support of the judgment. Likewise Green v. Darling, 73 Cal.App. 700, 239 P. 70, was appealed on the judgment roll alone. There was no mention of the sufficiency of the evidence. In each of the cases of Ibbetson v. Ibbetson, 52 Cal.App. 699, 199 P. 872, and Jensen v. Burton, 117 Cal.App. 66, 3 P.2d 324, implied findings necessary to sustain the judgment were held to be supported by the evidence which is set out in the opinions. In Dee v. Dee, 34 Cal.App. 658, 168 P. 588 findings were waived, the evidence was conflicting, and it was assumed that the court found all of the facts necessary to sustain the judgment. In Kritzer v. Tracy Engineering Co., 16 Cal.App. 287, 116 P. 700, the appeal was upon the judgment roll but there were no findings. Whether there was an actual waiver of findings was disputed. The court said that since every intendment is in support of a judgment it would be presumed that findings were waived.

The confusion seems to have arisen through the inadvertent addition of the words "proved and" in the Gordon case, with the erroneous citation of the Gray case which is not authority therefor, and the repetition of the same words in the Bekins case, which cites the Gordon case as authority. No assumption as to the evidence was necessary in either of those cases, because, as hereinbefore stated, it was in the record.

[4-8] The doctrine of stare decisis does not require us to follow those cases to the extent of assuming what facts were proved when the evidence is before us. It is a fundamental rule of that doctrine that a decision is not authority for what is *said* in the opinion but only for the points *actually involved* and actually decided. Norris v. Moody, 84 Cal. 143, 149, 24 P. 37; Hart v. Burnett, 15 Cal. 530, 598. The rule of stare decisis is a rule of public policy. For the preservation of harmony and for the stabilization of the law the courts will ordinarily follow precedents when the same points arise in subsequent litigation, although they will not persist in an absurdity or perpetuate a manifest error. There is no kinship between stare decisis and obiter dictum. Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum. Cardenas v. Miller, 108 Cal. 250, 252, 39 P. 783, 41 P. 472, 49 Am. St.Rep. 84. The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed, Brown v. Brown, 83 Cal.App. 74, 81, 256 P. 595; Hills v. Superior Court, 207 Cal. 666, 670, 279 P. 805, 65 A.L.R. 266; Laguna L. & W. Co. v. Greenwood, 92 Cal.App. 570, 574, 268 P. 699; Harris v. Industrial Acc. Com., 204 Cal. 432, 438, 268 P. 902, no matter how often repeated. W. B. Samuels & Co. v. Nelson County, 204 Ky. 490, 264 S.W. 1098, 1099. Expression of dictum is not binding on a court inferior to that which rendered the decision. City of Mountain View v. Farmers' Telephone Exch. Co., 294 Mo. 623, 243 S.W. 153, 157; Travelers' Ins. Co. v. Lancaster, Tex.Civ.App., 71 S.W.2d 318, 320; Arthur C. Harvey Co. v. Malley, 1 Cir., 61 F.2d 365, 366, affirmed 288 U.S. 415, 53 S.Ct. 426, 77 L.Ed. 866.

[9] When it is claimed on appeal that the evidence does not sustain the findings or judgment, there are two methods of ascertaining the answer: (1) To examine the evidence if it is in the record, and (2)

to assume its sufficiency if it is not. The court will apply one or the other of these methods but it will not resort to an assumption of evidence when the transcript is present. We may assume something to be true when there is no evidence one way or the other on the subject; but when there is positive evidence of the existence of a fact the judgment must be based on the evidence and there is no room for an assumption. There can be no assumption or presumption that a fact does not exist in the face of uncontroverted evidence to the contrary. The only reason for the affirmance of the judgment in this action is the sufficiency of the evidence, not an assumption as to what took place at the trial and not shown by the transcript.

2. *Sufficiency of the evidence to sustain the implied findings.* In support of the judgment findings must be implied that the charges of cruelty made by respondent were true, that she was entitled to permanent support in the amount awarded by the court, and that appellant had the ability to pay the same.

[10] The evidence as to cruelty is sufficient to sustain the implied finding thereon. Respondent testified that appellant attempted for a long period of time to keep their marriage secret; he introduced her under her maiden name; when they visited friends he asked her to remove her rings which were evidence that they were married; he never took her to places of amusement; he struck her several times and on two or three occasions grabbed her around the neck and choked her. Respondent's sister furnished corroboration for the latter acts of cruelty. Such evidence is sufficient to support the implied findings of appellant's cruelties. He offered nothing to the contrary, his testimony having been limited to their property and its value.

[11] The parties had been married less than a year when the complaint was filed. After the commencement of the action a child was born of the marriage who was eight months old at the time of the trial. In view of the age of the child and the necessity for its mother's constant attention to it, the implied finding of the necessity for the award of permanent support to respondent in the sum of $100 per month will not be disturbed.

The implied finding of appellant's ability to pay the amount awarded is sustained by the evidence. He was permanently employed in the United States Post Office Department; his annual income was shown to be approximately $3,600 from salary and rentals; during the marriage he had given respondent about $100 per month; in the year preceding the trial he had sold property (title to which he had taken in the name of his cousin) for about the sum of $1,000 above the purchase price after paying expenses of sale. After deduction for taxes and for his own living expenses he was still able to pay the amount required by the judgment. The amount awarded was not unreasonable.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, Justice (dissenting in part).

I concur in the judgment for the reason stated: that the evidence is sufficient to sustain the implied findings. But I do not subscribe to the conclusion reached in the main opinion under the heading (1) Assumptions and implications when findings are waived.

In spite of the language in certain earlier decisions to the contrary, it is my opinion that the Supreme Court has now established the law in California to be that where findings of fact and conclusions of law are waived by the parties, on an appeal from the judgment an appellate court will presume that every fact essential to the support of the judgment was (1) proved and (2) found by the trial court.

In Gordon v. Mount, (1932) 125 Cal.App. 701, at page 708, 13 P.2d 932, at page 935, Mr. Justice Plummer speaking for the District Court of Appeal says:

"Where findings are waived, it is presumed that every fact essential to the support of the judgment was *proved* and *found* by the court. (Gray v. Gray, 185 Cal. 598, 197 P. 945; 24 Cal.Jur., p. 956, and the cases there cited.)

"In support of the judgment, there being no findings in this case, we must hold that the court, notwithstanding the record shows want of probable cause and lack of reliance upon advice of counsel, that the testimony introduced in the cause did not justify the charge of malice, and the existence of malice being a question of fact, we are bound by the judgment of the trial court." (Italics added.)

In Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, at page 136 et seq., 130 P.2d 421, at page 422, Gordon v. Mount, supra, is cited with approval, the Supreme Court saying: "After the trial judge had ordered the judgment, findings of fact and conclusions of law were waived by written stipulation of counsel. On this state of the record every intendment is in favor of the judgment, and it is presumed that every fact essential to the support of the judgment was *proved* and *found* by the court. (Gray v. Gray, 185 Cal. 598, 197 P. 945; Miller v. Pacific Freight Lines, 40 Cal.App. 2d 451, 104 P.2d 1069; Gordon v. Mount, 125 Cal.App. 701, 13 P.2d 932; 24 Cal.Jur. p. 956, and cases there cited.) The applicable rule requires *the assumption that the proof showed* and that the *court found* and concluded that the services out of which the disputed tax arose were so much a part of the business of the plaintiff, were so customarily rendered in that connection, and so directly contributed to the transportation which was the plaintiff's principal business, that money derived therefrom must be regarded as part of the 'gross receipts from operations of said operator' and taxable as such." (Italics added.)

In Ibbetson v. Ibbetson, 52 Cal.App. 699, at page 702, 199 P. 872 at page 873, the court says: "Findings having been waived, the presumption is that every fact essential to the support of the judgment was *proved* and *found* by the court, and that accordingly the court found that there was no community property." (Italics added.)

It is apparent that the legal profession had understood the rule to be as just stated, for in 24 Cal.Jur. at page 956 appears this statement: "Where findings are waived it is presumed that every fact essential to the support of the judgment was *proved* and *found* by the court." (Italics added.)

Again, in 2 Bancroft's Code Practice and Remedies the rule is stated as follows: "Even in those jurisdictions wherein the court is required to make findings although not requested, findings may be waived, and if waived it is presumed in support of the judgment that every material fact was *proved* and *found*." (Italics added.) See also Vogel v. Marsh, 120 Cal.App. 99 at page 100, 7 P.2d 756; Gordon v. Mount, supra, 125 Cal.App. 701 at page 709, 13 P. 2d 932, and Jensen v. Burton, 117 Cal.App. 66 at page 68 et seq.,* 3 P.2d 324.

Such a rule appears to be fair and in consonance with the simplified pleading in this state. Should a litigant desire to question the sufficiency of the evidence he should request findings so that the trial court and opposing counsel may know that on appeal the sufficiency of the evidence to sustain the findings may be attacked; and in the event sufficient evidence has not been introduced to support a material finding of fact opposing counsel may request, or the trial court may direct, that the case be reopened and the parties given an opportunity to produce evidence to support a material finding, if they are in a position to do so.

In any event, the Supreme Court of the state has stated that where findings of fact are waived the presumption is that every fact was *proved and found* by the court. Hence this court is bound by the decision of the Supreme Court until such time as that court may disapprove or overrule its decision as set forth above. In re Estate of Mickelson, 37 Cal.App.2d 450 at page 453, 99 P.2d 687; Sawyer v. Sterling Realty Co., 41 Cal.App.2d 715 at page 724, 107

* The use of the words "presumed" and "presumption" in the cited cases is unfortunate and has had a tendency to cause confusion in the decisions. The true legal concept may be expressed accurately thus: When findings of fact and conclusions of law are waived, on appeal appellant will be deemed to have waived the right to urge either that (1) the evidence is insufficient to support implied findings of fact or, (2) the implied findings do not sustain the judgment.

P.2d 449; Chrisman v. Culinary Workers' Local, 46 Cal.App.2d 129 at page 132, 115 P.2d 553.

The law is established in California that where two independent reasons are given for a decision neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is of equal validity. (California Employment, etc. v. Municipal Court, 62 Cal.App.2d 781 at page 787, 145 P.2d 361, and cases therein cited.) Under this rule the statement of the Supreme Court in Bekins Van Lines Inc. v. Johnson, supra, was an independent reason for the decision and hence not dictum.

The result, therefore, in my opinion is that this court is bound by the decision of the Supreme Court, and that since the parties waived findings of fact and conclusions of law defendant may not urge before this court the insufficiency of the evidence to support the judgment.



In re LORING'S ESTATE.
Civ. 15040.

District Court of Appeal, Second District, Division 2, California.

April 17, 1946.

Rehearing Denied May 8, 1946.

Hearing Granted June 11, 1946.

1. Executors and administrators ⇐315(6), 513(9)

Decree on hearing of final account of executor and his petition for distribution of interests of beneficiaries of testamentary trust, wherein beneficiaries were not parties, was not res judicata of beneficiaries' subsequent claim that trust was invalid and that they had priority in receiving full benefits under trust.

2. Executors and administrators ⇐315(6), 513(9)

Decree, on hearing of final account of executor and his petition for distribution of interests of beneficiaries of testamentary trust, did not preclude beneficiaries from subsequently claiming that trust was invalid and that they had priority in receiving full benefits under trusts, on ground that they were represented at hearing by trustees, since a trustee does not represent any faction among his beneficiaries.

3. Executors and administrators ⇐315(6), 513(9)

Decree, on hearing of final account of executor and his petition for distribution of interests of beneficiaries of testamentary trust, was not binding on beneficiaries who were not parties on theory that proceeding was in rem and binding on all the world. Probate Code, §§ 1021, 1120.

4. Executors and administrators ⇐315(6)

Since the beneficiary of a testamentary trust may not petition for distribution, may not demand his benefits from the executor, and may not sue him, he is not bound by the decree of distribution.

5. Trusts ⇐140(1)

The beneficiary under a trust gains no advantage and receives no benefits until the estate is transferred by the decree of distribution to the trustee, and his rights thereafter are limited to compelling the execution of the trust by the trustee. Civ. Code, § 863.

6. Executors and administrators ⇐314(11)

If conditions within trust estate justify interposition of court's equitable powers, court will determine to whom property shall pass on termination of trust. Probate Code, § 1120.

7. Executors and administrators ⇐315(6)

A decree of distribution finally determines the terms and provisions of a trust as of the moment of its creation, but the decree is not conclusive as to contests which may subsequently arise among beneficiaries with reference to changed circumstances as to which no hearing has been had. Probate Code, § 1120.

8. Executors and administrators ⇐315(6), 513(9)

Decree, on hearing of final account of executor and his petition for distribution of interests of beneficiaries of testamentary

trust, did not estop beneficiaries, who were not parties to that proceeding, from thereafter demanding instructions to trustees. Code Civ.Proc. §§ 1908, 1910, 1911.

9. Courts ⇐200¼

A superior court sitting in probate has no equity jurisdiction aside from that granted by the probate code. Probate Code, § 1120.

10. Municipal corporations ⇐224

The phrase "municipal corporation", as used in statutory provisions that testamentary disposition may be made to "the state, to counties, to municipal corporations", etc., must, because the use of the phrase "the state" refer only to municipal corporations within the state. Probate Code, § 27.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Corporation".

11. Statutes ⇐181(2)

That interpretation of a statute must be given which will be consistent with reason and with practical, common sense. Civ. Code, § 3542.

12. Statutes ⇐193

The rule of "noscitur a sociis", as applied to a statute, requires that the meaning of a doubtful word is to be ascertained from the words which surround it.

See Words and Phrases, Permanent Edition, for all other definitions of "Noscitur a Sociis".

13. Trusts ⇐159

Town in Iowa could not take as trustee under California will. Civ.Code, § 3542.

14. Wills ⇐665

Beneficiaries of testamentary trust, by demanding such manner of division and payment of corpus of trust estate as may be consistent with law and decree of distribution, did not forfeit their rights under "in terrorem" provisions of will.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of George E. Loring, deceased. From an order directing the trustees under the will of George E. Loring, deceased, with reference to the distribution of the trust estate, the beneficiaries severally appeal.

Order reversed with instructions.

O'Melveny & Myers, of Los Angeles (Louis W. Myers and Pierce Works, both of Los Angeles, of counsel), for appellants Sarah M. Loring et al.

Tanner, Odell & Taft, for appellant Braille Institute of America, Inc.

Newlin & Ashburn and Paul Sandmeyer, both of Los Angeles, for appellant Town of Kingsley, Iowa.

MOORE, Presiding Justice.

The beneficiaries of a testamentary trust severally appeal from an order directing the trustees with reference to the distribution of the trust estate. Two of the beneficiaries are charities, the others are in the main heirs at law of the testator and will be referred to collectively as "Loring." The significance of the issues will appear after the facts have been intimately disclosed.

George E. Loring, having by his last will and three attached codicils directed the establishment of a trust for the temporary management and ultimate distribution of his estate, departed this life on November 18, 1939. His will was dated August 4, 1933, and the last of his codicils bore date of March 14, 1939. His estate, consisting of his spearate property, was appraised at $172,477.65. Costs of probate, expense of administration, debts, taxes and bequests paid and distributed aggregated $20,169.04, leaving $153,308.61 which was by order finally settling the account of the executors distributed to the trustees named in the will. The only bequests other than to the trustees were $1,000 to his widow, Ida L. Loring, and $1,000 to his sister Sarah M. Loring. He disinherited all heirs not specifically mentioned in his will. The beneficiaries of the trust were as follows: City or Town of Kingsley, Plymouth County, Iowa, herein referred to as Town; Braille Institute; Luella Bergstrasser, a niece, and her two sons; three nephews and four nieces. By the decree of distribution the trustees were required to give out of the earnings or corpus of the trust estate to Braille $10,000

and to Town $75,000. They were also directed to pay within five years out of the earnings or corpus to the several nieces and nephews a total of $21,000, and to Jane Loretta Johnston, a stranger to the blood, $5,000. After payment of all of the bequests above specified, the trustees were directed to give the residue and remainder of the trust estate to the sister Sarah M. Loring to have and to hold the same forever and thereupon to abolish the trust. The decree concludes with specific directions to Town as to the investment of its bequest. Such directions are not material to this discussion.

Some two weeks prior to the execution of his original will decedent effected a property settlement with his wife whereby she waived all rights to his property and acquitted it of all claims as an heir at law. After his death she made an agreement with the executors with the court's approval whereby she received property of the value of $34,232 and executed a "complete satisfaction in full and receipt in full and waiver of all her right, title and interest in and to the estate. * * *"

Less than three years after receiving the trust estate the trustees, on November 12, 1943, filed a petition for instructions in which they alleged that while the bequests aggregated $111,000 the total sum in the possession of the trustees was $56,807.38, and that no other funds would be received; that it would therefore be impossible to pay the bequests unless Town should not accept its gift under the conditions specified in the order of distribution, but that there were sufficient funds in the trust to make payment in full of all other bequests. They set forth the statutory provisions of Iowa pertaining to gifts to towns of that state for the purpose of establishing hospitals, but such statutes are without significance in view of our conclusions.

Separate answers were filed by (1) Town, (2) Braille, and (3) Loring. After a hearing on the petition and answers the court made findings and conclusions and entered its order directing that the two charities be paid "an amount equal to one third of the aggregate of the amount now available for distribution (less any future administration expenses) plus $11,123.06, which sum had been distributed during probate plus the amount, if any, of overpayment of Federal estate tax;" that of such distributable amount Town should receive 15/17 and Braille 2/17, but that from the sum distributable to Town "there should be deducted a sum equal to the California inheritance tax computed on the amount distributable to the Town of Kingsley, Iowa; the bequests of specific sums to individuals should be paid in full and the balance or residue distributed to Sarah M. Loring." The order concludes with specific directions to Town as to the fractional portions of its bequest to be applied to construction, furnishing and endowment.

Was the Decree of Distribution Final?

The charities contend that their bequests, having been fixed by the decree of distribution, cannot be reduced; that such decree having adjudicated the persons to whom the trust estate should be payable and the amounts payable to each, had become final long prior to the filing of the petition for instructions; that notwithstanding section 41, Probate Code, restricting charitable bequests to one third of testator's estate as against a spouse, sister, niece or nephew, it established the validity of the trust even though it might have been reversible on a timely appeal. In support of such contention they cite numerous California decisions: McGavin v. San Francisco Protestant Orphan Asylum Society, 34 Cal.App. 168, 167 P. 182; Estate of Scrimger, 188 Cal. 158, 206 P. 65; Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145; Crew v. Pratt, 119 Cal. 139; Estate of Easter, 24 Cal.2d 191, 148 P.2d 601; Cook v. Cook, 17 Cal.2d 639, 51 P. 38; McLellan v. McLellan, 17 Cal.2d 552, 110 P.2d 1034; Estate of White, 69 Cal.App.2d 749, 160 P.2d 204; Estate of Lingg, Cal.App., 162 P.2d 707; Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 146 P. 2d 962. These authorities hold that the decree of distribution supersedes the will and is conclusive as an ascertainment and adjudication of the terms of the trust and of the rights of all parties claiming any legal or equitable interest under the will (Estate of Easter, supra); that such de-

cree is a judgment in rem and although erroneous is as conclusive against one who fails to appear having the opportunity so to do, as it is against a party whose fault produced the error (McGavin v. San Francisco etc., supra, 34 Cal.App. at page 173, 167 P. at page 184); that it is conclusive as to the interpretation of the will and the rights of its legatees (Estate of White, supra); and that "as necessary to distribution, it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will." Estate of Scrimger, supra, 188 Cal. at page 165, 206 P. at page 68.

[1] In view of such explicit declarations, it would at first blush appear that the decree of distribution has forever disposed of the rights of all of the beneficiaries of the Loring trust and of the amounts payable to each of them by the trustees. But it is to be observed that section 1021 of the Probate Code provides that the decree of distribution must "name the persons and the proportions or parts to which each is entitled * * *." The quoted language clearly refers to those who are entitled to the assets of the estate under the decree of distribution. In the instant case the creation of the testamentary trust required the distribution to the trustees and to none other. This conclusion is emphasized by the language of the quoted section to the effect that the distributees may sue for and recover their respective shares from the executor. Certainly the beneficiaries of the testamentary trust could not have sued the executor. Therefore, they were not parties to the proceeding on the hearing of the final account of the executor and of his petition for distribution. This being so that decree is not res judicata of the claims asserted by the Loring answer whereby they for the first time raised the question of the validity of the trust and of their priority and precedence over the charities in the matter of receiving their full benefits under the trust. The decree of distribution is conclusive as to the rights of the heirs, legatees and devisees only to the extent that they claim in those capacities. It affects only parties legitimately before the court. It merely declares the title which accrues under the laws of succession or under the will. Chever v. Ching Hong Poy, 82 Cal. 68, 70, 22 P. 1081; Kingsbury v. Ross, 217 Cal. 484, 486, 19 P.2d 784; Parr v. Reyman, 215 Cal. 616, 619, 12 P.2d 440.

[2, 3] It remains that only under one possible theory were the beneficiaries parties to the distribution proceedings, to wit, that the trustees represented them at the time. But such cannot be successfully maintained in view of the principle that a trustee does not represent any faction among his beneficiaries. Hutchins v. Security Trust & Savings Bank, 208 Cal. 463, 467, 281 P. 1026, 65 A.L.R. 1059. The charities contend that a proceeding for a decree of distribution is in rem and therefore binds all the world. The answer to such contention is found in sections 1021 and 1120 of the Probate Code and in the language of the supreme court in Martinovich v. Marsicano, 137 Cal. 354, 359, 70 P. 459, 461. The latter case holds that the probate court in the proceedings for distribution has jurisdiction to distribute only the estate of which the decedent was possessed at the time of his death; that it can exercise such jurisdiction only over "the persons to whom the estate is to be distributed" and that it is "only these persons who can be affected by the notice, or required to give it any attention." Section 1021 declares that the decree of distribution "is conclusive as to the rights of heirs, devisees and legatees." Section 1120 provides that when a testamentary trust continues after distribution the superior court "shall retain jurisdiction for the purpose of determining to whom the property shall pass * * * upon * * * termination of the trust, to the extent that such determination is not concluded by the decree of distribution * * *."

[4-7] It follows that the beneficiary of a testamentary trust may not petition for distribution, may not demand his benefits from the executor, and may not sue him. He is therefore not bound by the decree of distribution. The beneficiary under the trust gains no advantage and can receive no benefits until the estate is transferred by the decree of distribution to the trustee.

His rights thereafter are limited to compelling the execution of the trust by the trustee. Civil Code, § 863. Having become a beneficiary under the testamentary trust he is thereupon entitled to appear in his own right before the court in the exercise of its equitable jurisdiction and assert his rights as "to whom the property shall pass * * *." From the language of section 1120 the legislature must have intended that if conditions within the trust estate itself should justify the interposition of its equitable powers the court will make such determination as "to whom the property shall pass." In the present action the changed circumstances dominate the entire arena. Not only had the value of the trust estate dwindled during administration to less than half of its appraised value, but the industry of the individual beneficiaries brought to light that under section 41 of the Probate Code the charitable bequests cannot "collectively exceed one-third of the testator's estate as against his * * * sister, nephew, niece * * * who would otherwise * * * have taken the excess over one-third * * *." Without such discovery it is not likely that a contest would have arisen. Also, it is a reasonable interpretation of section 1120 that it was intended that the decree of distribution finally determines the terms and provisions of the trust as of the moment of its creation, but that it is in no sense conclusive as to contests which might subsequently arise among beneficiaries with reference to changed circumstances as to which no hearing had been had.

[8, 9] The Loring heirs cannot by virtue of the decree of distribution be estopped from demanding instructions to the trustees. They were not parties to the proceeding prior to distribution. They created this controversy to enforce the proper distribution of the trust estate after the trustees had disclosed its intrinsic deterioration. Having no right to object to the creation of the trust or to the decree of distribution they cannot be considered to have been parties thereto. The parties to two proceedings are "deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case * * *." Code Civ.Proc. sec. 1910. Moreover, the subject matter of the instant proceeding was not "actually and necessarily included" in or necessary to the distribution proceeding. Code Civil Proc. sec. 1911. A former judgment "is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest * * * litigating for the same thing under the same title and in the same capacity * * *." Code Civil Proc. sec. 1908. The distinction between the instant proceeding and one in which the decree of distribution might have been successfully pleaded as a complete bar lies in this, that the essential purpose of this proceeding was to nullify the trust as to a beneficiary who is not authorized to take under a California will. Servente v. Murray, 10 Cal.App.2d 355, 359, 52 P.2d 270. The Loring legatees could not have made such demand at the distribution because they were not parties. The trustees could not have done so because they were non-partisan. Inasmuch as the identity of the issue and its determination are of paramount importance to the consideration of a plea of res judicata (Servente v. Murray, supra, 10 Cal.App.2d at page 361, 52 P.2d at page 273), it must follow that such plea in this proceeding is unavailing since the issue decided here contrary to the decree of distribution was not involved there. See English v. English, 9 Cal.2d 358, 364, 70 P.2d 625, 128 A.L.R. 467; Freeman v. Barnum, 131 Cal. 386, 63 P. 691, 82 Am.St.Rep. 355. In truth such equitable issue could not have been considered by the court sitting in probate, which has no equity jurisdiction aside from that granted by section 1120, Probate Code.

Town's Authorities.

The authorities cited by the charities with reference to the application of the doctrine of res judicata are thus distinguished: They expound the principle of the finality of a decree of distribution but they refer to situations where the devises who attacked the decree were parties to the precedent proceeding and no concealment of facts had caused the probate court to eliminate the possible reversionary interest designated in the will. See Miller v. Pitman, 180 Cal. 540, 182 P. 50. In none

of them is found a situation in which a testamentary trust estate underwent revolutionary intrinsic change prior to its dissolution. For instance, the McGavin case, 34 Cal.App. 168, 167 P. 182, was a direct action in equity to vacate the final decree of distribution on the ground of excusable neglect, whereas it was clearly not excusable. The action brought by the Society of California Pioneers, 63 Cal. App.2d 332, 146 P.2d 962, was for the purpose of impeaching the decree of distribution by reference to the will. Of course it is fundamental that the will is merged into the decree. The McLellan case, 17 Cal.2d 552, 110 P.2d 1034, raised the question as to whether the beneficiary was entitled to interest from the date of the death to the date of distribution. There the decree was held to be final with reference to facts which had occurred prior to the decree.

The Estate of Lingg, Cal.App., 162 P. 2d 707, is the most recent expression upon the subject but it adds nothing to the doctrines announced in the other cited cases. A settlement was agreed upon before distribution to which the widow and the residuary devisees and the beneficiaries were parties. They were estopped by the doctrine that when the court has incorporated a method of distribution by consent of heirs and devisees in its decree the consenting parties cannot complain on appeal that the decree ignored the terms of the will. Mrs. Lingg having consented to the decree was not permitted thereafter to object to it; and if she could not object to it her heirs were likewise estopped. That decision is not an authority making it obligatory upon Loring to have requested the court at the hearing of the executors' final account to reserve final distribution until the termination of the trust. Such reservation is made by the provisions of section 1120, so that any question arising from intrinsic changes in the trust estate may be equitably resolved at a subsequent date. Neither is it authority for the finality of the decree distributing the residue to the trustees. In the first place, it merely holds that such decree is "valid"; secondly, the discussion of that subject is outside of the issue presented by the appeal, to wit, whether a devisee may upset a decree to which she consented.

A Town in Iowa May Not Take Under a California Will.

[10, 11] Having demonstrated that the decree of distribution was not a limitation upon the power of the court in the exercise of its equitable jurisdiction to determine to whom the property shall pass and be delivered upon the termination of the trust, Probate Code, sec. 1120, we now advert to the Loring contention that the trial court erred in directing the payment of any funds to Town. There is no statutory provision for a testamentary devise to any state other than California. Section 27, Probate Code, provides that a testamentary disposition may be made "to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations * * *. No other corporation can take under a will unless expressly authorized by statute." If Town can take under the will of decedent it must take as a municipal corporation. That it cannot do so is rendered clear by a close scrutiny of the quoted section and its companion provisions. If "the state" refers to California, as clearly it must, then the municipal corporations mentioned in the section must refer to the municipal corporations of California. The legislature could not reasonably have intended by the phrase "the state" to mean "a state," for the latter phrase might be reasonably construed to mean any established government on earth. It is unthinkable that the lawmakers would have thus legislated. If then the language of section 27 implies an inhibition against a bequest to another state it would be unreasonable to conclude that a bequest might be made to a political subdivision of another state. Such interpretation of a statute must be given as will be consistent with reason and with practical, common sense. Civil Code, sec. 3542; Kipp v. Billingham, 217 Cal. 527, 530, 20 P.2d 318; Martin v. Gibson, 48 Cal.App.2d 449, 451, 119 P.2d 1012.

[12] Another guide to the interpretation of the statute is the rule of noscitur

a sociis. That rule requires that the meaning of a doubtful word is to be ascertained from the words which surround it. Fox v. Hale & Norcross Silver Mining Company, 108 Cal. 369, 426, 41 P. 308. In view of the fact that a state is territorially composed of counties and municipal corporations the reference in section 27 to municipal corporations must mean those existing within the state of California. Under the rule of ejusdem generis the general words "municipal corporations" following the word state must refer to things of the same kind—that is to say, cities within the state of California—and not to a city of any other state or country.

These constructions are supported by the legislative history of section 27. It was first enacted in 1872 as section 1275 of the Civil Code. At that time no corporation was permitted to take from a California testator unless especially authorized by statute so to do. In 1873 the section was amended so that corporations "formed for scientific, literary or solely educational purposes" might take under such will. (Amendments to the Codes, 1873–74 p. 275.) In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept * * * any gift, bequest and devise. * * *" Stat. 1881, p. 2.) In 1903 section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a California will. Stats. 1903, p. 258. In 1905 the section was further amended to permit counties and municipal corporations to take under a California will, subject to the provisions of section 1313, the antecedent of section 41, Probate Code. Stats. 1905, p. 605. Neither statutory provision nor court decision has been suggested that would indicate whether the counties and municipal corporations added by the amendment of 1905 referred to those of California alone or to those of other states. But the Loring heirs have suggested that the code commissioner's note to the amendment of 1905 was that the legislature intended the municipal corporations included by the amendment of that year to refer to those of California only. Such suggestion rises to the dignity of an argument in the light of the fact that the code commissioner in submitting section 27 of the Probate Code to the legislature of 1931 directed that body's attention to the commissioner's note of 1905 for a construction of the newly proposed section. While it does not necessarily follow that the note of a code commissioner has the potency or effectiveness of a statute, at the same time the fact that the attention of the legislature was called to such construction lends force to the deduction that it was their intention to permit or authorize bequests to municipal corporations of the state of California only and not to those of another state. It was not until the Probate Code was adopted in 1931 that "the state" was added to the list of entities privileged to take under a California will. So far as has been shown, the practical effect of the addition of "the state" in the statute was to emphasize the construction which was theretofore reasonably deducible, to wit: that only the municipal corporations of California might take under a California will. It cannot be gainsaid that the right of this state to take under a California will was ever open to question, for being all-powerful in its domestic concerns its right and its power to receive a bequest could be questioned by no one. See Kubach Co. v. McGuire, 199 Cal. 215, 217, 248 P. 676.

The foregoing leads us to observe that the interpretation herein placed upon section 27 is further fortified by the inherent indisposition of any sovereign state through its lawmaking agencies to authorize the transfer of its wealth to the coffers of another state or government. Its needs and its own selfish interests impel it to conserve and perpetuate the wealth that is developed within its borders, and they also forbid an interpretation of section 27 to the effect that neither a sovereign power outside of California nor any of its constituent subdivisions may take from a California testator.

Town cites effective authorities (Estate of Yule, 57 Cal.App.2d 652, 135 P.2d 386; Estate of Halm, 196 Cal. 778, 239 P. 307; Estate of Sloane, 171 Cal. 248, 152 P. 540; Estate of Robinson, 63 Cal. 620; Estate of Coleman, 167 Cal. 212, 138 P. 992, Ann.

Cas.1915C, 682) and contends that they furnish precedents for the validity of the bequests to it. But with the exception of the Robinson case each of them involved a charitable bequest to a charitable institution. In Estate of Robinson a bequest of $40,000 had been made to "the Mayor, Common Council and Commonalty of the City of San Francisco" in trust to be used for the destitute women and children of that city. By the decree of distribution the money was distributed to the trustees named by the testator although they were designated in the amended decree as "the mayor and Board of Supervisors of said City and County." Town argues that Robinson made a bequest to a municipality prior to the amendment which allowed bequests to political subdivisions. The record of that case discloses that there was in fact no gift to the city but, on the contrary, to its executive and legislative officers as trustees for the destitute class named in the will. The court did "not understand appellants [residuary legatees] to claim that the court below erred in substituting the legal appellation of the municipality in question for that employed by the testator, but their claim is that the bequest itself is void because prohibited by statute." In fact the name of the city was not substituted for that of the testamentary trustees. While the city was not named as trustee either by the will or by the amended decree of distribution, the Supreme Court was evidently drawn into a discussion of the right of a city to take under a will by the learned brief of the residuary legatees, who maintained that "the city of San Francisco was expressly prohibited by statute from receiving a legacy or bequest." They traced the law supporting their thesis to England's Statutes of Mortmain, to the Magna Charta, and to other celebrated statutes of England of later periods on the hypothesis that the bequest had been made to the city. But the authorities were not pertinent and the argument was irrelevant. The selection of the "mayor and common council" as trustees of the fund for charity was clearly not a gift to the city but merely the designation of trustees who would remain under the jurisdiction of the California courts and whose whereabouts could always be promptly ascertained. The court's discourse upon the constitutionality of trusts "for perpetual charitable uses" was not related to the issue of the validity of the trust and should have been omitted.

[13] Were the superior court to distribute money or other personalty of this state to a town of Iowa as trustee of a charitable bequest what control would the court have over a faithless or neglectful trustee? The question illustrates a distinguishing feature of the Loring will as contrasted with that of Robinson. However severe in its practice of honesty and fair dealing the town of Kingsley might be, and of that no doubt is entertained, section 27 in effect inhibits a testamentary disposition to a town outside of this state and that spells finis for the bequest to Town.

Beneficiaries Not Disinherited by This Contest.

[14] Town contends that by reason of their appearances in this proceeding the heirs forfeited their rights under the will. It is true that the testator provided that any heir of a legatee who shall seek to establish "any claims to my estate or any part thereof, excepting under this will * * * I give and bequeath to such person or persons the sum of One Dollar and no more. * * *" But such stricture is not applicable. No one attacked the will. The trustees asked for instructions more than two years after the estate had been distributed. All beneficiaries appeared, demanding such manner of division and payment of the corpus of the estate held in trust as they deemed consistent with law and the decree of distribution. Every one stands squarely upon what he deems to be a valid construction of that decree. For a beneficiary under a testamentary trust to seek an interpretation of a final decree of distribution and diligently to serve the court in its labors to ascertain the true meaning of such decree does not give cause to apply to him the testator's restrictive clause. The legatees' efforts herein in that behalf do not therefore work a forfeiture of their rights under the decree. Es-

tate of Brisacher, 27 Cal.App.2d 327, 330, 80 P.2d 1033; Estate of Harrison, 22 Cal. App.2d 28, 41, 70 P.2d 522.

In view of the foregoing it is unnecessary to discuss the other points raised. The nullity of Town's bequest leaves sufficient funds to pay all sums specified in the court's order to Braille and to the individual legatees named, leaving a respectable sum for the residuary devisee.

It is therefore adjudged that the order appealed from be and it is reversed and the court is directed to require the trustees of the George E. Loring trust at the proper time to pay nothing to Town but to pay all other legacies as specified in the decree of distribution and any excess to Sarah Loring, the residuary legatee.

McCOMB and WILSON, JJ., concur.



74 Cal.App.2d 150

In re McGIVERN'S ESTATE.

MARTIN v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13065.

District Court of Appeal, First District, Division 2, California.

April 25, 1946.

1. Wills ⇐82

A will, executed by person having testamentary capacity and not acting under undue influence, cannot be invalidated solely on ground that its provisions are unnatural, unreasonable, unjust, unfair, improper, or even cruel, but unnaturalness thereof may be considered in determining whether testator was competent or will was his free and voluntary act.

2. Wills ⇐82

A testatrix' grandniece was not natural object of testatrix' bounty, so that failure of will to mention such relative did not tend to prove testatrix' incompetency as showing that will was unnatural.

3. Appeal and error ⇐928(4)

Appellant must show at whose request criticized instructions to jury were given by trial court, and otherwise appellate court must assume that they were given at appellant's request.

4. Wills ⇐166(2)

A will, bequeathing substantial portion of testatrix' estate to a Catholic priest for benefit of Catholic church, was not invalid on ground of his undue influence over testatrix, in absence of evidence that he or any one in his behalf exercised any pressure on testatrix' mind or that he knew will was being executed, discussed subject thereof with testatrix or used any influence to procure execution of will or legacy to him.

5. Wills ⇐166(7)

Mere proof of a testamentary beneficiary's opportunity to influence testator's mind, though coupled with an interest or motive to do so, will not sustain finding of undue influence invalidating will, in absence of testimony showing pressure operating directly on testamentary act.

6. Wills ⇐1

A testator may leave his property to any one he sees fit or to charitable or religious institution, and his relatives' consent to such disposition is unnecessary to rebut inference of undue influence arising from will itself.

7. Appeal and error ⇐231(1), 273(3)

The reviewing court will not consider appellant's assignments of trial judge's misconduct prejudicial to appellant, in absence of specific objection or exception thereto in trial court.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Proceeding by the Bank of America National Trust & Savings Association, executor under the will of Katherine A. McGivern, deceased, and others for probate of the will, contested by Blossom Martin. From an adverse judgment, contestant appeals.

Affirmed.

Walter H. Hewicker, of Bakersfield, for appellant.

Thos. J. Riordan and Eugene H. O'Donnell, both of San Francisco, for respondents Rev. Thomas Byrne and Bank of America etc.

Albert T. Roche and Charles A. Sweigert, both of San Francisco, for respondent Coleman.

Charles F. Craig, of San Francisco, for respondents Larkins.

NOURSE, Presiding Justice.

The contestant of a will appeals from the judgment entered on a jury verdict against her on the count of unsound mind and from the order granting a nonsuit on her count of undue influence.

Katherine McGivern (a single woman) was a retired school teacher at the time of her death on November 27, 1943. She died as the result of injuries incurred when she was struck by an automobile October 23, 1943. Her last will and testament executed on June 15, 1935, was admitted to probate on December 27, 1943. It provided that the Bank of America act as executor; that it act as trustee of her property and pay her half-sister, Elinor Quivey, $50 a month for life; after her death the trustee was to pay legacies to her housekeeper and her two named cousins and give the residue to Father Thomas Byrne (administrator of her parish) to "be disposed of by him in accordance with my wishes heretofore expressed to him, although * * * it is not my intention to create any trust. * * *" The will further provided that if Elinor Quivey predeceased the testatrix the same legacies should be paid and the residue should go to Father Thomas Byrne "to be disposed of by him in accordance with my wishes. * * *" The will made no mention of Blossom Martin (contestant) who was a grandniece by half blood of the testatrix or of Frank Quivey, Elinor Quivey's brother. The will was admitted to probate and Blossom Martin contested on the grounds of unsound mind and undue influence charged to Father Byrne. Frank Quivey assigned his interest to Mrs. Martin. At the trial the following facts were shown:

Testatrix had been a school teacher in San Francisco from 1898 to her retirement in July, 1936. She had been principal of various schools and in 1928 was appointed principal of the Alma school. She remained at this position until her retirement in July, 1936. In 1933 she received an "above average" efficiency report. She took an active part in the school savings program and in parent teacher activities until her retirement. Several months prior to June 15, 1935, she notified the Bank of America she wished to make a will as she was planning a trip to Europe. She went to attorney A. T. Roche, gave him instructions and he drafted the will. She called at his office and he read the will to her. They went to the Bank of America and the will was executed with Roche and Mr. Farber as witnesses. That evening testatrix left on an eleven weeks' vacation in Europe. She wrote letters to her friends describing the voyage. After her return she continued her work as principal of the Alma school until July, 1936, when she retired.

Both Roche and Farber testified that the testatrix was fully competent at the time of the execution of the will. The companions of testatrix on her European trip affirmed her sanity and rationality. Father Byrne testified that he had not talked with testatrix about her affairs any more than with his other parishioners. Testatrix had not expressed any wish to him as to what should be done with her property, although just before she left on her trip she told him she was naming him as executor. He told her she could not do that as priests were not allowed to mix in family affairs in any way. He testified that he did not know attorney Roche until after the death of Miss McGivern when Roche wrote and told him about the will.

Contestant testified that she and testatrix were in San Jose during Mrs. Quivey's last illness. As she walked into the room she heard testatrix, "saying to my mother that she was going to change lawyers because Father Byrne was dissatisfied with the lawyer that she had then, and that he was going to take her to his lawyer and that she was going to make a will, and she asked my mother for some papers." Mr. O'Conner testified that in 1937 testa-

trix opened an account with the Bank of America and made various purchases of stock. He found her competent and with a keen mind.

On June 9, 1936, testatrix qualified as administratrix of her brother's estate and handled its affairs. When she was hit by an automobile in October, 1943, she was sent to St. Mary's Hospital and remained there until her death. In November her cousin, Sarah Larkin, filed a petition to be appointed guardian because of the need to pay the nurses and hospital expenses. When the petition was shown to testatrix "She was very antagonistic to the word 'incompetent' * * * and that is why we never went through with it." She died before the petition was heard.

[1] Appellant's first assignment of error is: "The Court Committed Error in Instructing the Jury That a Will Cannot be Upset Even Though in the Opinion of the Jury It Is Unnatural." Several instructions on "unnaturalness" were given (at whose request it does not appear) and those instructions state the law correctly. Thus we find the following:

"If you find from the evidence in this case that Katherine A. McGivern had testamentary capacity at the time of the execution of her will, you cannot invalidate her will, even though you believe that the provisions thereof are unnatural, unreasonable or unjust, irrespective of her reasons or motives for making such disposition of her property."

Again, "A person of sound mind may select such objects of her bounty as she prefers. The fact that you disagree with her choice, and think her selection unfair, cannot invalidate her will. You are not authorized to overturn a will merely because its dispositions do not conform to your notions of justice or propriety."

The portion of the instruction upon which appellant relies must be read with the entire instruction which is: "A will cannot be upset because in the opinion of a jury it is unnatural. The jury are instructed that as a matter of law one has a right to make an unjust will, an unnatural will, an unreasonable will, or even a cruel will. The real question at issue always is, is the will the spontaneous act of a competent testatrix. If it is, it should be sustained. The right to dispose of one's property by will is most solemnly assured by law and is a most valuable incident to ownership and does not depend upon its judicious use."

The instructions on the issue were sound and they are supported by ample authority. In Estate of Higgins' Estate, 156 Cal. 257, 265, 104 P. 6, 10, the supreme court said: "And where the will makes an irrational or unnatural disposition of property, this is a circumstance to be considered in determining the state of mind of the testator. But, *If there be no defect of testamentary capacity,* a will is not to be upset because its provisions may seem to the court or the jury to be unreasonable, unnatural, foolish, or unjust. In re Wilson's Estate, 117 Cal. 262, 277, 49 P. 172, 711; In re McDevitt's, Estate, 95 Cal. [17], 33, 30 P. 101." (Emphasis added.) A concise statement of the rule involved in these instructions is that if the maker of a will is of sound mind, and was not acting under undue influence, his will cannot be invalidated *solely* on the ground that the court or jury believes it to be unnatural, but that "unnaturalness" is an element, or circumstance, which may be considered in determining whether the maker was competent, or whether the will as executed was his free and voluntary act.

[2] These instructions were followed by a correct enumeration of the relationships which the law recognizes as natural objects of a person's bounty. Since the contestant herein was a grandniece of the testatrix she was not within the group of natural objects of the bounty of deceased and her effort to prove the incompetency of deceased on the ground that the will was "unnatural" was abortive.

On the issue of contestant's claim to be a "natural object" of decedent's bounty this court, in answer to the same argument as that raised here, in Re Estate of Nolan, 25 Cal.App.2d 738, 742, 78 P.2d 456, 458, said: "The expression 'natural objects' of the testator's bounty has reference to the descendants, surviving spouse, and parents of the testator, who, purely by reason of relationship, may be assumed to have had

claims upon his bounty. 25 Cal.Jur. p. 695. Nephews, nieces, brothers, sisters and other collateral heirs, are not, because of such relationship alone, natural or normal objects of bounty. [In re] Estate of Easton, 140 Cal.App. 367, 377, 35 P.2d 614; [In re] Estate of Jacobs, 24 Cal.App.2d 649, 76 P.2d 128. In Re Estate of Finkler, 3 Cal.2d 584, 597, 46 P.2d 149, it was held that nephews and nieces of a predeceased spouse, though heirs at law, were not the natural objects of the bounty of the testator."

[3] It is a settled rule of our appellate procedure that the appellant must show at whose request criticized instructions were given. Otherwise an appellate court must assume that they were given at his request. Leenders v. California Hawaiian, etc., Corp., 59 Cal.App.2d 752, 759, 139 P.2d 987; 2 Cal.Jur. 870. For this reason appellant is in no position to attack any of the instructions given, but, since they are a correct statement of the law we prefer to rest our holding on that ground rather than the technical one of procedure.

[4, 5] Appellant argues that it was error to grant the motion for nonsuit on the second count charging undue influence. As evidence of undue influence on the part of Father Byrne appellant states that he was merely a casual acquaintance known to her "only as the ordinary parishioner knows her priest." But there is no evidence that Father Byrne, or any one in his behalf, exercised any pressure upon the mind of the testatrix, that he knew that the will was being executed, that he at any time discussed the subject of the will with the testatrix, or that he used any influence at any time to procure the execution of the will, or the legacy to him. Viewing the entire evidence in the light most favorable to the appellant the sum and substance of it is that Father Byrne received a legacy of a very substantial portion of the estate, presumably for the benefit of the Roman Catholic Church, of which the deceased was a devoted member, but that he knew nothing about the will or the legacy until after deceased's death, and that he took no part in its execution. It is the settled rule that: "Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act. Estate of Langford, 108 Cal. 608, 41 P. 701; [In re] Estate of Carithers, 156 Cal. 422, 105 P. 127." In re Estate of Kilborn, 162 Cal. 4, 11, 120 P. 762, 765.

In Re Estate of Morcel, 162 Cal. 188, 195, 121 P. 733, 735, the Supreme Court, in speaking of the quantum of proof necessary, said: "And it must also be borne in mind that a mere suspicion that undue influence *may* have been used is not sufficient to warrant the setting aside of a will on that ground. [In re] Estate of Keegan, 139 Cal.[123], 127, 72 P. 828. The evidence against the will must 'do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator.' In re McDevitt's Estate, 95 Cal. 33, 30 P. 106. 'In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.' Estate of Langford, 108 Cal. 623, 41 P. 705."

The record here discloses that if the opportunity to influence the testatrix existed it was not employed and appellant's argument rests upon the shallow theory that because someone has been made a substantial bequest he must have used undue influence upon the testatrix.

[6] The right of a testator to leave his property to any one he sees fit, or to a charitable or religious institution cannot be denied. Nor is the consent of his relatives to such disposition necessary to rebut any inference of undue influence arising from the will itself. But here there are no facts which would remotely support an inference of undue influence. Granting to the appellant the benefit of the most favorable view of the evidence on the issue of undue influence, the conclusion necessarily follows that there was no evidence upon which any inference could rest—noth-

ing but suspicion which might excuse some of the jurors in voting to reject the will because of their antipathy or prejudice against the Church which was the beneficiary of the gift.

[7] Finally appellant argues that she was denied a fair trial because of the bias and prejudice of the trial judge. The error is asserted for the first time on the appeal and we cannot understand why counsel for appellant has raised it. More than seventy instances of misconduct or prejudice are cited in the brief and in not one of these instances did counsel raise the point in the trial court. It is a well known and well settled rule of procedure that in the absence of a specific objection or exception made in the trial court where the error might have been cured by an explanation or instruction the reviewing court will not consider assignments of misconduct. People v. Osborn, 12 Cal.App. 148, 150, 106 P. 891; 2 Cal.Jur. pp. 234, 281; 4 C.J.S., Appeal and Error, § 288, p. 558.

However, in fairness to the trial judge we should add that we have examined the numerous assignments and find nothing to justify the charges of misconduct. At the most the trial judge displayed some impatience because of the tedious conduct of counsel for appellant in their repetitious examination of witnesses on wholly irrelevant and inconsequential matters. We find nothing in his conduct of the trial which indicates any bias or prejudice against the appellant.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

74 Cal.App.2d 339

PEOPLE v. ERICKSON.

Cr. 3984.

District Court of Appeal, Second District, Division 2, California.

May 1, 1946.

1. Criminal law ⇐1023(12)

An appeal would not lie from order denying defendant's application for probation, and an order denying defendant's motion to rehear his application for probation was not an order after judgment from which a defendant could appeal, but was equivalent to a second denial of his original application. Pen.Code, § 1237.

2. Criminal law ⇐998

Where a judgment has been regularly pronounced and is not void on its face, the court is thereafter without authority to set it aside except in mode provided by law, such as motion for a new trial or appeal. Pen.Code, § 1182.

3. Criminal law ⇐1023(12)

In absence of exceptional circumstances, a defendant who had right to appeal from judgment of conviction and failed to exercise that right would not be permitted to move to set judgment aside and then appeal from the order denying his motion. Pen.Code, § 1182.

4. Criminal law ⇐982

Statement of defendant's counsel upon argument of motion to rehear application for probation that she wished "the motion to show * * * that defendant at this time, after judgment has been pronounced is seeking under a motion in arrest of judgment and a motion to set aside the judgment, in the spirit of a motion for new trial," was properly disregarded as a vain effort to induce court to rule on questions that had been waived by failure to raise them at the proper time. Pen.Code, §§ 1182, 1185.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Frank E. Erickson was convicted of a violation of Section 288 of the Penal Code, and he appeals from denial of his motion to rehear application for probation and to set aside the judgment.

Appeal dismissed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was convicted of a violation of section 288 of the Penal Code. He filed an application for probation which was heard by the court and denied. He was then sentenced to San Quentin for the period prescribed by law. Thereafter he presented a motion to rehear his application for probation. After argument the motion was denied. Appellant appeals from the denial of his motion (1) to rehear probation and (2) to set aside the judgment. These are non-appealable orders.

[1] There is no appeal from an order denying probation. People v. Bartley, 12 Cal.App. 773, 775, 108 P. 868; People v. Felix, 58 Cal.App.2d 646, 650, 137 P.2d 472. The order denying appellant's motion to rehear his application for probation is not an order made after judgment from which a defendant may appeal, Penal Code, § 1237, but is equivalent to a second denial of his original application.

[2] Appellant did not give notice of a motion to set aside the judgment, but if the statement of his counsel hereinafter mentioned may be considered as such it should have been denied. When a judgment has been regularly pronounced and is not void on its face, the court is thereafter without authority to set it aside except in the mode provided by law, such as motion for a new trial or appeal. People v. Munger, 119 Cal. App. 725, 726, 7 P.2d 195; People v. Ramirez, 139 Cal.App. 380, 381, 33 P.2d 848. Appellant did not make application for a new trial before judgment, Penal Code, § 1182, and he has not appealed from the judgment.

[3] Unless exceptional circumstances exist (which are not present in this case) a party who has the right to appeal from a judgment and fails to exercise that right is not permitted to move to set it aside and then appeal from the order denying his mo-

tion. People v. Carkeek, 35 Cal.App.2d 499, 503, 96 P.2d 132; People v. Simpson, 41 Cal. App.2d 526, 527, 107 P.2d 262; People v. Bowles, 135 Cal. App. 514, 516, 27 P.2d 411.

[4] The statement of appellant's counsel upon argument of the motion to rehear probation that she wished "the motion to show * * * that the defendant at this time, after judgment has been pronounced, is seeking under a motion in arrest of judgment and a motion to set aside the judgment, in the spirit of a motion for a new trial," was a vain effort to induce the court to rule on questions that had been waived by failure to raise them at the proper time. Motions are not made in spirit but must be made in fact and within the time provided by statute. Penal Code, §§ 1182, 1185.

The appeal is dismissed.

MOORE, P. J., and McCOMB, J., concur.



74 Cal.App.2d 223

JONES v. GREEN.

Civ. 12951.

District Court of Appeal, First District, Division 2, California.

April 29, 1946.

1. Attorney and client ⇐76(1)

Court's power to permit withdrawal of an attorney rests within its sound discretion.

2. Appeal and error ⇐966(2)
Continuance ⇐12, 20(1)

The granting or refusing of a continuance on account of illness or absence of counsel rests largely, if not wholly, in discretion of trial court, and such discretion will not be reviewed unless it is clearly abused.

3. Attorney and client ⇐76(1)

Where attorney for defendant in paternity case, after hearing on order to show cause for temporary support, concluded that client's case was a lost cause in absence of additional evidence and that it would be a waste of client's money to pay counsel fees to contest the trial and sought a discharge from client, court, on day of trial, did not abuse discretion in granting attorney leave to withdraw.

4. Bastards ⇐67

Where hearing on order to show cause for temporary support in paternity case disclosed that defendant did not have a meritorious defense, and defendant was given ample notice of time of trial and of desire of his counsel to withdraw, and defendant at time of withdrawal of his counsel indicated that he could not pay new counsel and declined opportunity given him to seek out his lodge brothers for advice, refusal of a continuance upon withdrawal of counsel was not an abuse of discretion.

5. Attorney and client ⇐76(1)

The phrase "ceases to act as such," as used in code section providing that, when an attorney ceases to act as such, party for whom he was acting as attorney must be required by adverse party by written notice to appoint another attorney or appear in person, contemplates that notice be given when attorney ceases to practice as an attorney rather than when he ceases to act as an attorney in a particular piece of litigation. Code Civ.Proc. § 286.

See Words and Phrases, Permanent Edition, for all other definitions of "Ceases To Act As Such".

6. Bastards ⇐65

Evidence supported judgment finding defendant to be father of infant plaintiff and directing him to support such infant. Code Civ.Proc. § 2055.

7. New trial ⇐101

Evidence available to defendant at the time of trial does not warrant a new trial on the grounds of newly discovered evidence.

8. Bastards ⇐65

In paternity case by infant, where there was testimony that defendant lived with plaintiff's mother from a period before conception to time of plaintiff's birth, evi-

dence that defendant during such time had another room where he lived part of the time did not disprove paternity.

9. Infants ⇐82

Where mother of infant plaintiff was appointed guardian ad litem and, during trial, judge remarked that a guardian ad litem should be appointed in her place and indicated that infant's aunt was proper person to appoint, judgment appointing aunt "guardian of the person and property" of infant but which did not contain any provision removing mother as guardian ad litem was a nullity, leaving original guardian ad litem in office. Probate Code, § 1440 et seq.

10. Infants ⇐80(3)

Irregularity in appointment of guardian ad litem for infant plaintiff in a paternity action did not vitiate judgment, since, even in absence of a guardian ad litem, a judgment recovered on behalf of an infant is not void.

11. Infants ⇐82

Mother of infant plaintiff in a paternity action, if incapacitated, could be removed as guardian ad litem and some other competent person substituted for her entirely within control of trial court subject to code section requiring mother's nomination or consent to such appointment unless mother is incompetent. Civ.Code, § 196a.

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Action by Beverly Jones, a minor, by Terissa Jones, her guardian ad litem, against Clinton Green, to establish paternity and compel support. From an adverse judgment, defendant appeals.

Modified and affirmed.

Edward D. Mabson, of San Francisco, for appellant.

Milton Marks and Morris Lowenthal, both of San Francisco, for respondent.

GOODELL, Justice.

Terissa Jones, the mother and guardian ad litem of Beverly Jones, an infant, brought this action under sec. 196a, Civ. Code, against the appellant, claiming that he is Beverly's father and should therefore be compelled to support the child.

Terissa was married to one Sam Jones in Tennessee but she has not seen him for many years. Plaintiff alleged, and it is an undisputed fact, that she and appellant never have been married.

At the trial appellant was not represented by counsel. His present attorney came in after judgment and made a motion for a new trial.

The appellant's principal contention is that the court abused its discretion in proceeding with the trial when he had no lawyer. Because of this contention the history of the litigation and the lengthy proceedings prior to trial are of importance.

An order was issued requiring the defendant to show cause why he should not support the child pending the litigation. The defendant promptly filed his answer denying paternity, and the matter of temporary support came on for hearing before Judge Harris on June 16, 1944. The answer had been drawn by an experienced lawyer, who represented appellant at all the hearings for temporary support and continued as his counsel until the morning of trial. There were about six hearings, culminating in an order pendente lite, made by Judge Harris on July 17, 1944 directing appellant to pay $10 a week. The plaintiff later caused a garnishment to be levied on appellant's employer, but it yielded nothing. There has been no compliance whatever with the order.

Counsel for respondent claim there was an understanding that on the order to show cause the entire matter would be gone into so that a trial (in all but a technical sense) could be obviated. Appellant's former counsel did not admit this, but the fact remains that the case was extensively presented by both sides at the hearings. That they amounted to "practically a trial of the case" was stated at the trial by appellant's former counsel. At the hearings a number of witnesses were examined on the question of paternity, about eight on plaintiff's side, and two or three on defendant's. The transcript of the first day's hearing shows that the mother (who came into court with

Beverly in her arms) testified that she met appellant on Easter Sunday, in April of 1942; that he came to live with her at her home on Broad Place, in San Francisco, where they slept together and where they continued to live until she moved to Willow street in June of 1942; that he moved her belongings from the old to the new location, and lived there with her until the baby was born, which was on January 31, 1943. The transcript shows that she testified that when she was pregnant appellant made no claim that the child was not his, and that after she returned from the hospital "he said that he knew he did not do right * * * he was coming home and do right"; "he said he was going to do all he could for me and the baby". She also testified as shown by the transcript that when she returned from the hospital appellant had departed and that "Every time I asked him for money, he claimed he did not have it." After he absented himself, when she saw him on the street he would "turn and go some other way". When Beverly was about six months old the appellant told Terissa "the kid wasn't his'n" and repeated it, and when she asked why not, the only reason he gave was that "The kid did not have hair like him". Terissa's cross-examination was confined to but three subjects, none of which materially weakened her direct testimony as to her relations with appellant: (1) that when she had alleged in the complaint that "ever since the month of February, 1941" until the child's birth she and appellant lived together, she had been mistaken as to the date, for when she arrived in San Francisco she had been pregnant for about eight months with another baby born in February, 1942, who lived but a few days; (2) that the father of this deceased baby was in Tennessee and was neither Jones nor appellant; and (3) that she had been confined to the Sonoma State Home for awhile.

In January, 1945, the case was set, and thrice re-set, for trial. On January 9 appellant's former lawyer sent him, registered, a lengthy letter stating that the plaintiff and her attorney were insisting on a trial and that it had been set for the 10th, but he had obtained a postponement to the 17th. He reminded him that he had told him at several conferences that Judge Harris' decision on the order to show cause "was a strong indication of what would be the ultimate outcome of the trial of the case upon the same evidence." In the letter he continued: "In other words, the case was practically tried once before Judge Harris" and "I told you then, and I now repeat, that unless there is available to you evidence which was beyond our reach or not known to us at the time * * * it is practically a foregone conclusion that another judge trying the same issues upon the same evidence would inevitably find as did Judge Harris. I say again to you that I feel that it would be a waste of time and money on your part to contest this matter further, unless, of course, you are possessed with additional strong evidence to establish that some other person is the father of the child." He concluded by saying he would be reluctant to accept a fee to further defend the case because of his doubt that he "could be of material assistance", and asked for an immediate answer. On the 22d the attorney wrote appellant another registered letter, as lengthy as the first, stating that the case had been on that morning's calendar for trial and that the presiding judge in again continuing it—to the 29th—had stated that the trial "would have to proceed at that time * * * or a default judgment [would be] entered against you." He then advised him as to the consequences of a default judgment, including possible criminal proceedings. He stated "that without more evidence * * * I see no chance of your prevailing" and that he did "not feel that even if you had the money you should spend it for counsel fees for what seems to be a lost cause." He concluded by saying he wished to withdraw as attorney, and enclosed a form of consent which he asked appellant to sign.

On January 29, 1945 the case was assigned to Judge Schonfeld for trial. Appellant was there, as was the attorney who had represented him from the outset. Plaintiff's attorney was present but the guardian ad litem—the baby's mother—was not. Appellant's attorney expressed his desire to withdraw from the case and explained the steps he had taken to obtain ap-

pellant's consent in writing. The letters of January 9 and 22, both of which appellant received, went into evidence. Appellant's former counsel stated that the matter had been thoroughly heard before Judge Harris, before whom "There was practically a six-day trial on it", and that any judge trying the case would, in his judgment, reach the conclusion already reached, that appellant was the father; that he could not accept any further fee and that appellant's case was "a lost cause in the face of the evidence already presented. * * * I thought it foolhardy to proceed further. * * *" He stated that at the hearing appellant had admitted having had intercourse with Terissa on two occasions within ten months prior to the baby's birth. He also stated that appellant when the case was first in court had told him that he had certain witnesses to prove that Terissa had been consorting with soldiers and sailors, but that he had been unable to give the names of any. This the appellant admitted.

The judge, the record shows, took ample time and displayed patience and consideration. The matter occupied all morning and a good part of the afternoon. The judge read to appellant excerpts from the letters of January 9 and 22 to assure himself that appellant understood their contents. He asked appellant if he wanted to get in touch with his lodge brothers (Colored Elks) or other friends, looking to his further representation, but was given negative answers. Appellant said he intended to do "whatever your Honor sees fit to do, go ahead and do it; I am not going to take care of the child. I am not working." This last he repeated, adding, "You can put me in jail." To this the judge replied, "It is not up to me. * * * It is entirely up to you. * * *" The appellant reiterated, "I am not going to support the child; it ain't mine. I am going to leave it up to you." With respect to his counsel he said: "Let him withdraw, then. He said he couldn't do me any good. I told him he needn't go any further and waste time if he could not do me any good. * * *" And later: "There is no use to go any further." The discussion moved back and forth without making much headway and the judge finally announced that the attorney could withdraw from the case. The attorney remained in the courtroom, however, until after appellant had testified at the trial.

To appellant's statement, "I thought I was going to have another trial" the judge replied, "You can have another trial today." Appellant responded, "I am here. They told me last week to be here Monday morning." To the judge's question, "Are you ready to go to trial?" appellant answered, "Sure I am ready to go to trial", and when asked if he had an attorney he answered, "I haven't got anything. An attorney can't work for nothing."

At the trial proper the transcript of the first day's hearing on the order to show cause, containing Terissa's testimony already summarized, was introduced in her absence. Appellant was then called under sec. 2055, Code Civ.Proc., and *admitted that he had had intercourse with Terissa on Easter Sunday 1942.* Terissa's aunt named Gertrude Plousha then testified that appellant had lived with Terissa for almost a year—from April, 1942, to the time of the baby's birth, had slept in the same bed with her, had kept his clothes there and had taken his meals there, which, of course, fully corroborated Terissa's testimony already narrated. The aunt testified, further, that appellant had made admissions to her and to the rest of the family that he was the baby's father.

When appellant was recalled to the stand and questioned respecting his earning capacity he answered, "I can't work. They garnisheed my pay." He said he worked only at odd jobs, waxing automobiles and "free-lancing automobile washing."

The judge made the same award as that made on the order to show cause, i. e. $10 a week, and ordered judgment accordingly.

[1] The appellant does not question the proposition that the court's power to permit the withdrawal of an attorney rests within its sound discretion, but claims that here the court's action in permitting such withdrawal was an abuse of discretion, and, further, that the court sua sponte should have granted appellant a reasonable continuance to procure other counsel.

[2] It is well established "that the granting or refusing [of] a continuance on account of the illness or absence of counsel is a matter which rests largely, if not wholly in the discretion of the trial court, and such discretion will not be reviewed unless it is clearly shown to have been abused". 5 Cal.Jur. 970, 982, 984; In re Estate of McCarthy, 23 Cal.App.2d 395, 73 P.2d 913; Corbin v. Howard, 61 Cal. App. 715, 215 P. 920; 12 Am.Jur. 455, 456.

[3, 4] We have given a rather detailed summary of the circumstances of the instant case, and it is not necessary to repeat or enlarge on them. It is sufficient to say that instead of showing any arbitrary action on the part of the trial judge, they show that he dealt with the matter with deliberation, patience and consideration. One of the factors in such a case is whether or not there is a meritorious defense. See 5 Cal.Jur. 982, § 12 and Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 585, 84 P. 47, 113 Am.St.Rep. 308. In the instant case there was not only no suggestion of a meritorious defense, but the showing before the court indicated that had a continuance been granted, new counsel obtained, and a full trial had, there would have been simply a repetition of what was "practically a six-day trial" on the order to show cause. In a case such as this, before a plaintiff can obtain an order for temporary support for the child paternity must be proved, and to do this might well take as much time and effort as would have to be expended on a trial on the merits. As was said in Anrade v. Newhouse, 54 Cal.App.2d 339, 346, 128 P.2d 927, 931, "It is practically equivalent to the necessity of two complete trials on the paternity issue." The appellant was not abandoned; he had been given timely notice that the presiding judge was insisting on the case going to trial and the trial judge offered him the opportunity of getting in touch with lodge brothers or other friends respecting his defense, but appellant said he was ready to go to trial, and indicated that he had no money wherewith to employ another attorney. He had told the court emphatically that he did not propose to obey the order already outstanding. We find no abuse of discretion in the trial court's action.

[5] The appellant claims that the provisions of sec. 286, Code Civ.Proc., are applicable and mandatory in this case, but it was definitely held in De Recat Corporation v. Dunn, 197 Cal. 787, 242 P. 936, 938, 42 A.L.R. 1342, that notice must be given under that section, not when an attorney "ceases to act as such" in a particular piece of litigation, but when he ceases to practice as an attorney.

Linn v. Superior Court, 79 Cal.App. 721, 250 P. 880, 881, relied on by appellant holds nothing to the contrary. There the petitioner sought a writ of mandate directing the superior court to permit his withdrawal as attorney in a pending action. In denying it the court said, "We have not, however, been referred to a case, and our research has discovered no case, in which it has been held that it is an abuse of discretion or the arbitrary exercise of discretionary power for the court to permit counsel to withdraw, nor have we been referred to a case in which it has been held that counsel has the unqualified right to withdraw." The court concluded, however, on the facts of that case, that if the motion to withdraw had been granted irreparable injury might have been done to *third* parties. "It is undoubtedly true", the court said, *"that, in the great majority of instances the attorney should be permitted to withdraw,* but * * * not * * * if his withdrawal will work injustice upon a third party." (Emphasis ours.)

[6] There is no merit in appellant's contention that the evidence is insufficient to support the judgment. At the trial the 28-page transcript of the first day's hearing on the order to show cause was introduced in evidence. This transcript contains the testimony of the mother earlier summarized. Then the appellant was examined under sec. 2055 and he made the admissions already referred to. Thereafter the aunt was examined, and gave the corroborative testimony to the effect that Terissa and appellant had lived together from April, 1942, until the birth of the baby on January 31, 1943, and that he had admitted to her

and to other relatives of Terissa that he was the father.

[7, 8] The appellant's motion for a new trial on the ground of newly discovered evidence was properly denied. The record shows that evidence that appellant had another room in San Francisco during at least part of the time from April, 1942 to January, 1943 was available at the hearings and apparently was laid before the court during the hearings. In any event the fact that he maintained two establishments would not disprove paternity.

[9-11] A statement made during the trial, that the guardian ad litem had been confined to the Sonoma State Home for a while doubtless gave rise to the remark by the judge that a guardian ad litem should be appointed in her place and he indicated that Gertrude Plousha, her aunt, was the proper person to appoint. The judgment, however, does not contain any provision removing Terissa Jones, who had been regularly appointed such guardian ad litem (at which time the court found her competent), and, furthermore, it purported to appoint Gertrude Plousha "guardian of the *person and property*" of the minor. The judge had suggested a new *guardian ad litem* only. The attempted appointment of a general guardian was irregular for the additional reason that it did not conform to the requirements of sec. 1440 et seq., Probate Code. This irregularity, however, in no way vitiates the judgment, for even in the absence of a guardian ad litem a judgment recovered on behalf of a minor is not void. 13 Cal.Jur. p. 206, § 53; Foley v. California Horseshoe Co., 115 Cal. 184, 47 P. 42, 56 Am.St.Rep. 87. The purported appointment of a general guardian was a mere nullity which left the original guardian ad litem in office. If she is incapacitated she may be removed and Gertrude Plousha or some other competent person substituted for her. 13 Cal.Jur. 207, § 54; In re Cahill, 74 Cal. 52, 15 P. 364. This lies entirely within the control of the court, Estate of Hathaway, 111 Cal. 270, 43 P. 754, except that § 196a, Civ.Code, requires the mother's nomination or consent to such appointment unless she is incompetent.

The court is directed to modify the judgment by striking therefrom the paragraph numbered 5 reading: "That Gertrude Plousha is a relative of plaintiff Beverly Jones and is a competent and responsible person to become the guardian of the person and property of said infant," and likewise the paragraph reading: "It is further ordered, adjudged and decreed that Gertrude Plousha be and she hereby is appointed guardian of the person and property of said Beverly Jones."

As so modified the judgment is affirmed, respondent to have her costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.



NEFF v. NEW YORK LIFE INS. CO.

Civ. 14944.

District Court of Appeal, Second District, Division 1, California.

April 26, 1946.

Hearing Granted June 24, 1946.

1. Appeal and error ⇐919

On appeal from a judgment for defendant entered after objection to the introduction of evidence was sustained on the ground that complaint failed to state a cause of action, reviewing court was required to assume truth of all allegations of complaint.

2. Insurance ⇐629(1)

Complaint, alleging that insured became totally and permanently disabled from tuberculosis, that insurer fraudulently represented that insured was not entitled to disability benefits and disclaimed liability, and that insured relied upon such representation, as did insured's widow after insured's death, stated a cause of action on contract.

3. Limitation of actions ⇐104(1)

A fraudulent concealment of the facts upon the existence of which cause of action

accrues is a good answer to plea of statute of limitations.

4. Limitation of actions ⇐104(1)

Insurer's alleged concealment from insured and his widow of right to disability benefits was concealment of a fact, the existence of which was essential to cause of action, which prevented the running of limitations, and alleged concealment was not excused by fact that insured was in possession of policy.

5. Insurance ⇐11

When an insurer undertakes to explain meaning of its policy, it owes a duty to insured to do so accurately and truthfully, and, when an insurer varies the language of a policy in rejecting a claim, it does so at its own peril.

6. Limitation of actions ⇐99(1)

Where policy provided disability benefits if insured became wholly disabled by bodily disease so that he would presumably be permanently and continuously prevented from engaging in any occupation and insurer rejected a claim based upon insured's tuberculosis on ground that proof did not indicate that insured was prevented thereby "for life" from pursuing some gainful occupation, on which representation insured and his widow relied, representation tolled running of limitations, so that action brought by widow's administrator within nine months after widow's death was timely. Code Civ.Proc. § 337, subd. 1.

7. Insurance ⇐11

Insurer has a duty of good faith in dealing with insured.

8. Limitation of actions ⇐104½

The period of statutes of limitation may be extended or tolled by causes not mentioned in the statutes themselves.

9. Limitation of actions ⇐179(1)

Facts pleaded by administrator of widow of deceased insured concerning insurer's rejection of claim under policy for disability benefits during insured's life, using language other than that contained in policy together with facts set forth in offer of proof, unless controverted, were sufficient to raise an estoppel and toll statute of limitations. Code Civ.Proc. § 337, subd. 1; § 338, subd. 4; § 353.

10. Limitation of actions ⇐179(1)

Allegations that insured was induced to change his position with reference to his rights under policy by reason of statements and conduct of insurer, that such statements were untrue, and that by reason of acts and conduct of insurer insured suffered prejudice, were sufficient pleading of equitable estoppel.

11. Insurance ⇐11

Under the rule that no one has a right to complain because another has placed too great reliance upon truth of what he himself has stated, an insured is not required to assume that insurer will mislead him.

12. Limitation of actions ⇐100(11)

The fact that means of knowledge of fraud are open to a party does not necessarily start running of limitations, and it is only when circumstances are such that inquiry becomes a duty that the failure to make inquiry becomes a negligent omission for which discovery of fraud is chargeable in advance of actual knowledge.

13. Limitation of actions ⇐13

Where delay in commencing action is induced by conduct of offending party, such party cannot take advantage of the statute of limitations as a defense.

14. Estoppel ⇐56

An estoppel may arise where a party has been induced by another to refrain from using such means or taking such action as lay in his power and by which he might have retrieved his position and saved himself from loss.

15. Estoppel ⇐53

An estoppel may arise although there was no designed fraud on part of person sought to be estopped.

16. Insurance ⇐146(3)

While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, they must do so in light of primary function of insurance to insure, and, when claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by John V. Neff, administrator with the will annexed of the estate of Arthur V. Neff, deceased, against the New York Life Insurance Company to recover disability benefits to which decedent was allegedly entitled at time of his death and for other relief. From a judgment for defendant entered after an objection to the introduction of any evidence was sustained on the ground that complaint failed to state a cause of action, plaintiff appeals.

Reversed and remanded for a new trial.

Hunter R. Skinner and C. P. Von Herzen, both of Los Angeles, for appellant.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent.

WHITE, Justice.

This action was brought by appellant as administrator of the estate of Arthur V. Neff, deceased, seeking to recover the amount of certain disability benefits to which said decedent was allegedly entitled at the time of his death under the terms of an insurance policy, and also the amount of the annual premiums on the policy which the decedent paid during the last ten years of his lifetime.

The action went to trial upon plaintiff's second amended complaint, general demurrers to the prior complaints having been sustained. Defendant did not demur to the second amended complaint, but filed an answer thereto, denying the allegations as to fraud, and mistake and pleading that the purported causes of action were barred by the statute of limitations: Subdivision 1 of section 337; subdivision 4 of section 338; and section 353 of the Code of Civil Procedure.

At the commencement of the trial, and after the first witness was sworn, defendant interposed an objection to the introduction of any evidence, on the ground that "the second amended complaint shows on its face that the alleged causes of action are barred by the Statute of Limitations" and consequently fails to show any cause of action. The objection was sustained and judgment for defendant entered. Plaintiff has appealed from the judgment.

From the first cause of action in the second amended complaint, it appears that in 1926 insured was totally disabled by tuberculosis of both lungs. On or about April 1, 1927, insured presented due written proof in accordance with the requirements of the policy "that he had, on said December 1st, 1926, become wholly and presumably permanently disabled by bodily disease, and that said proofs informed defendant he was then and would presumably continue to be prevented from engaging in any occupation whatsoever for remuneration or profits, and that such a disability had by said April 1st, 1927, existed continuously for more than sixty (60) days before date of such proofs; and at said time and place, the said insured requested the defendant to provide for him and pay to him such benefits as he may have been entitled to under the terms of said policy." In said complaint it is further alleged "That the defendant, New York Life Insurance Company, on or about May 7th, 1927, fraudulently, unlawfully and with the intent to deceive and defraud the said insured, represented to the said insured that he was not entitled to any benefits under said policy by reason of the disability from which he was then suffering and fraudulently, wrongfully and unlawfully disclaimed any and all liability under the disability benefits of said policy on the ground that it did not appear to the defendant that the plaintiff was 'permanently, continuously and wholly prevented thereby, for life, from pursuing some gainful occupation'; that the said insured believed the fraudulent, unlawful and wrongful representations pertaining to said policy, and the rights of the said insured thereunder, and relied until the date of his death, upon the statements and representations of the defendant with respect thereto, and was thereby prevented from making any further claims and from receiving any benefits thereunder at any time during his lifetime. That at the time of said representations and statements by the defendant, as aforesaid, and thereafter during the life of the said insured, the defendant well and truly

knew the condition of the said insured and nature and character of the disability from which he suffered, which said disease and disability was total and presumably permanent within the meaning of said policy of life insurance, and that said statement and representation on the part of the defendant were made with the intent to deceive the insured, and to enable the said defendant to withhold the disability benefits to which the said insured was then and thereafter entitled, and that said insured was actually deceived thereby, and believed that said statements and representations were true and correct. That in truth and in fact said policy did not contain any requirement that the insured must show that the disability from which he was then suffering would permanently, continuously, and wholly prevent the said insured *for life,* from pursuing some gainful occupation, and the defendant well and truly knew that such wrongfully required proof could not possibly be furnished during *his* lifetime." In said second amended complaint it is further alleged that insured's widow (who was beneficiary of the life insurance provided for by the same policy, and who was sole beneficiary and executrix named in the will of insured) likewise relied upon and believed defendant's fraudulent representation made to her after the death of insured in 1937, that no disability benefits had accrued under the terms of said policy, and by such fraudulent misrepresentation and concealment of the liability of defendant under the correct interpretation of said policy, she was induced to surrender said policy of insurance to defendant upon receiving credit for the life benefit, and, believing defendant's representation that insured was entitled to no disability benefits under said policy, she failed to offer insured's will for probate or to press the claim of his estate for such disability benefits. She died April 1, 1943. In March, 1943, during her last illness, plaintiff (who is the son of insured and his said widow) discovered correspondence had between insured and defendant in 1927, which caused him to inquire as to the existence of the instant cause of action. December 10, 1943, some nine months after the plaintiff's discovery of the facts allegedly constituting such cause of action, the complaint was filed.

[1, 2] On the instant appeal, we are required to assume the truth of all allegations of the complaint, which undoubtedly states a cause of action on contract. Neither subdivision 4 of section 338 nor section 353 of the Code of Civil Procedure can be applied, but, as contended by respondent, the time limited by subdivision 1 of section 337 ordinarily would have commenced to run against each annual instalment as it became due under the disability benefit clause of the policy, from the year 1928 to 1937, respectively.

[3] Appellant calls our attention to cases holding that "a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations." Kane v. Cook, 8 Cal. 449; Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 66 Cal.App.2d 376, 380, 152 P.2d 501.

[4] Respondent's argument that insured's condition was known to him and could not have been concealed by the insurer is beside the point. From the complaint, it clearly appears that the insurer concealed from the insured and his widow the fact that disability benefits had accrued under the terms of the policy of insurance. That was a fact the existence of which was essential to the cause of action. Such alleged concealment is not excused by the fact that the insured was in possession of the policy. Menk v. Home Ins. Co., 76 Cal. 50, 14 P. 837, 18 P. 117, 9 Am. St.Rep. 158; Vierra v. New York Life Ins. Co., 119 Cal.App. 352, 6 P.2d 349.

The front page of the policy herein sued upon (a copy of which is attached to the second amended complaint) provides that defendant will pay to the insured $300 per annum "during the lifetime of the insured, *if the insured becomes wholly and permanently disabled* before age 60, subject to all the terms and conditions contained in section 1 hereof"; and section 1 (in the fine print on the inside of the policy) provides that said benefits shall be paid when the in-

sured "has become wholly disabled by bodily * * * disease so that he is and will be *presumably* thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit. * * *." (Emphasis added.)

[5, 6] From the second amended complaint, it clearly appears that the insured presented to the insurer proof of disability which he believed would, and which, as alleged, if true, did in fact meet the requirements of the policy and entitle the insured to disability benefits. It is alleged that respondent, in refusing to make the payments requested by the insured, departed from the language of the policy and attempted to explain its meaning to the insured. The complaint alleges that the insured understood from such explanation that the policy required proof that the insured *was* disabled for his entire life and not merely that *presumably* he was so disabled. Such interpretation of the policy, it is alleged, was erroneous. That it was first adopted by respondent (not the insured) is shown by the allegations of the second amended complaint that insured presented due proof of disability as required by the policy, that respondent rejected his claim on the ground that it did not appear from that insured *was* "permanently, continuously and wholly prevented thereby, *for life,* from pursuing some gainful occupation." (Emphasis added.) When an insurer undertakes to explain the meaning of its policy, it owes a duty to the insured to do so accurately and truthfully (Morrison v. Mutual L. Ins. of New York, 15 Cal.2d 579, 588, 103 P.2d 963), and when an insurer varies the language of a policy in rejecting a claim, it does so at its own peril. It would be palpably unjust to permit an insurer to take advantage of the insured's delay in bringing action when such delay as is alleged herein was occasioned by the fraudulent and misleading statements of the insurer. Bonacci v. Massachusetts Bonding & Ins. Co., 58 Cal.App.2d 657, 666, 137 P.2d 487. Such alleged erroneous interpretation of a policy and statements respecting the rights of the insured may amount to fraudulent concealment of a fact upon the existence of which the cause of action accrues, and if so, tolls the running of the statute of limitations until the death of the insured's widow and successor in interest on April 1, 1943. The instant action was filed December 10, 1943, well within the period provided by subdivision 1, section 337, of the Code of Civil Procedure, if the insured's widow had a cause of action at the time of her death.

[7] In the instant action it is alleged that the insured presented his claim for disability under the terms of the policy, in that he had become "wholly disabled by bodily * * * disease so that he is and will be *presumably* thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit * * *." (Emphasis added.) In rejecting the insured's claim the insurer did not predicate such rejection on the ground that the proofs submitted did not establish the fact that the insured would be "presumably" permanently disabled, but on the ground that the insurer interpreted the policy to mean that before the insured was eligible for benefits thereunder it must appear to the satisfaction of the insurer that the insured *"will be"* (not presumably) "permanently and continuously and wholly prevented thereby, *for life,* from pursuing some gainful occupation." Had the insurer rejected the insured's claim on the ground that he would not, under the language of the policy, be *"presumably"* permanently disabled, there can be no doubt that under the statute of limitations his action would be barred. But the insurer did not do that. Instead it proceeded to interpret the policy as requiring not presumptive evidence of permanent disability, but evidence satisfactory to the insurer that the insured would in fact be "prevented thereby *for life* from pursuing some gainful occupation." Nothing is said in the policy about disability for life, it provided only that satisfactory proof that the insured would "presumably" be permanently disabled would suffice to entitle him to benefits. Had it not been for the allegedly incorrect interpretation put upon the terms of the policy by the insurer, the representations the insured and his widow

after his death might have taken the necessary steps to establish his or her rights under the policy as they understood its terms; but through the company's alleged representations the insurer and his widow were led to believe that proof that he was "presumably" permanently disabled was insufficient and that proof was required to show that he "will be permanently, continuously and wholly prevented" by his affliction from pursuing some gainful occupation "for life." The second amended complaint alleges that such proof could not be furnished by the insured at any time during his life. The object and purpose of the contract being insurance or indemnity against disability, the courts in construing the rights and duties of the parties thereto should strive to effectuate that purpose. The case before us involves an insurer whose duty of good faith in dealing with the insured is well established. See 13 Appleman, Insurance Law and Practice, § 7386, p. 37; Vance on Insurance (1930) 74.

[8] With reference to statutes of limitation, it might be observed that they are not so rigid as they are sometimes regarded, and the period of such statutes will be extended or tolled upon the occurrence of certain events. As was said in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 411, 154 P.2d 399, 406: "It is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. Braun v. Sauerwein, 10 Wall. 218, 77 U.S. 218, 223, 19 L.Ed. 895; Collins v. Woodworth, 6 Cir., 109 F.2d 628, 629. It is settled in this state that fraudulent concealment by the defendant of the facts upon which a cause of action is based (Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39) or mistake as to the facts constituting the cause of action (Davis, etc., Co. v. Advance, etc., Works, Inc., 38 Cal.App.2d 270, 100 P.2d 1067; see 16 Cal.Jur. 505) will prevent the running of the period until discovery."

[9, 10] Respondent earnestly insists that appellant has not successfully pleaded an estoppel. Bearing in mind the duty owed by the insurer to the insured when the former undertakes to explain the meaning of the policy and the peril attaching to the insurer when in making such explanation it varies the language of the policy, we are persuaded that the facts pleaded in the second amended complaint and set forth in the offer of proof, unless controverted, were sufficient to raise an estoppel and toll the statute of limitations. Morrison v. Mutual L. Ins. of New York, supra, 15 Cal.2d at pages 588, 589, 103 P.2d 963; Bollinger v. National Fire Ins. Co., supra, 25 Cal.2d at page 411, 154 P.2d 399. Principles of equity and justice are controlling here and require that the second amended complaint be heard on its merits. The allegations of the second amended complaint set forth that the insured was induced to change his position with reference to his rights under the policy by reason of the statements and conduct of the insurer; that such statements were untrue, and that by reason of the acts and conduct of the insurer the insured suffered prejudice. This was sufficient to set in motion the doctrine of equitable estoppel.

[11, 12] We have examined the cases of Fleishbein v. Western Auto S. Agency, 19 Cal.App.2d 424, 427, 65 P.2d 928; Cohen v. Metropolitan Life Ins. Co., 32 Cal.App. 2d 337, 347, 89 P.2d 732, and other cases relied upon by respondent, and are impressed that nothing therein contained militates against the conclusion at which we have herein arrived. The insured was not required to assume that the insurer would mislead him, and courts are inclined to hold that one can act upon the assumption that there exists no intention to cheat or defraud him. "No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated." Togni v. Taminelli, 11 Cal.App. 7, 14, 103 P. 899, 902. As was stated by this court in Laraway v. First National Bank of La-Verne, 39 Cal.App.2d 718, 730, 104 P.2d 95, 101: "The fact, as urged by respondents, that means of knowledge were open to appellant, does not necessarily debar her from relief. It is only when the circumstances are such that inquiry becomes a duty that the failure to make it becomes a negligent omission. * * * We find nothing in the evidence here that would

excite the suspicions of an ordinarily prudent person situated as appellant was or that would put him on inquiry. Even if we concede that some of the representations made by respondents related more or less to matters of opinion, nevertheless expressions of opinion, to avoid an action for deceit or fraud, should be of an opinion honestly entertained by the person making the same (citing cases); and whether representations are of a fact or matters of opinion depends largely on the circumstances." (Citing cases.)

[13-15] Where the delay in commencing an action is induced by the conduct of the offending party, it cannot be availed of by him as a defense. An estoppel may also arise where a party has been induced by another "to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." Miles v. Bank of America, etc., Ass'n, 17 Cal.App. 2d 389, 399, 62 P.2d 177, 182. The same case, 17 Cal.App.2d at page 398, 62 P.2d at page 182, is authority for the statement that "an estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped."

[16] In Bollinger v. National Fire Ins. Co., supra, 25 Cal.2d at page 405, 154 P.2d at page 403, the court said: "While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, *it must not be forgotten that the primary function of insurance is to insure.* When claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits." (Citing cases.) And at page 407 of 25 Cal.2d, at page 403 of 154 P.2d, we find the following: "Under the circumstances of the present case it would be manifestly unjust for this court to prevent a trial on the merits, which the law favors." (Citing cases.)

The second amended complaint states a cause of action. The judgment is therefore reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

74 Cal.App.2d 327

HUGHES v. HUGHES et al. (two cases).

Civ. 15165, 15166.

District Court of Appeal, Second District, Division 2, California.

May 1, 1946.

Rehearing Denied May 16, 1946.

Hearing Denied June 27, 1946.

1. Appeal and error ⇐1011(1)

Findings with reference to title and ownership of realty, which were based on conflicting evidence, and which followed the language of the pleadings and were approved as to form by counsel for parties before presentation to trial judge for signature, would not be disturbed.

2. Pleading ⇐8(11)

Allegation of ownership of property is not a conclusion of law, but is an averment of an ultimate fact.

3. Trial ⇐395(5)

Findings as to ownership of realty in the same language as the pleadings are sufficient, without setting forth in detail the evidential facts supporting finding of ownership.

4. Judgment ⇐326

Where judgment as entered did not accord with original order fixing terms of judgment, an order amending judgment nunc pro tunc in order that record should be in conformity with direction of trial court was proper.

5. Deeds ⇐32, 39

A deed signed in blank is ordinarily void and passes no title.

6. Husband and wife ⇐267(9)

Where wife, over a period of several years, had signed great number of deeds in blank, placing community property in husband's possession with knowledge that he intended to use deeds in refinancing and in conveyances of the property, fact that wife, as one of the community, received her share of such profits as was derived from the sales estopped her from asserting invalidity of the deeds and clouding the title to parcels conveyed by husband.

7. Husband and wife ⇐249

Where legal title to property of which record title was in defendant husband was

in a third party by reason of his payment of entire consideration for the property, the property was not "community property," so that signature of defendant husband alone on deed to such third party would have conveyed title without signature of plaintiff wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

8. Divorce ⇐254

That portion of interlocutory judgment of divorce relating to division of property was stricken from the judgment, where property was not brought into the litigation by the pleadings.

Appeals from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Euldene Frances Hughes against Aloysius Peter Hughes, James L. Hughes, and another for divorce from first-named defendant and for division of community property consisting of several parcels of realty and personalty. From the judgment and from amendment nunc pro tunc thereto and from order denying her motion to vacate the judgment and enter a new and different judgment and from order denying a new trial, the plaintiff appeals, and from adverse portions of the judgment, the defendant J. L. Hughes appeals.

Modified and affirmed.

Lee Combs and Wallace B. Scales, both of Los Angeles, and Robert W. McIntyre, of Santa Barbara, for appellant and respondent Euldene Frances Hughes.

M. Lewis Lehman and Maynard B. Henry, both of Los Angeles, for respondent Ethel Toney and appellant and respondent James L. Hughes.

WILSON, Justice.

Plaintiff brought this action for divorce and for division of community property consisting of several parcels of realty and personalty. The three parcels involved in the appeals are designated as (1) the Long Beach property, (2) the Western Avenue property, and (3) the Toney property.

Plaintiff appeals (1) from the judgment and from the amendment nunc pro tunc thereto; (2) from the order denying her motion to vacate the judgment and enter a new and different judgment; (3) from the order denying a new trial. Defendant J. L. Hughes appeals from those portions of the judgment determining that plaintiff and defendant A. P. Hughes are entitled to an undivided one-fourth interest each in the Long Beach property, and that he is not the owner and entitled to the whole of said property; also from the order amending the judgment.

Plaintiff alleged in her complaint that she and her husband, A. P. Hughes, had community property including the Long Beach and Western Avenue properties, and that defendant J. L. Hughes held some of their community property in his name. Said defendant answered denying that he held any property in trust and alleging that he was the owner in fee of both of said properties and that neither of them belonged to the community.

[1] 1. *Sufficiency of the findings.* The court found (1) that an undivided one-half interest in the Long Beach property was community property and (2) that J. L. Hughes did not hold title to any other property belonging to the community. The only reasonable construction of said finding is that J. L. Hughes was the owner of the Western Avenue property and the other one-half interest in the Long Beach property. Since the findings follow the language of the pleadings and were approved as to form by counsel for all parties before presentation to the trial judge for signature, plaintiff's objections to the findings have no force. Additional detailed findings would not aid her cause, since they could not be otherwise than adverse to her contentions as to the facts.

As conclusions of law the court declared that an undivided one-half interest in the Long Beach property should be divided equally between plaintiff and defendant A. P. Hughes and that defendant J. L. Hughes was the owner of the Western Avenue property and an undivided one-half interest in the Long Beach property free of any right, title or interest claimed by plaintiff

or defendant A. P. Hughes. The judgment followed the conclusions of law. The findings with reference to the title and ownership of both of said properties were based on conflicting evidence and will not be disturbed.

[2, 3] An allegation of ownership of property is not a conclusion of law but is an averment of an ultimate fact. Robinson v. City of Glendale, 182 Cal. 211, 214, 187 P. 741, and cases cited. The findings as to ownership are in the same language as the pleadings and are sufficient. It is not necessary to set forth in detail the evidential facts supporting a finding of ownership.

[4] 2. *The amendment to the judgment.* After the entry of the judgment the court made an order amending it nunc pro tunc to conform to the actual judgment announced and rendered by adding a paragraph thereto relating to incumbrances on the Long Beach property. The amendment was not to correct a judicial error but to rectify a clerical omission. The judgment as entered did not accord with the original order of the court fixing the terms of the judgment, and the amendment was made in order that the record should be in conformity with the direction of the court.

[5, 6] 3. *Alleged error in the admission of evidence.* Plaintiff assigned as error the introduction in evidence of one or more deeds which she had signed in blank and delivered to her husband and in which he thereafter inserted the names of the grantees and the descriptions of properties, asserting that said deeds did not divest her of title. A deed signed in blank is ordinarily void and passes no title. The evidence in this case shows that plaintiff, over a period of several years, had signed deeds in great numbers, probably hundreds of them, placing them in her husband's possession with the knowledge and understanding that he intended to and would use them in refinancing and in the sales and conveyances of community real property. At times she protested that she did not desire to sign blank deeds, but nevertheless continued the practice. She knew at all times that he filled in the blanks in the deeds when he made sales and that he frequently inserted his own name in many of them, thus making the property his separate property of record. Her course of conduct, extending through a period of several years, and the fact that she, as one of the community, received her share of such profits as were derived from real estate sales, estop her from now asserting the invalidity of the deeds and upsetting or clouding the title to hundreds of parcels of real property.

[7] The fact that the transfer of the Western Avenue property was made by using one of the blank deeds which had been signed by plaintiff, or her failure to sign the deed at all, did not detract from the title of J. L. Hughes. The record title to said property was vested in A. P. Hughes although the legal title thereof was in J. L. Hughes. The finding that the latter did not hold said property in trust for plaintiff and defendant A. P. Hughes and the conclusion that J. L. Hughes was the owner free of any claim of the other parties to the action are sustained by the evidence that J. L. Hughes paid the consideration therefor and that A. P. Hughes paid none. Since the legal title was in J. L. Hughes it was not community property, and the signature of A. P. Hughes alone on the deed to J. L. Hughes would have conveyed title.

[8] 4. *Title to the Toney property not litigated.* Evidence was offered concerning three parcels of property known as the Toney property, and the judgment decrees that neither plaintiff nor defendant A. P. Hughes has any right or title therein. Said property was not brought into the litigation by the pleadings, not having been mentioned in the complaint or in the answers of either J. L. Hughes or Ethel Toney. It does not appear from the record that the case was tried on the theory that title to said property was in issue, the evidence concerning it having been offered for a purpose not involved in these appeals.

It is ordered that that portion of the interlocutory judgment of divorce relating to the Toney property, to wit, Lot 11 in Tract 11542, Lot 154 in Tract 6440, and the West 73.4 feet of Lot 49 of Kendall's Berry Land Tract, be stricken therefrom. The judgment as so modified is affirmed; the order amending the judgment nunc pro tunc and the order denying plaintiff's mo-

tion to enter a new and different judgment are affirmed; plaintiff's appeal from the order denying a new trial is dismissed; neither party to recover costs on appeal.

MOORE, P. J., and McCOMB, J., concur.



74 Cal.App.2d 405

In re O'BRIEN'S ESTATE.

BOIVIN et al. v. RHEAD et al.

Civ. 12999.

District Court of Appeal, First District, Division 1, California.

May 6, 1946.

1. Appeal and error ⇐1008(3)

Where no extrinsic evidence was introduced on issue as to proper construction of will, question of document's proper interpretation became a question of law and, hence, on appeal, the appellate court would exercise independent judgment on the issue and was not bound by conflicting evidence and inference rules applicable to fact appeals.

2. Wills ⇐439, 440

In interpreting a will, the paramount rule is to attempt to ascertain testator's intent from words used.

3. Wills ⇐470

A will must be read and construed as a whole, and parts of will are to be construed together and in relation to each other so as to form, if possible, a consistent whole.

4. Wills ⇐449

In absence of controlling language in will to contrary, it will be presumed that a testator intended to dispose of all of his property.

5. Wills ⇐449

An interpretation, if reasonably possible, that will prevent a partial intestacy is to be preferred to one that would require partial intestacy.

6. Wills ⇐449

The fact of making a will raises a presumption that testator intended to dispose of all of his property, but rule will not be applied where will clearly expresses a contrary intention, nor will it be applied where to do so would result in disregarding any of the language used.

7. Wills ⇐488, 587(1)

Where first sentence in will devised ranch, livestock and $3,000 to two named persons, and second sentence provided that two other named persons "will take charge of the rest including bonds", the phrase "take charge of" in second sentence, when will was read as a whole, created an ambiguity requiring interpretation, and an interpretation of the second sentence as a bequest of the residual estate, rather than as a naming of executrices to administer testator's estate, was proper, in view of presumption against partial intestacy.

8. Judgment ⇐735

Where court, in appointing one as administratrix with will annexed, decided only that persons who were directed to "take charge of the rest including bonds" were not executrices, and the right of any person to take under will was not then in issue, the determination was not res judicata that persons named in will to "take charge of the rest including bonds" were devisees.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of William O'Brien, also known as Wm. O'Brien, William P. O'Brien, deceased, wherein Anna F. Boivin and another filed a petition to determine heirship, opposed by Mary E. Rhead, administratrix with the will annexed, and others. From adverse judgment, the petitioners appeal.

Affirmed.

Douglas Nye, Phillip Barnett, and Robert L. Dreyfus, all of San Francisco, for appellants.

Duncan A. McLeod, of San Francisco, and Edmund Scott and Jos. R. Fitzpatrick, all of Redwood City, for respondents.

PETERS, Presiding Justice.

Appellants Anna F. Boivin and Margaret Hallahan filed this petition to determine heirship in the estate of William O'Brien, alleging that they are first cousins of the deceased, that he died intestate as to a portion of his estate, and that as heirs at law they are each entitled to a one-fourth interest in the portion of his estate not willed to others. The trial court determined that the deceased had not died intestate and that there was no portion of his estate to which petitioners are entitled.

It is admitted that if O'Brien died intestate as to any portion of his estate, petitioners, as two of his first cousins, are entitled to a portion of such estate. The question presented to the trial court and now involved on this appeal is whether O'Brien died wholly testate or partially intestate. The solution of this problem turns upon the interpretation of a document admittedly testamentary in character, and admittedly properly executed by O'Brien. The document, wholly written, dated and signed by the testator, reads as follows:

"Sept. 15 1943

To Mr and Mrs Frank Bell
For their kindness and service to me I will to them the Casey ranch my intire stock of sheep cattle horses rig and my dog Lexcie and Three Thousand dollars.
Mrs Mary Rhead Mrs Preugschat will take charge of the rest inculding bonds
And Oblige
William O'Brien"

This document has been admitted to probate and Mary E. Rhead has been appointed and qualified as administratrix with the will annexed. At the hearing on the present petition the will was offered and admitted into evidence and it was stipulated that Anna Boivin, Margaret Hallahan, Mary Rhead and Margaret Preugschat are all first cousins of the deceased. No other evidence was introduced at the hearing relative to the proper interpretation of the will. The trial court found that by the will the decedent intended to dispose of his entire estate, and that by the last sentence he intended to and did bequeath the residue and remainder of his estate to Mary Rhead and Margaret Preugschat. It is from the judgment based on this finding that petitioners appeal.

[1] Inasmuch as no extrinsic evidence was introduced, the question of the document's proper interpretation becomes a question of law and not of fact. We agree with appellants that under the circumstances here existing this court must exercise an independent judgment on the issue and is not bound by the conflicting evidence and inference rules applicable to fact appeals. Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Western Coal & Mining Co. v. Jones, Cal.Sup., 167 P.2d 719.

The controversy hinges upon the proper interpretation of the last sentence which reads: "Mrs Mary Rhead Mrs. Preugschat will take charge of the rest inculding bonds." If the testator had merely said that the named persons "will take * * * the rest," there would be no doubt at all that the sentence was intended to constitute a bequest of the residual estate. Appellants contend that since the testator added "charge of" after the word "take" that he must have intended that the named persons should simply administer or care for the balance of the estate. Appellants urge that this is the ordinary meaning of "take charge of," and that the words must be given their ordinary meaning. Much is made of the fact that in the first sentence of the document he used the word "will,' it being argued that when the testator desired to make a bequest he knew the proper term to use. It is argued that if the testator meant the same thing by sentence two as by sentence one he would naturally have used the same language and that by the use of different language he must have meant different things. It is contended that the interpretation of the trial court has resulted in striking from the will the words "charge of," it being urged that a court has no power to rewrite a will or to delete therefrom any material portion.

The respondents urge that the interpretation of appellants would mean that the testator intended to appoint the two per-

sons named in the last sentence as executrices of only a portion of the estate, and urge that this is a legal impossibility. Respondents also point out that the testator quite obviously had difficulty in expressing himself, and that it would defeat his obvious intent to give the words "take charge of" their technical meaning of "to administer." Other contentions are made by both parties.

[2-6] It is our duty to try to ascertain what the testator had in mind when he drafted the last sentence of his will. On such an issue precedents are of but little value, except for the establishment of certain general rules. In interpreting a will the paramount rule is to attempt to ascertain the testator's intent from the words used. The document must be read and construed as a whole, and all parts of the will are to be construed together and in relation to each other so as to form, if possible, a consistent whole. One of the important rules of construction peculiarly applicable to the present case is that in the absence of controlling language in the will to the contrary, it will be presumed that a testator intended to dispose of all of his property. An interpretation, if reasonably possible that will prevent a partial intestacy is to be preferred to one that would require such partial intestacy. In re Estate of Spence, 57 Cal.App.2d 922, 135 P.2d 419; In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; In re Estate of Ottoveggio, 64 Cal.App.2d 388, 148 P.2d 878. The very fact of making a will raises a presumption that the testator intended to dispose of all of his property. See many cases collected and commented upon 26 Cal. Jur. p. 899, sec. 215. Of course, this rule will not be applied where the will clearly expresses a contrary intention, nor will it be applied where to do so would result in disregarding any of the language used. In re Estate of Peabody, 21 Cal.App.2d 690, 70 P.2d 249; In re Estate of Hoytema, 180 Cal. 430, 181 P. 645; In re Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052.

[7] Appellants must contend, and do, that the phrase "take charge of" is so clear that it can have but one reasonable meaning, namely, that the testator was appointing the two persons named executrices of his estate. If it once be conceded that the phrase, when read with the balance of the document, is ambiguous and susceptible of the reasonable interpretation that it amounted to a bequest of the residual estate, the presumption against partial intestacy is sufficiently strong to require this court to interpret the phrase in favor of respondents. That presumption is based on common sense and common experience. Normally, a man does not sit down and draft a will that disposes of only a portion of his estate. It is a solemn act to draft a will, and in the normal case it is the result of mature deliberation and careful thought. When this factor is considered, and the will read as a whole, we are of the opinion that the phrase "take charge of" is sufficiently ambiguous to require interpretation, and is reasonably capable of either of the interpretations here urged. This being so, the weight of the presumption heretofore discussed is sufficient to tip the balance of reasonable probabilities in favor of respondents. This testator obviously had difficulty in expressing himself in writing. He first wanted to be sure that Mr. and Mrs. Frank Bell received the Casey ranch, its stock and equipment, his dog, and some money. He expressed himself as basing this bequest upon their "kindness and service" to him. But that did not dispose of his entire estate. There was a substantial portion of the estate left. So he drafted the second sentence and said that respondents "will take charge of the rest inculding bonds." Is it reasonable to suppose that by the use of such words he simply intended to appoint the two respondents executrices and to permit the balance of his estate to go to his heirs at law, whoever they might be? Is it reasonable to suppose that by the use of the questioned phrase he had in mind the technical meaning of the words, namely, "to administer"? Is it not more reasonable to suppose that he was using the phrase somewhat colloquially to mean that they were to get the balance? Certainly, we cannot say that the only reasonable interpretation is that sponsored by appellants. That reached by the trial court and urged by respondents seems to us to be equally reasonable. That

being so, we should and do determine that the last sentence amounted to a bequest of the residuum to respondents.

[8] Respondents make a somewhat involved argument that because the trial court appointed Mary Rhead administratrix with the will annexed, that it must have determined in that proceeding that the will did not name her and Mrs. Preugschat as executrices. The respondents argue that in that proceeding, therefore, the court must have also determined that the two respondents were devisees, and contend that such determination is res judicata in this proceeding. This point is clearly without merit. On that hearing the court simply decided that the respondents were not executrices—it did not, and in that proceeding could not, determine whether they were legatees or devisees. The right of any person to take under the will was not then in issue.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



74 Cal.App.2d 279

PEOPLE v. RICHARDS.

Cr. 3948.

District Court of Appeal, Second District, Division 1, California.

April 30, 1946.

Rehearing Denied May 10, 1946.

1. Criminal law ⇐1144(13)

On appeal from judgment of conviction following a guilty verdict, evidence must be viewed in the light most favorable to the prosecution.

2. Robbery ⇐24(3)

In prosecution for first degree robbery, testimony relating to defendant's foot prints at scene of crime did not have a direct and obvious relevancy to crime charged, where defendant was at scene of crime by virtue of his employment there.

3. Criminal law ⇐552(1)

Facts relating to guilt of accused may be established by circumstantial evidence as well as by direct evidence.

4. Criminal law ⇐745

The right to draw proper inferences from evidence is the function of the jury.

5. Criminal law ⇐1159(1)

So long as jury's conclusions do not do violence to reason or challenge credulity, appellate tribunal is without power to substitute its finding of ultimate fact in place of the finding arrived at by the jury.

6. Criminal law ⇐552(4)

Evidence as to circumstances may be as conclusive in its convincing effect as the direct testimony of witnesses to the act charged against defendant.

7. Robbery ⇐24(1)

In prosecution for first degree robbery, evidence that defendant had opportunity to commit the offense, coupled with unequal opportunity for others and false statements of defendant tending to disclose a consciousness of guilt warranted conviction. Code Civ.Proc. §§ 1958, 1960, subd. 2.

8. Criminal law ⇐338(1)

In robbery prosecution, cross-examination of defendant with respect to defendant's purported statement to officers that defendant had come into possession of considerable money by gambling, was error where robbery occurred some 10 days before defendant's conversation with officers took place and conversation had reference to a sum of money had by defendant a month or two before. Code Civ. Proc. § 1854.

9. Criminal law ⇐396(2)

Where part of a conversation or writing material to the issues is given in evidence, other parts of such conversation or writing having relevant reference to the part given may also be introduced under statute. Code Civ.Proc. § 1854.

10. Criminal law ⇐342

In robbery prosecution, testimony of police officer that defendant recently purchased an automobile and had additional

payments to make thereon was material with reference to question of motive that defendant may have had on the day of the robbery.

11. Criminal law ⇐342

Where circumstantial evidence is largely relied upon for conviction in robbery prosecution, motive becomes a matter of inquiry, notwithstanding that motive constitutes no element of the crime itself.

12. Robbery ⇐26

If defendant accused of robbery was confronted with obligation to meet installment payments on automobile purchase contract and by reason of not working steadily his financial condition was such that he could not meet the obligation, it was for the jury to determine whether his pecuniary situation tended to directly connect him with the commission of the crime or disclose a motive for its commission.

13. Criminal law ⇐1169(3)

In robbery prosecution, erroneous admission of portion of conversation regarding defendant's possession of other money a month or two before the robbery, in which conversation defendant was quoted as saying he obtained money by gambling, was not prejudicial, where another portion of conversation relative to purchase of automobile and defendant's need to pay more thereon was material with reference to question of motive and defendant's answer that he obtained the down payment by gambling.

14. Criminal law ⇐822(1)

Instructions should be considered in their entirety.

15. Criminal law ⇐822(16)

An instruction was not erroneous as advising jury to return guilty verdict if reasonable construction of evidence pointed to guilt, where instructions considered in their entirety fully and fairly instructed the jury that the defendant could not be convicted unless his guilt was established by competent evidence beyond a reasonable doubt.

16. Criminal law ⇐308

The rule that if evidence is susceptible of two interpretations, each of which appears reasonable, and one of which points to guilt of defendant and the other to his innocence, the interpretation admitting of defendant's innocence must be adopted, is applicable only to cases in which there are two opposing interpretations each of which appears reasonable, and if one interpretation appears reasonable and the other unreasonable, the reasonable interpretation must be adopted.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Arthur Richards was convicted for first degree robbery and he appeals. From the judgment of conviction and from the order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon and Carl S. Kegley, Deputy Attys. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, the defendant was accused in count I of the crime of robbery and in count II of the offense of assault by means of force likely to produce great bodily injury. After trial before a jury the defendant was found guilty of the crime of robbery, which was found to be of the first degree. He was acquitted of the charge contained in count II. His motion for a new trial was denied. From the judgment of conviction and from the order denying his motion for a new trial defendant prosecutes this appeal.

[1] Viewing the evidence in the light most favorable to the prosecution, as we are required to do following a guilty verdict, we find in the record evidence that

one Joseph Rosenfield was the owner of a junk and salvage business at 1023 South Alameda Street in the city of Los Angeles. His father, Morris Rosenfield, the victim herein, helped him at the salvage yard. The aforesaid business premises comprised a "front building" and a "rear building", between which a tent housed and protected assorted army tents and salvaged canvases. Projecting along and across the east end of the front building is a platform or dock six feet wide and three feet high, with an approach or ramp slanting down in an easterly direction to the ground at the southerly front portion thereof. At the extreme south of this dock there is a three foot direct drop to the ground.

The defendant had worked for Joseph Rosenfield at the salvage yard over a period of time some two years before the date of the alleged offenses. He was known to both Joseph and Morris Rosenfield as Arthur Richards and was by them called "Richard." On February 27, 1945, the defendant was again employed at the salvage yard, and at the time of his employment he signed the "employee's withholding exemption certificate" giving the name "Leroy Dozier." Defendant testified that he used the latter name because of domestic trouble he was having with his wife, by reason of which he desired that she not know of his employment. No particular significance can be attached to the use of this alias because the record reflects that defendant was at all times known as "Richard" by both Joseph and Morris Rosenfield, and there was no evidence that this change of name was utilized in any way to deceive either of the Rosenfields.

At the conclusion of his day's work on February 27 the defendant was paid his wages for that day. He returned to work on the following day, February 28. Some time during the early afternoon of February 28 Morris Rosenfield was waiting on a customer who was interested in purchasing some salvaged canvas in the tent on the junkyard premises, but the canvas there exhibited not being what the customer wanted, he, the elder Rosenfield and the defendant went back to the front building where there were some raincoats and other odd lots of junk. The customer purchased some canvas and the defendant assisted Rosenfield in cutting it.

At about 3:30 on the afternoon of February 28 Joseph Rosenfield found his father lying on the floor in the building on the front of the salvage lot. The father was unconscious, his pockets were pulled inside out, and his wallet was missing. The major injury suffered by the victim in the assault was a fracture at the base of his skull, although there were additional cuts and abrasions about his head and face.

At the trial Rosenfield Senior testified that he had difficulty recalling anything after being knocked down; that as a result of the injuries sustained by him he had difficulty remembering; that he saw double, and had headaches. However, he recalled that after paying $5 the aforesaid customer went out; that this was before the attack; that he put the money in his purse. He had no recollection of being struck and at no time did he identify the defendant as his assailant, nor did he testify actually that the defendant was present at the time of the assault. The witness also testified that the defendant inquired about his health, although, as we read the record, this inquiry was not made, as contended by respondent, "after the customer went out," but was made on the morning of February 28. This witness also testified that near the scene of the assault there was a platform scale and scale weights; but we fail to see the applicability of the evidence with reference to scales to the issues in this case, because while the victim's son made no examination of the scale weights, deputy Sheriff Hannon did, and failed to find anything about them to indicate that they had been used in connection with the assault.

On the day of the crime, Officers Hannon and Achenbach went to the junk yard, saw the scene of the crime, photographed the surroundings, and saw footprints stepping south from the platform in front of the building. Impressions, photographs

and casts of the same were made. These footprints were on the ground stepping south from the platform and were about 20 to 25 feet from the bloodspots. At the trial the defendant stipulated that the footprints were his.

The defendant was apprehended on March 8 at Imperial Boulevard and Bandera Street, a point approximately two miles from the junk yard here in question and about one-half block from his home. Upon being questioned by the officers, defendant denied knowing Mr. Rosenfield; and stated that on the day of the offense here in question he had been looking for work and was in downtown Los Angeles "with a friend looking for a job." In answer to the officer's question as to whether he had ever worked for the firm of J. Joseph Company, he said that he had "a couple of years prior to this time and he was not working for him the preceding week." It might here be noted that the Rosenfields operated their business under the name of "J. Joseph Company." On the day following his arrest a further conversation was had with the defendant at the Firestone Sheriff's substation, where he was told that the officers had photographs of his footprints, pictures of his shoes, and that the footprints and the shoes coincided; that the son of the victim had identified the defendant and that the latter's "girl friend" where he was rooming said he had had a considerable sum of money a month or two previously. Upon that occasion Officer Foster told the defendant he knew that the defendant had purchased an automobile recently and paid $275 cash on account of such purchase, and asked the defendant where he got the money, to which the defendant replied, "Well, * * * I won it gambling." In another conversation the second day after his arrest, one of the officers summarized the evidence against the defendant as consisting of footprints on the job, the son having identified him, handwriting identification, statements by the victim that defendant hit him, his wife and his girl friend "saying he had large sums of money." To this the defendant replied that he did not care to make any explanations to the officers, but denied that he was at the salvage yard on the date of the assault.

On the 13th of March defendant was taken to the hospital where the victim was confined, at which time the latter stated that defendant had worked for him on the day previous to his injury and that he was working with him in the shed "the day that he was injured, and that only him and Richard (the defendant) were in the shed at the time that Mr. Rosenfield received his injury; that he did not know who struck him." Upon this occasion the defendant denied that he was present at the time of the assault upon Mr. Rosenfield. The officer also testified that while the defendant was in Mr. Rosenfield's presence at the hospital Rosenfield told of a quarrel between himself and the defendant and related a threat uttered by the defendant against him. The defendant testified that no such conversation occurred and that nothing was said by Rosenfield of any quarrel or threats. It might here be noted that when Mr. Rosenfield appeared as a witness he denied ever having had a quarrel with the defendant; denied that the defendant had threatened him, and testified that on the day of the assault the defendant, knowing that Mr. Rosenfield had visited a doctor the preceding day, made inquiry as to the state of Mr. Rosenfield's health.

The defendant, testifying as a witness in his own behalf, stated that he had worked for the Rosenfields some two years prior to the date of the assault; that he worked for them on February 27 and at the close of that day had been paid for his services. He testified that he again worked at the salvage yard on February 28, the day of the robbery; that on that day he went to work about 9:30 and worked until 2:30, when he left, after telling Morris Rosenfield he was not feeling well; that while he was there a customer came in and that he accompanied the customer to the tent to check out some canvas; that later Morris Rosenfield joined him. He testified there was some discussion respecting the price of the canvas, and that while the discussion was in progress the elder Rosenfield told the defendant to go back to the front building. De-

fendant testified he never saw Rosenfield return to the front building but that Mr. Rosenfield was uninjured when the defendant last saw him. He further testified that he went home and was sick for about eight days; that two or three days after leaving his work he went to the salvage yard for his pay, but that the yard was closed and nobody was there. In explanation of his denial at the time of his arrest that he had recently worked for the Rosenfields, defendant testified that he did so because the officers who arrested him had cursed and threatened him.

As a first ground for reversal, appellant earnestly urges that the verdict of the jury finding him guilty of robbery is contrary to and unsupported by the evidence and is contrary to law. In this regard appellant contends that the evidence for the prosecution does no more than indicate an opportunity for him to commit the crime plus suspicion. It is true that the victim of the assault and robbery was hazy in his recollection of what transpired just prior to and at the time of the assault. Without doubt the violent injuries sustained by Mr. Rosenfield, who was 65 years of age, affected his memory and ability to recite details of the incidents occurring just before and after the attack was made upon him. In fact, a physician who specialized in brain surgery and attended Mr. Rosenfield testified that in the case of a man of Mr Rosenfield's age the injuries sustained would, in his opinion, "affect the memory or his ability to recite details of incidents before or after the accident or injury." Mr. Rosenfield did, however, testify to the fact that he remembered the defendant was with him in the building where the assault occurred after the customer whom both of them had been serving had departed. But as the doctor testified, one who received the injuries inflicted upon Mr. Rosenfield "will be confused as to things that might have happened immediately before"; and when asked how close the defendant was to him just before he was struck, the victim replied that he could not remember.

[2] We are satisfied that if the conviction is to be sustained from an evidentiary standpoint, it must rest upon whether reasonable inferences are deducible from the surrounding facts and circumstances to justify the jury in concluding that the defendant was the perpetrator of the crime of which he stands convicted. Immediately adjoining and outside of what was referred to as "the front building", where the assault occurred, there is a dock or loading platform. On the south side of this there is a ramp running due east down to Alameda Street. The level portion of the ramp is about three feet above the lot proper. On the ground immediately south of the higher or level portion of the ramp footprints were found about six inches from the base of the ramp. The footprints led in a southerly direction. A fence runs along and adjoining the platform and there was a dirt footpath along there with footprints on it going south. As heretofore indicated, at the trial defendant's attorney made no issue as to whether these footprints were made by the defendant, stating that the defendant was "there." Respondent contends that the evidence concerning footprints justified the jury in concluding that the defendant left the scene of the crime by jumping from the platform and hurrying southward on the path alongside the fence. The defendant in his testimony stated that he came out the front door, walked down the ramp, and did not "go around right next to the platform on the south side of it." In explanation of his admitted footprints on the ground by the platform, defendant testified that "when the customers came there to see those tents, I have to carry them out to the car—truck right there in front." When asked if after coming down this ramp he at any time went up next to the platform on the south side, he replied, "Not that I know of." Appellant points out that the footprint was only six inches away from the base of the platform and that this negatives the contention that it was made by someone hastily leaving the premises and jumping from the ramp in order to expedite his departure. To quote from appellant's closing brief: "A wrongdoer hurrying away from the scene of his crime and jumping from the platform (only

three feet high) with the intent of speeding his flight, would not strike the earth at a point only six inches removed from that platform." In view of the conceded presence of the defendant in the salvage yard by reason of his employment there, we are impressed that, giving to the footprint testimony all the probative force claimed for it by respondent, it cannot be said to have a direct and obvious relevancy to the crime charged. People v. Flores, 58 Cal.App.2d 764, 769, 137 P.2d 767.

[3-7] However, there are present in this case certain circumstances that cannot be reconciled with innocence as reasonably as they can be with guilt. We refer to the defendant leaving his employment early on the day in question without advising the younger Rosenfield, owner of the yard, and without asking for his pay for that day's work, as was his custom, and which custom was followed on the preceding day; his failure to return at any time for the wages due him; also, his admittedly false statements made to the officers at the time of his arrest wherein he denied knowing Mr. Rosenfield and falsely stated that while he had worked for the firm of J. Joseph Company (under which name the salvage yard was operated) "a couple of years prior to this time," he "was not working for him the preceding week." While it is true the defendant testified that he had in fact returned to the salvage yard to obtain the day's wages due him and the place was closed, this merely presented a conflict which the jury was entitled to resolve against him. The same may be said of defendant's explanation of why he falsely denied having recently worked at the yard, which he attributed to the fact that the officers had cursed and threatened him. When the foregoing facts were legally proven to the satisfaction of the jury, the latter were entitled to draw therefrom such inferences as were "warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." Code Civ.Proc. §§ 1958 and 1960, subd. 2. The corpus delicti having admittedly been proven, we are unwilling to hold that the jury was not entitled to make a deduction from the foregoing proven facts that the defendant was the perpetrator of the crime charged against him. It is well settled that a fact or facts relating to the guilt of an accused may be established by circumstantial as well as by direct evidence; that the right to draw proper inferences from evidence is a function of the jury; and that so long as its conclusions do not do violence to reason or challenge credulity, an appellate tribunal is without power to substitute its finding of the ultimate fact in place of that arrived at by the constitutional as well as the statutory arbiter thereof. Evidence as to circumstances may be as conclusive in its convincing effect as the direct testimony of witnesses to the act charged against the defendant. Here there was proof of opportunity for the defendant to commit the offense, coupled with an unequal opportunity for others (because there is testimony that the customer had departed before the assault); there was proof of false statements which tended to disclose a consciousness of guilt; from all of which the jury reasonably could conclude that the defendant was guilty, as indicated by the verdict. People v. Kynette, 15 Cal.2d 731, 744, 104 P.2d 794. The case of People v. Flores, supra, relied upon by appellant, is distinguishable from the case at bar. In the cited case it was said (58 Cal.App.2d at page 769, 137 P.2d at page 769): "* * * It is manifest that every fact proven is consistent with the reasonable conclusion that the appelllant did not participate in the theft of the automobile. There is, therefore, a failure of proof in particulars necessary to conviction of the crime of grand theft, and the question is one of law for the court." As heretofore pointed out, such is not the case here.

It is next urged that the trial court erred in permitting the district attorney, over defendant's objection, to cross-examine him respecting a purported statement to the officers in which he said that he came into possession of considerable money by gambling. In this regard the record reflects that during the presentation

of the prosecution's case Officer Foster had testified that on the day following defendant's arrest the officer said to him, among other things, "I find your girl friend where you are rooming tells me that you had a considerable sum of money back a month or two ago. You tell me you have not been working any place. I also find now that you purchased an automobile recently and paid two hundred, I think it was—$275.00—my recollection now you paid that much cash and you have more to pay here. You had that sum of money. Can you explain to me where you got that money without having worked steadily anywhere." The defendant's reply, according to the officer, was, "Well, I won it gambling."

The foregoing conversation was admitted over defendant's objection. Subsequently, during the cross-examination of the defendant, the following ensued:

"Q. Had you been working regularly just before you started working on these two days in question? A. Had I been working regular?

"Q. Regular? A. No sir, not steady.

"Q. You had been out of employment some? A. Yes, sir.

"Q. You remember having had a conversation with the officers about money that you had; isn't that true? A. Yes, sir.

"Q. You told them that you had been gambling and got considerable money that way?"

Objection to the last interrogatory was overruled, and the defendant's answer thereto was "Yes."

[8, 9] The ruling was erroneous. The trial court overruled the objection apparently upon the theory that the part of the conversation here in question came within the rule enunciated in section 1854 of the Code of Civil Procedure, which reads: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence." From the remarks of the trial judge it is manifest that he correctly understood that what is meant by the code section just cited is that where part of a conversation or writing material and relevant to the issues of a case is given in evidence, the other parts of such conversation or writing having relevant reference to the part given may also be introduced. People v. Mahach, 65 Cal.App. 359, 381, 224 P. 130. But such is not the case here. The conversation related by the officer had reference to "a considerable sum of money" had by the defendant "back a month or two ago," whereas the robbery here in question occurred only some ten days before the conversation took place. Obviously, whatever money the defendant had "back a month or two ago" could have no materiality or relevancy to the robbery committed some ten days prior to the date of the conversation. Had the evidence shown that at the time of his arrest some ten days after the robbery the defendant had in his possession "a considerable sum of money," and had explained its possession with the statement that he had obtained the same through gambling, then that portion of the conversation relating to the manner in which he obtained the money would be relevant to the issues of the case and the reasonableness of his explanation of how he obtained possession of such money would be a question for the jury. But the money he possessed a month prior to the robbery or the manner in which he obtained possession thereof was wholly foreign to any material or relevant issue in the case at bar.

[10-13] With reference to that portion of the conversation hereinbefore narrated in connection with the previous purchase of an automobile by defendant, upon which he had made a down payment, and in connection with which the officer stated to him he would "have more to pay," we cannot agree with appellant that it was inadmissible. As stated by the trial court, "if it has a tendency to prove that on

the 28th day of February (the date of the robbery) the defendant is in need of money, and it is a circumstance which may or may not have any weight or may or may not have any particular significance. But I think it is admissible as a circumstance." In other words, the objection went to the weight rather than the admissibility of that part of the conversation. While the fact that the defendant was in possession of a sufficient sum of money to make an initial payment on a contract to purchase an automobile some time before the date of the robbery would not be material, it was merely preliminary to that portion of the statement with reference to the fact that he was required to make subsequent payments on the purchase price and had not been working steadily immediately prior to the robbery, and which fact might be a circumstance tending to create or prove a motive in a case of this character. While motive constitutes no element of the crime itself, it must be conceded that in cases where circumstantial evidence is largely relied upon for conviction, as in this case, then motive becomes a matter of most earnest inquiry. If the defendant were confronted with an obligation to meet installment payments on an automobile purchase contract and by reason of not working steadily his financial condition was such that he could not meet the obligation, it was for the jury to determine whether his pecuniary situation tended to directly connect him with the commission of the crime or to disclose a motive for its commission. Since that portion of the conversation relative to the purchase of an automobile and that the defendant would "have more to pay here" was relevant and material with reference to the question of motive, and he answered that he had obtained the down payment by gambling, we have no difficulty in holding that he was not prejudiced by that portion of the conversation regarding his possession of other money "a month or two" before the date of the crime in which he was quoted as saying that he obtained such money by gambling.

[14-16] Finally, appellant asserts that the trial court committed prejudicial error in giving to the jury an instruction concerning circumstantial evidence. The challenged instruction was as follows:

"If the evidence in this case as to any particular count is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

"You will notice that in this instruction this rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable.

"This rule of law does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and the other appears to you to be unreasonable.

"In the latter case it would be your duty, under the law, to adopt the reasonable construction and reject the one which, in your judgment, appears to be unreasonable."

Conceding the correctness of the first two paragraphs of the questioned instruction, appellant contends that paragraph 3 thereof is purely an argument on the application of the first two paragraphs and that paragraph 4 is an incorrect statement of the law. No authority is cited by appellant in support of these claims. We cannot agree with appellant when he urges that "the last paragraph of the instruction advises the jury that if the reasonable construction pointed to guilt they should adopt it and return a verdict of guilty." Instructions should not be considered singly but in their entirety. People v. Curtis, 36 Cal.App.2d 306, 322, 98 P.2d 228. In addition to the instruction complained of, the court advised the jury of the presumption of innocence as well as of the doctrine of reasonable doubt, and also, at the request of the defendant, instructed the jury that "it is the law that neither mere opportunity to commit a crime, nor suspicious circumstances are sufficient to sup-

port a verdict of guilty. The guilt of a defendant necessary to justify a conviction must be shown and based upon such evidence as will convince a reasonable mind beyond a reasonable doubt." We are satisfied that the jury was fully and fairly instructed that the defendant could not be convicted unless his guilt was established by competent evidence beyond a reasonable doubt. Furthermore, the challenged instruction and a similar attack made upon it was reviewed in the case of People v. Horowitz, Cal.App., 161 P.2d 833, where the instruction here challenged was approved.

The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.



74 Cal.App.2d 199

PEOPLE v. ONE 1941 MERCURY SEDAN.

Civ. 12934.

District Court of Appeal, First District, Division 1, California.

April 29, 1946.

Hearing Denied June 27, 1946.

1. Forfeitures ⇐5

A proceeding for forfeiture of vehicle allegedly used in violation of law to transport narcotics is an action equitable in nature in rem against the vehicle. Health and Safety Code, § 11610 et seq.

2. Forfeitures ⇐5

The purpose of proceeding for forfeiture of vehicle allegedly used in violation of law to transport narcotics is to forfeit the interests of all persons who claim adversely to the state. Health and Safety Code, § 11610 et seq.

3. Forfeitures ⇐5

Legal and registered owners of vehicle voluntarily become parties to proceeding for forfeiture of vehicle allegedly used in violation of law to transport narcotics, by filing answers pursuant to their statutory right to notice and to contest validity of state's claim of forfeiture. Health and Safety Code, § 11610 et seq.

4. Forfeitures ⇐4
Poisons ⇐4

The transportation of narcotics in automobile subjects automobile to forfeiture and likewise is a criminal offense in so far as passengers who are transporting narcotics are concerned. Health and Safety Code, § 11610 et seq.

5. Criminal law ⇐394

Illegally obtained evidence is admissible on a criminal charge.

6. Criminal law ⇐393(3)
Witnesses ⇐300

The "privilege against self-incrimination" protects the individual from any forced oral or written disclosures made by him, and is limited to protection against the testimony or compulsion, and does not preclude introduction of physical disclosures which the individual is forced to make or the results of tests to which he has involuntarily submitted. Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege against Self-Incrimination".

7. Criminal law ⇐393(3)
Witnesses ⇐300

The privilege against self-incrimination protects accused from the process of extracting from his own lips against his will an admission of guilt, but does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. Const. art. 1, § 13.

8. Witnesses ⇐300

The purpose of privilege against self-incrimination is to prevent the compulsory oral examination of accused before or during trial. Const. art. 1, § 13.

9. Criminal law ⇐393(3)

In proceeding for forfeiture of automobile allegedly used to transport marihuana, admitting evidence concerning narcotic contents pumped out of stomach of automobile's registered owner who swal-

lowed something when automobile was stopped by police owners did not violate owner's "privilege against self-incrimination". Health and Safety Code, § 11610 et seq.; Const. art. 1, § 13.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding by the People of the State of California for the forfeiture of One 1941 Mercury Sedan Engine No. 302,286, claimed by Anglo California National Bank of San Francisco, a national banking association, and Frank Williams. From a judgment denying forfeiture, the State appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for appellant.

Jos. G. Gallagher, of San Francisco, for respondent.

PETERS, Presiding Justice.

This proceeding was instituted by the state pursuant to section 11610 et seq. of the Health and Safety Code to declare a forfeiture of the interests of one Frank Williams, the registered owner, and of the Anglo California National Bank of San Francisco, the legal owner, in a designated automobile, on the ground that such automobile was on April 18, 1944, used unlawfully to conceal, convey, carry or transport marihuana in violation of law. The bank has been paid the balance due on the purchase price of the automobile and has no further legal interest in the proceeding. The trial court excluded most of the evidence offered by the state, and, as a result, found that on the date in question the vehicle was not used in violation of law to conceal, convey, carry or transport narcotics. Judgment was accordingly entered denying forfeiture of the car. From this judgment the state appeals, contending that the rejected evidence was admissible.

The record discloses that on April 18, 1944, an inspector of the State Division of Narcotic Enforcement followed the Williams car for some distance. He testified that he then knew the car was being used to transport marihuana. The inspector picked up two police officers and then stopped the Williams car then being driven by Williams. Williams got out of the car. The inspector handcuffed one of the passengers and then came over to where the police officers were attempting to search Williams. As he approached, Williams, who had some brown paper in his hands, put the paper in his mouth and tried to pull away from the officers. The inspector asked Williams what he had put in his mouth and was told it was gum. The inspector tried to force Williams' mouth open, and in doing so got his finger between Williams' teeth. Williams bit down on the inspector's finger, and, in the ensuing struggle, Williams succeeded in swallowing what he had in his mouth. One of the officers during the struggle succeeded in handcuffing Williams' hands behind his back.

Williams, still handcuffed, was then put in the inspector's car and taken by the officers to the emergency hospital. He was there placed on an operating table with his hands cuffed in front of him. He was told that the doctor there present was going to pump out his stomach, and, if necessary, they would strap him to the table and use force. Williams stated that would not be necessary. A doctor thereupon forced a tube through Williams' mouth and down his throat and proceeded to pump out the contents of his stomach. Towards the end of this operation Williams began to kick his legs about and the officers then held his legs down on the table.

The substances pumped out of Williams' stomach were placed in jars by the inspector and later delivered by him to another inspector of the State Division of Narcotic Enforcement whose duty it was to make analyses of narcotic drugs. This chemist made an analysis of the contents of the jars and found that they contained marihuana.

The state was permitted to make this preliminary proof, but when the jars were offered in evidence the trial court sustained an objection on the ground that the evidence had been unlawfully secured, and on the further ground that to permit such evidence would be to compel Williams to

be a witness against himself in violation of Art. 1, § 13, of the California Constitution.

The inspector also testified that after Williams had had his stomach pumped out and his handcuffs removed he had a conversation with Williams in the lobby of the hospital; that in response to questions Williams admitted that on the day in question he had purchased five marihuana cigarettes for an unidentified friend; that he had these cigarettes in his possession when he was stopped by the police; that it was these cigarettes that he had swallowed when the police started to search him.

On this evidence the trial court based its findings and judgment that the state had failed to prove a violation of law sufficient to warrant the forfeiture. The correctness of this judgment admittedly turns upon the correctness of the trial court's ruling excluding the proffered evidence.

[1-4] Before discussing the basic question involved there are certain preliminary observations that should be made. In the first place, this is an action equitable in nature in rem against the vehicle. People v. One 1933 Plymouth Sedan Deluxe Automobile, 13 Cal.2d 565, 569, 90 P.2d 799; Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 384, 220 P. 306. The purpose of the action is to forfeit the interests of all persons who claim adversely to the state. The legal and registered owners have the statutory right to notice and to contest the validity of the state's claim. By filing answers such persons voluntarily become parties to the proceeding. People v. One Ford Coupe, etc., 10 Cal.App.2d 321, 51 P.2d 882. The basis of the claimed forfeiture in such cases is the use of the car in violation of the statute. Such offense likewise is a criminal offense in so far as the persons in the car who are transporting narcotics are concerned. This being so, for the purposes of this appeal, and without now deciding the question, it may be assumed that the same rules apply, so far as the admissibility of the rejected evidence is concerned, as would apply were this a criminal charge against Williams.

[5] In the second place, the question of the legality of the methods used to secure the evidence need not here be discussed. Whether the officers and doctors involved were guilty of an unlawful search and seizure, whether they were guilty of an assault, whether they could be held civilly liable in an action for trespass or for a violation of Williams' right of privacy, are matters not involved on this appeal. For the purposes of this appeal it may be assumed, without deciding, that the proffered evidence was secured illegally. Whatever our views may be as to the propriety of officers of the law using illegal means to enforce the law, the rule is now settled in this state, contrary to the rule prevailing in the federal courts and in some states, that where competent evidence is produced on the trial the courts will not permit an inquiry into its source or the means by which it was obtained. In other words, illegally obtained evidence is admissible on a criminal charge in this state. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Kelley, 22 Cal.2d 169, 137 P.2d 1. This court is bound by the rule of these cases.

The third factor to be kept in mind is that this is not a proceeding to compel a defendant by court order to submit to a physical examination or to an operation. Of course, if that would constitute an illegal search or seizure no court would or should give a court order to permit an illegal act. Nor in this case are we presented with any question relating to the right of the state to interrogate Williams under § 2055, Code of Civil Procedure, or otherwise. We are here presented with a case where evidence was produced clearly relevant on the issue involved. That evidence in no way depends for its introduction on the credibility or testimony of Williams. It is sought to be introduced through the testimony of the police inspector and doctor who secured that evidence. The problem involved is whether the trial court correctly ruled that the introduction of such evidence would be in violation of Art. 1, § 13, of the State Constitution, which provides in part that: "No person shall be * * * compelled

in any criminal case, to be a witness against himself." The specific question to be decided is whether this section prohibits the introduction of this otherwise competent and relevant testimony.

There is a hopeless conflict on this subject. There appears to be no California case directly in point. Many of the cases that hold that such evidence is not admissible are from states where illegally secured evidence is not admissible. Many courts have confused the two questions and, although they frequently discuss the privilege against self-incrimination, the real basis of their opinions is that illegally secured evidence is not admissible. Other cases that hold that the privilege against self-incrimination would be violated by admitting such evidence involve the question as to whether the prosecution by court order can compel the defendant to undergo tests or operations—an issue outside the scope of this appeal. But even when these classes of cases are excluded there is still a conflict of authority on the specific question here involved. The solution to the controversy, of course, hinges upon the scope of the privilege against self-incrimination. The question is whether that privilege includes the right of the defendant to exclude evidence gained by physical examinations or tests made upon his body against his will, or whether the privilege is limited to testimonial utterances of the defendant, either written or oral. An examination of the many cases and legal discussions of the problem discloses that the weight of authority, particularly of the more modern cases, is to the effect that the privilege involved only protects a person from any unwilling testimonial disclosures and does not include the right to exclude testimony gained by forced examinations or tests. This conclusion seems inescapable when the history and purpose of the privilege against self-incrimination is considered. See, for an excellent discussion of the history of the privilege, 8 Wigmore on Evidence, 3d Ed., § 2250, p. 276. After exhaustively discussing the history and background of the privilege Wigmore states (§ 2263, p. 362):

"Looking back at the history of the privilege (ante, § 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries,—the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow-objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath. * * *

"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other.

"The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness."

In § 2265, p. 374, the author reaches the following conclusions on the specific problem here involved:

"If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

"The limit of the privilege is a plain one. From the general principle (ante, § 2263) it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, i. e. upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial,—unless all bodily

action were synonymous with testimonial utterance; for, as already observed (ante, § 2263), not complusion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself (ante, § 1150). Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, the main object of the privilege (ante, § 2251) is to force prosecuting officers to go out and search and obtain all the extrinsic available evidence of an offence, without relying upon the accused's admissions. Now in the case of the person's body, its marks and traits, itself is the main evidence; there is ordinarily no other or better evidence available for the prosecutor. Hence, the main reason for the privilege loses its force.

"Both principle and practical good sense forbid any larger interpretation of the privilege in this application." See, also, for an interesting article on the subject, where many cases are collected and the same conclusion reached, 17 Minn. Law Rev. 187.

The cases are collected and commented upon in 22 C.J.S., Criminal Law, § 649, p. 993.

At page 994 the following conclusions, supported by many cases, are set forth: "While some authorities have extended the privilege against self-incrimination to compelling accused to do any act against his will which results in evidence tending to incriminate him, and accordingly hold that evidence so produced or discovered is incompetent, the more general view is that the constitutional guaranty renders incompetent only such evidence as is furnished or produced by accused under 'testimonial compulsion,' such as disclosures obtained by legal process against him as a witness, or, as otherwise stated, that it extends only to communications, written or oral, on which reliance is to be placed as involving accused's consciousness of the facts and the operation of his mind in expressing it. The test of admissibility under the majority rule has been said to be whether the proposed evidence depends for its probative force on the testimonial responsibility of accused, or has such force in itself, unaided by any statement of accused."

The overwhelming number of cases hold that the mere fact that the evidence, other than testimonial evidence, had its origin with defendant, even where taken against his will, is no ground for its exclusion. Practically every modern court holds that the accused can be compelled to stand in court for purposes of identification, and that his fingerprints, footprints, photographs and clothing, even where taken against his will, may be admitted, where relevant, without violation of the privilege in question. A few typical cases will suffice to demonstrate the point. In Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, 20 Ann.Cas. 1138, a defendant, under duress, was compelled to put on a blouse, and at the trial a witness other than defendant testified that the prisoner put it on and it fitted him. This testimony was objected to upon the ground of the constitutional privilege. The Supreme Court said (218 U.S. at page 252, 31 S.Ct. at page 6): "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent."

In People v. Sallow, 100 Misc. 447, 165 N.Y.S. 915, the defendant contended that by requiring her to have her fingerprints taken, and the receipt in evidence of such fingerprints, she was required, in violation of her constitutional rights to be a witness against herself in a criminal case. The court said (165 N.Y.S. at page 924): "The taking of finger prints is not a violation of the spirit or purpose of the constitution-

al inhibition. 'The scope of the privilege, in history and in principle,' says Greenleaf, 'includes only the process of testifying, by word of mouth or in writing; i. e., the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the witness' body or about his person.' Section 469e, vol. 1, 16th Ed. It would be a forced construction to hold that by finger printing the defendant was required to furnish evidence against herself."

Another interesting case is State v. Barela, 23 N.M. 395, 168 P. 545, L.R.A. 1918B, 844, where the sheriff, against the will of the accused, compelled them to remove their shoes for purposes of comparison with prints found at the scene of the crime. At the trial the sheriff was permitted over objection to testify as to the result of these comparisons. The Supreme Court of New Mexico stated (168 P. at page 547): "The provisions against self-incrimination are limited to testimonial compulsion under process of some kind directed against the defendant as a witness. It does not and cannot logically apply to actions of the defendant under compulsion of persons or officers without judicial sanction. In such cases the physical facts speak, not the defendant as a witness." After referring to a few cases that hold to the contrary, the court stated that those cases follow a minority and unsound doctrine. At page 548 of 168 P. it is stated: "They allow the fact that the evidence was illegally obtained to control its admissibility. As before seen, this has nothing to do with the matter. The test is as to whether the evidence is compulsorily given by the defendant under process as a witness. The question as to whether it is the result of an unlawful search or seizure, or whether it is obtained by force or intimidation of private persons or officers, not under sanction of judicial process, ordinarily has no effect whatever upon its admissibility."

In State v. Aspara, 113 La. 940, 37 So. 883, an exception was taken to the ruling by the trial court in allowing state witnesses to examine certain clothing taken from the defendant after his incarceration, with a view of identifying it as that worn by him at the time of his arrest. One of the grounds of the exception was that it would be equivalent to compelling him to give testimony against himself in a criminal case. The court stated that the objection was properly overruled, and held that incriminating articles may, if relevant, be used in evidence against the accused, though forcibly, irregularly, or illegally taken out of his possession. In State v. McLaughlin, 138 La. 958, 70 So. 925, a detective was allowed to testify that on the day of defendant's arrest, which was the date of the homicide, he, with another detective, visited defendant and took certain scrapings from his fingernails; that he placed the scrapings together and turned them over to the assistant chief of detectives. The scrapings were taken in order to ascertain whether they contained human blood. It was shown on the trial that they did. The court on appeal held that the testimony was properly admitted and violated no constitutional right of the defendant.

In Ross v. State, 204 Ind. 281, 182 N.E. 865, the defendant was accused of robbery. Before trial he was produced before a prospective witness for identification, with a handkerchief over his face and when he had a beard of several hours' growth. The appellant contended that this amounted to a violation of his privilege against self-incrimination. The court held that the rule did not apply to pretrial efforts to identify a suspect as the probable perpetrator of a crime even though those efforts involve physical examination or observation of the suspect against his will. The court, after quoting from O'Brien v. State, 125 Ind. 38, 25 N.E. 137, 9 L.R.A. 323, stated (182 N.E. at page 869): "We think that O'Brien v. State properly limits the privilege against self-incrimination to testimonial compulsion, i. e. a defendant cannot be required to be a witness in his own trial, nor can another person testify under such circumstances that he is a mere 'mouthpiece' of the defendant; the defendant being the 'real witness.' The privilege does not embrace testimony of a witness other than the defendant unless such testimony results in getting before

the jury evidence which rests upon the testimonial responsibility of the defendant."

In People v. Jones, 112 Cal.App. 68, 296 P. 317, the defendant claimed that the evidence of his fingerprints was improperly admitted, being in violation of his privilege against self-incrimination. There was no evidence that the fingerprints were taken by force. The court held the evidence admissible, and, after quoting from the case of People v. Sallow, supra, stated (112 Cal.App. at page 72, 296 P. at page 319): "While our attention has been called to no California cases upon this point, the introduction of such evidence is supported, not only by long established usage, but, in our opinion, by the better reasoning. As pointed out in the case just referred to, such evidence is not the evidence of the defendant, but is the evidence of a competent witness, and, while it is based upon an examination of the defendant, it is no more inadmissible than would be the testimony of one who testified to the existence of a scar."

Many other cases could be cited to the same effect. There are some cases to the contrary. See State v. Height, 177 Iowa 650, 91 N.W. 935, 59 L.R.A. 437, 94 Am. St.Rep. 323; State v. Newcomb, 220 Mo. 54, 119 S.W. 405; State v. Horton, 247 Mo. 657, 153 S.W. 1051; State v. Matsinger, Mo.Sup., 180 S.W. 856; Bethel v. State, 180 Ark. 290, 21 S.W.2d 176; People v. Corder, 244 Mich. 274, 221 N.W. 309. These cases are far in the minority and have been subjected to criticism. See 8 Wigmore on Evidence, 3d Ed., § 2252, at p. 320, fn. 2.

Coming now directly to the question of the admissibility of tests or operations made upon the defendant against his will as distinguished from physical identification evidence, the majority of cases find no legal distinction between such evidence and the various types of physical identification evidence heretofore discussed. It is true that there are some cases refusing admissibility to evidence, forcefully secured, that the defendant was suffering from a venereal disease, where that evidence is relevant. See in particular People v. Corder, supra; State v. Height, supra. But the majority of courts have held that the privilege against self-incrimination is not violated by producing in court through witnesses other than the accused the results of medical examinations, even where done forcefully. A few typical cases will suffice to illustrate the point. In State v. Gatton, 60 Ohio App. 192, 20 N.E.2d 265, the question arose over the admissibility of evidence as to the refusal of the defendant to submit to a blood test or urinalysis where he had been charged with operating a motor vehicle while intoxicated. The evidence was admitted and he was convicted. On appeal he contended that the admission of such testimony violated the privilege against self-incrimination. In holding that the privilege was limited to disclosure by utterance the court stated (20 N.E.2d at page 266): "It will be observed in the instant case that the evidence offered was not required to be given by the defendant himself, but was given by the deputy sheriff and the doctor called by the deputy to make the examination of defendant. We are unable to observe any merit in the defendant's claim that the introduction of such evidence violated his constitutional rights, and we believe, and hold, that the constitutional inhibition against self-incrimination relates only, as stated by Greenleaf, to disclosure by utterance. No such disclosure was required of defendant in this case." See comment on this case 24 Minn.Law Rev. 444.

The case of State v. Cram, Or., 160 P.2d 283, is one where the defendant was charged with manslaughter committed while under the influence of intoxicating liquor. The accused was rendered unconscious by the accident, and while still unconscious he was arrested and a sample of blood was taken from him for the purpose of having it analyzed to determine its alcoholic content, if any. At his trial the doctor testified as to such content. The court on appeal held the evidence was admissible and stated (160 P.2d at page 289):

"We need not consider how far a court would go in requiring a man to submit to a blood test. See Holt v. United States, supra. Here the blood has already been extracted; defendant is not being called upon to submit to an examination.

"The defendant was not deprived of any of his constitutional rights by the admission of the testimony here in question. He was not compelled to testify against himself. Evidence of the result of the analysis of the blood sample was not his testimony but that of Dr. Beeman, distinct from anything the defendant may have said or done. The blood sample was obtained without the use of any process against him as a witness. He was not required to establish the authenticity, identity or origin of the blood; those facts were proved by other witnesses."

In State v. Duguid 50 Ariz. 276, 72 P. 2d 435, involving the admissibility of a urinalysis, but where there was no compulsion, the court at page 438 of 72 P.2d discussed the problem as follows, quoting from Lee v. State, 27 Ariz. 52, 229 P. 939: "'* * * It may be doubted if the constitutional privilege now invoked was ever intended to exempt an accused from an exposition of physical or natural marks or distinctions or characteristics, such as tracks, foot-prints, stains, and finger prints. 4 Wigmore on Evidence, § 2265. The learned author thinks the privilege against self-incrimination should be confined to testimonial utterances. As was said in State v. Graham, 116 La. 779, 41 So. 90:

"'"The tendency of the more modern case is to restrict the constitutional privilege against compulsory self-crimination to confessions, and admissions proceeding from the accused, and to open the door to the reception of all kinds of 'real evidence' or proof of physical facts, which speak for themselves."'"

A case quite similar, factually, to the instant case is Ash v. State, 139 Tex.Cr.R. 420, 141 S.W.2d 341. There the accused, who had been charged with receiving stolen property, swallowed several of the stolen rings. He was taken to the hospital and the rings located by fluoroscopic examination. Against his will and over his vigorous objections he was compelled to submit to an enema, and the stolen property thus recovered. This property was identified and produced in evidence at his trial over his objections. He was convicted and appealed, contending the privilege had been violated. The court stated (141 S.W.2d at page 342): "It will be noted from the facts of this case that the officers had information pointing to the appellant's guilt; that after he came under their observation they saw him place a metallic object in his mouth which they took to be the rings in question, or one of them. This proved to be correct. His possession of the rings and secreting them in the presence of the officers is the gist of the offense. He was, therefore, committing a felony in their presence. This gave them a legal right to arrest him and search his person. Hayes v. State, 115 Tex.Cr.R. 644, 28 S.W.2d 556; Bevins v. State, 110 Tex.Cr.R. 52, 7 S.W.2d 532. Where then should they end this search? If the rings remained in the appellant's mouth, they would have had as much right to search his mouth and secure the rings as if they were in his pocket. He swallowed them. They determined this by seeing him make three or four efforts to swallow something, which took place in their presence and which warranted them in continuing their search. There is no contention that the officers resorted to any cruel or inhuman method of determining the presence of the rings, nor in extracting them. The applied the most approved method of doing so. Under the directions of a skilled operator they located the rings in the appellant's bowels. Could it be said that if a thief has stolen property, sewed it up in his pocket, or in the lining of his coat, that the officers would have no right to cut the stitches or even to injure his clothing for the purpose of securing the valuables belonging to another and that when they did so there would be a question about the admissibility of the evidence thus obtained? The evidence is replete with the conduct of the appellant in fighting the officers physically resisting every effort made by them to procure the rings, but there is no evidence to indicate any cruelty or unusual treatment on their part in doing so. They gave him an enema, a very normal and natural thing to do, thereby extracting the rings which the appellant had chosen to secrete in this most unusual manner. If the act of the officers should be considered unusual, it was brought about by reason of the act of the accused party. We think that the officers had a legal right to arrest appellant and

to search him and to continue that search to such a reasonable degree as to permit them to ascertain whether or not the appellant possessed the stolen property, which they had a right to believe he had."

The modern and majority rule has been approved by the Model Code of Evidence drafted by the American Law Institute. Rule 205 (p. 136) reads as follows:

"No person has a privilege under Rule 203 to refuse

"(a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or (b) to furnish or to permit the taking of samples of body fluids or substances for analysis."

The rule is followed by this comment: "This Rule like Rule 201 adopts the doctrine of the better considered cases that the privilege against self-incrimination applies only to prevent testimonial compulsion and has no application to compulsory exhibition of the body. A number of decisions have held that a compulsory physical examination of a defendant over his protest, for the purpose of determining his physical condition, is a violation of his constitutional right and that evidence discovered by this means is not admissible against him. Some cases dealing with evidence of finger-prints avoid the issue by finding a waiver of privilege by failure to object. The trend is, however, strongly toward the view expressed in the Rule. The legality of the practice of taking Bertillon measurements and finger-prints and other records of identifying characteristics of a person under legal arrest is expounded in United States v. Kelly, 2 Cir., 1932, 55 F.2d 67, 83 A.L.R. 122. The same principle is applicable to Clause (b). This Rule deals only with the privilege against self-incrimination, and leaves entirely open the question whether any other rule of law protects a witness or party against invasion of an asserted right to freedom from interference with his person."

[6-9] In line with the weight of authority it is our opinion that the privilege against self-incrimination does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted. It is our view that the privilege only protects the individual from any forced disclosures made by him, whether oral or written. It is limited to the protection against testimonial compulsion. The privilege protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. The privilege is aimed at preventing the compulsory oral examination of the accused before or during trial. Experience of many years has demonstrated that when statements are extorted from an accused there is a strong likelihood that the extorted evidence would be unreliable. But the reason for the rule no longer exists when physical evidence is considered. In the present case the evidence as to the narcotic content of Williams' stomach in no way depended upon the testimonial utterances of Williams for its probative force. Williams was not required to establish the identity, origin, or authenticity of the evidence, nor was he required in any way to testify concerning its analysis. This was done by other witnesses. Under the circumstances, for reasons already stated, the evidence was not privileged and should have been admitted.

Williams contends that whatever the rule may be in other jurisdictions, California has adopted the rule that such evidence, if not voluntarily given, is not admissible. In this connection he cites People v. Guiterez, 126 Cal.App. 526, 14 P.2d 838, and People v. Salas, 17 Cal.App.2d 75, 61 P.2d 771. In the Guiterez case the defendant submitted voluntarily to a physical examination to determine whether he had a venereal disease and such testimony as to the results was held admissible. The same result was reached in the Salas case, where an examination was made of the defendant's forearm without objection, and at his trial it was held that a properly qualified person could testify that the arm showed scars as though made by a hypodermic syringe. The courts there held that results of physical examinations to which the defendants have voluntarily submitted are admissible. It seems to be the

thought of Williams that because those two cases emphasized that the physical examinations there involved were voluntary they necessarily implied that the results of an involuntary examination would not be admissible. This is clearly a non sequitur. All that the courts were there concerned with was whether the results of voluntary examinations were admissible. They did not pass upon the question, because it was not involved, whether the results of an involuntary examination are admissible.

The case of People v. Akens, 25 Cal.App. 373, 143 P. 795, so strongly relied upon by Williams, also is not in point. In that case the defendant was charged with the rape of a female under the age of consent. He was convicted of assault with intent to commit rape. The appellate court reversed the judgment, holding that the verdict was without the scope of the information. At the conclusion of the opinion the following appears (25 Cal.App. at page 376, 143 P. at page 796): "In the event of a new trial * * * it may be stated that the defendant cannot be required, against his consent, to submit to an examination by a physician * * *." Apparently, the prosecutor was there attempting to secure a court order to compel such examination. As already pointed out, we are not here called upon to pass upon the legality of the methods used to secure such evidence, nor are we called upon to decide whether a court could or should order such an examination. The question here involved is whether the evidence relating to the narcotic contents of Williams' stomach, already obtained, and assuming, but not deciding, illegally obtained, was admissible. The legality of the methods used to obtain the evidence is not involved on this appeal. So far as the privilege against self-incrimination is concerned, that privilege was improperly invoked in the present case. Other remedies may exist to protect an accused from such acts, but the privilege against self-incrimination is not one of them.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

74 Cal.App.2d 304

DAVIES v. BEACH et al.

Civ. 15045.

District Court of Appeal, Second District, Division 3, California.

April 30, 1946.

Hearing Granted June 27, 1946.

1. United States ⇐91

The Second Liberty Bond Act is a valid exercise by Congress of its constitutional power to borrow money on the credit of the United States. Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

2. United States ⇐79

The constitutional power to borrow money necessarily includes the power to fix the terms of the obligation of the United States. U.S.C.A.Const. art. 1, § 8.

3. United States ⇐91

The regulations of the Treasury Department under which United States savings bonds are issued have the force of federal law. Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

4. States ⇐4

A state cannot vary the terms of federal obligations.

5. United States ⇐91

A United States savings bond, issued under the Second Liberty Bond Act and the regulations of the Treasury Department, is a contract obligation of the United States to the owner and to the beneficiary severally. Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

6. United States ⇐91

Where a United States savings bond is issued in the name of owner and made payable at death to designated beneficiary, at owner's death the proceeds of the bond belong to beneficiary and there is no right in owner's estate to such bond or the proceeds thereof. Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

7. United States ⇐91

Civil Code section providing that United States savings bonds registered in the name of one person and payable on death to a named survivor, shall, upon death of registered owner, become sole and absolute property of surviving beneficiary unless federal laws provide otherwise is in accord with federal law. Civ.Code, § 704; Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

8. United States ⇐91

The statutory right, afforded by states, to dispose of property by will is not paramount to the power of the federal government to borrow money, hence a person in whose name a federal bond is registered and who has designated a registered beneficiary cannot dispose of bond by will to one other than beneficiary. Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

9. Husband and wife ⇐264

Evidence sustained finding that money decedent had used to purchase United State savings bonds, which were made payable to decedent's sister upon his death, was decedent's separate property, derived from his mother's estate, rather than community property and that decedent's widow had no right thereto. Civ.Code, § 704; Second Liberty Bond Act of Sept. 24, 1917, as amended, 31 U.S.C.A. § 747 et seq.; U.S.C.A.Const. art. 1, § 8.

10. Husband and wife ⇐263

Circumstantial as well as direct evidence is receivable in determining whether money is community or separate property of one of the spouses.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Elizabeth B. Davies against Edith V. Beach, individually and as administratrix with the will annexed of the estate of George H. Beach, deceased, for declaratory relief with respect to certain United States savings bonds, wherein defendant cross-complained. From a judgment for plaintiff, defendants appeal.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

Gerald Bridges, of Los Angeles, for respondent.

WOOD, Justice.

This is an action for a declaration of the rights of the parties to certain United States savings bonds. The plaintiff claims title thereto under the provisions of the bonds, the regulations of the Treasury Department, and Section 704 of the Civil Code. The defendant, who appears individually and as an administratrix, claims title thereto under the provisions of a will and the community property laws. Defendant appeals from the judgment in favor of plaintiff.

Plaintiff is the sister of George H. Beach, who died on October 19, 1943. Defendant is his widow and the administratrix with the will annexed of his estate. Defendant and decedent were married in 1919, and lived together until his death.

On April 7, 1936, he paid $3,543.75 for United States savings bonds, Series "B," of a maturity value of $4,725. The bonds recited that "The United States of America, for value received, promises to pay to Mr. George H. Beach—payable at death to —Mrs. Elizabeth B. Davies," the aggregate sum of $4,725 ten years after date. When the bonds were issued, a few days after April 7, 1936, he delivered them to his sister, who kept them until June, 1942, when at his request she returned them to him.

On February 9, 1942, he made an holographic will which provided: "That my share of the estate left by my late mother Mary J. Beach all of which has been invested in U Savings Bonds under date of April 7th 1936 and in case of my death made payable to my sister Elizabeth B. Davies I now desire and direct that same shall be changed to read made payable to

my lovable wife Edith V. Beach. In case the change is so made I hereby give to said Elizabeth B. Davies Two Hundred Dollars in cash. The entire balance of my estate is to go to my lovable wife. Should any person or persons contest this will, I hereby leave such person or persons the sum of One Dollar. All former Wills revoked. All of our property is deeded jointly. No Bond required. George H. Beach."

The bonds were issued by the United States pursuant to the Second Liberty Bond Act of September 24, 1917, as amended, 31 U.S.C.A. § 747 et seq., the Treasury Department Circular No. 554 of December 16, 1935, and the Treasury Department Circular No. 530, as amended, of December 2, 1930.

Circular 554 provided: That the bonds would be issued only in registered form. That they would not be transferable, and "will be payable only to the owner named thereon, except in case of death or disability of the owner or as a result of judicial proceedings, and then only in accordance with regulations prescribed from time to time by the Secretary of the Treasury. (See Treasury Department Circular No. 530, as amended.)" That information as to the authorized forms of registration is in Circular 530, as amended. Payment will be made as provided in Circular 530, as amended, following presentation and surrender of the bond, by registered mail or otherwise, at the expense of the owner, to the Treasury Department, with the request for payment appearing on the back of the bond duly executed by the owner and certified by certain designated persons. That regulations in effect governing bonds are in Treasury Department Circular No. 530, as amended.

Circular 530, as amended December 2, 1935, and in force at the time the bonds were purchased, provided:

"The following forms of registration are authorized. * * *

"(c) In the name of one individual and a single designated beneficiary in case of death, as, for example, 'Mr. John Smith, payable on death to Mrs. Mary Smith,' in which case the address of the registered owner and the address of the beneficiary should be inscribed on the face of the savings bond. * * *

"United States Savings Bonds are not transferable and are payable only to the owner named thereon except in the case of the disability or death of the owner or as the result of judicial proceedings, and then only to the extent specifically provided in Sections VIII, IX, XIV, and XV hereof. [Said Sections relate respectively to minors, disability of owners, deceased owners, and creditors rights.]

"A savings bond registered in the form 'A, payable on death to B,' will be payable to the registered owner, until the Treasury Department has received notice of his death, upon the execution by him alone of the request for payment, as if the beneficiary were not named in the savings bond. * * * Registration naming beneficiaries at the death of the registered owner cannot be changed so as to add, eliminate, or substitute beneficiaries.

"Upon proof of the death of the registered owner and proof of the survivorship of the beneficiary, even though the beneficiary should thereafter die, the savings bond will be paid or reissued as though the beneficiary had been the registered owner. * * *

"Payment of a savings bond will be made in accordance with a judgment or decree of a court of competent jurisdiction, or proceedings pursuant to such judgment or decree, except in cases where the action is instituted for the purpose of giving effect to an attempted transfer by the owner contrary to Section II, hereof." (Section II is the section above quoted to the effect that the bonds are not transferable.)

Circular 530, as amended June 1, 1942, and in force at the time of the death of George H. Beach, provided:

"A bond registered in the name of one person payable on death to another, for example, 'Henry W. Ash, payable on death to John C. Black,' will be paid to the registered owner during his lifetime upon his properly executed request as though no beneficiary had been named in the registration. * * *

"A bond registered in the name of one person payable on death to another may not be reissued during the latter's lifetime to eliminate his name, but may be reissued, on request of the registered owner * * * to name the beneficiary as co-owner. * *

"If the registered owner dies without having presented and surrendered the bond for payment or authorized reissue to a Federal Reserve Bank or the Treasury Department, and is survived by the beneficiary, upon proof of such death and survivorship, the beneficiary will be recognized as the sole and absolute owner of the bond, and it will be paid only to him, or may be reissued in his name * * *."

Section 704 of the Civil Code, effective February 10, 1943, provided:

"All United States savings bonds or other bonds or obligations of the United States, however designated, *now* or *hereafter issued,* which are registered in the name of one person payable on death to a named survivor, shall, upon the death of the registered owner, become the sole and absolute property of the surviving beneficiary named therein, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.

"This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided." (Italics added.)

The court found that the money used in purchasing the bonds was decedent's separate property. It was adjudged that plaintiff was the owner and entitled to the possession of the bonds.

Appellant contends that the "payable at death" clause in the bonds is void because it is testamentary; that Congress had no power to insert such a provision in the bonds; that if Congress did have such power it had no right to delegate it to the Treasury Department; that Congress did not exercise such power; that Congress did not delegate such power to the Treasury Department; and that the regulations do not prohibit a change of beneficiary by will

[1-6] Those contentions are not sustained. The Second Liberty Bond Act is a valid exercise by Congress of its constitutional power "To borrow Money on the credit of the United States"; the borrowing power necessarily includes the power to fix the terms of the obligation of the United States; the regulations of the Treasury Department, under which the bonds are issued, have the force of federal laws; the State cannot vary the terms of federal obligations; a savings bond, issued under the Second Liberty Bond Act and the regulations of the Treasury Department, is a contract obligation of the United States to the owner and to the beneficiary severally. Conrad v. Conrad, 66 Cal.App.2d 280, 286, 152 P.2d 221; and cases cited therein. In the Conrad case the bonds were payable to co-owners, that is, to Mrs. Inman (decedent, who furnished the money) or Mr. Conrad. In the present case the bonds were "payable at death" to the beneficiary, decedent's sister. The court stated in the Conrad case, 66 Cal.App.2d at page 285, 152 P.2d 221 that the "majority rule," as shown by cases from other jurisdictions, was that when the co-owner of a savings bond, who furnished the purchase money, died, the bond belonged to the surviving co-owner with no interest left in deceased's estate, the question being one of contract under federal regulations which provided for exclusive ownership in the surviving co-owner. Relative to the "payable at death" clause, it was further stated therein, 66 Cal.App.2d at page 285, 152 P.2d at page 224, that "Some of the bonds in those cases [referring to the "majority rule" cases] were issued to two persons *as co-owners,* and others to the purchaser, *and upon his death, to a named beneficiary.* There seems to be no logical distinction to be made between the rights in the bonds of a *surviving co-owner* or a *surviving beneficiary.*" (Italics added.)

Appellant contends further than section 704 of the Civil Code does not affect her for the reasons that: it is not retroactive; it impairs the obligation of a contract; it invades the judicial function; it deprives her of liberty and property without due process of law; it invades federal jurisdiction; it abridges the privileges and im-

munities of citizens; it denies the equal protection of the laws; it is void as a special law giving effect to invalid wills; it does not exclude the right to change the beneficiary of the bonds by will; it does not have uniform operation; and it grants special privilege to the Secretary of the Treasury. She contends further that if the bond is a contract and is not void, the sister is a trustee for the widow; that she who comes into equity must do equity; and if the bond is testamentary in effect, it has been revoked by a subsequent will.

[7] Section 704 of the Civil Code is not in conflict with the federal law, but on the contrary its provisions are in accord therewith, it being provided therein that bonds now or hereafter issued which are payable on death to a named survivor shall, upon the death of the registered owner, become the sole and absolute property of the surviving beneficiary named therein unless the federal laws provide otherwise. Since the beneficiary named in the bonds herein became the owner thereof, if otherwise entitled thereto, under the provisions of the bonds and the federal regulations, it is not necessary to determine whether said Section 704 is retroactive, or to determine the other contentions relative to that section.

[8] The statutory right, afforded by the State, to dispose of property by will is not paramount to the power of the federal government to borrow money. If such a statutory power can render nugatory the provisions of the bonds and the rules and regulations of the Treasury Department, upon which purchasers of the bonds rely, the power of the federal government to raise money will be impaired. The capacity of the federal government to borrow money depends on the inviolability of its obligation, and on its ability to carry it out strictly in accordance with its terms. If the State may treat the bonds as the property of some person other than the one whom the contract has designated the federal government will be prevented from carrying out its agreement.

The phraseology of the will, directing a change of beneficiary in the bonds and stating "In case the change is made," indicates that Mr. Beach knew it was necessary to comply with rules and regulations in order to make that change, and that there was some question or uncertainty about effecting the change. He lived about 1½ years after he made the will. He had the bonds in his possession over a year preceding his death. It appears that he had ample opportunity to comply with the rules and regulations, and effect the change which he stated he desired to make.

Appellant contends further that the evidence was insufficient to support the finding that the money used in purchasing the bonds was decedent's separate property. She asserts that the money so used was community property. At the trial she stated that she would rely solely upon the presumption that property acquired during the marriage is community property. She offered no evidence in addition thereto. There was evidence as follows: Decedent's mother died in 1927, and her estate of approximately $22,000, consisting of $8,198.38 in cash and the balance in mortgages, was distributed in 1929 in equal parts to her five children, the decedent receiving property in excess of a value of $4,000. On June 11, 1929, decedent started a bank account in his name in the California Bank with a deposit of $1,639.70, which was approximately 1/5 of the $8,198.38 cash which was distributed. Also on said date he started another account in his name in the Bank of Italy, depositing $508.49. On July 22, 1929, he deposited $489.69 therein. At various times when the amounts of the mortgages which were a part of the estate were collected, decedent received his proportionate share thereof. On September 4, 1929, a further amount of $301.75 was distributed to decedent as his share of a further distribution, and on that day he deposited that amount in said Bank of Italy account. On June 30, 1930, his balance in the Bank of Italy, including accrued interest, was $1,347.67. On the next day, July 1, 1930, he withdraw $1,710 from the California Bank account, being the amount of the deposit of $1,639.70 and interest thereon, and deposited it in the Bank of Italy account, making a balance there of $3,057.67. On August 30, 1930, he deposited $3,057.67 in the Bank of America in an ac-

count entitled, "Geo. H. Beach or Della B. Purmort," apparently being the money which had been on deposit in the Bank of Italy. Della B. Purmort is his sister. No other deposits were made in the Bank of America account, and on December 30, 1930, the balance therein of $3,126.48, including accrued interest, was withdrawn. It does not appear that this amount was redeposited in a bank. On September 9, 1931, an account entitled, "Geo. H. Beach or Della B. Purmort," was started in the Security-First National Bank with the sum of $618.81. Other deposits were made therein as follows: $566 on February 13, 1932, $379.67 on September 1, 1932, and $2,612.50 on August 1, 1934. On that last-mentioned date the balance in the account, after certain withdrawals, was $3,496.41. That balance remained unchanged until April 1, 1936, when that balance and the accrued interest of $90.20, a total of $3,586.61, was withdrawn. On April 7, 1936, the bonds were purchased at a post office in the presence of respondent. In his will decedent stated, as above shown, that he had invested his share of his mother's estate in the bonds. Respondent testified, over appellant's objection, that decedent told her on the day the bonds were purchased that he was going to buy the bonds with the money from his mother's estate, which money was in the Security Bank, that he was going to make respondent the beneficiary and he wanted her to keep his "mother's money" in that state.

[9, 10] Irrespective of whether the testimony of respondent, as to what decedent said to her about the source of the funds, should have been received, the evidence otherwise was sufficient to support the finding that the money used to purchase the bonds was decedent's separate property. In the Estate of Tompkins, 123 Cal.App 670, 11 P.2d 886, it was contended that certain property was separate property of a deceased husband, it being claimed that he purchased it with money inherited by him. The widow contended that the trustees of the estate, who asserted that the property was separate property, were required to identify each item as property acquired with inherited money. The court said, 123 Cal. App. at pages 675 and 676, 11 P.2d at page 889: "Proof should consist of the best evidence reasonably obtainable, but the law does not exact the impossible; and it must be remembered that the widow had been in possession of her husband's records after his death, but testified that they had been lost in some way. Circumstantial as well as direct evidence is receivable, and legal proof is that made by a preponderance of the evidence under all the facts and circumstances as presented in each individual case. Upon the submission of the controversy, it is then for the court to draw its reasonable inferences from all the evidence adduced, bearing in mind the rule that, to dissipate the naked legal presumption in behalf of the community right, there need be exhibited only 'such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind.'"

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

Hearing granted; EDMONDS and CARTER, JJ., dissenting.



74 Cal.App.2d 367

ARMSTRONG et al. v. PACIFIC GREYHOUND LINES et al.

Civ. 7218.

District Court of Appeal, Third District, California.

May 2, 1946.

1. Carriers ⇐318(7)

In passengers' action against bus company for injuries in a collision between bus and automobile, evidence that bus was traveling at a moderate speed on its proper side of highway and pulled over onto shoulder in an effort to avoid collision when on-coming automobile crossed center line of highway at an excessive speed authorized finding that collision occurred through no negligence of bus driver or company.

2. Carriers ⇐321(21)

In action by passengers in bus against bus company for injuries sustained in collision between bus and automobile, where evidence warranted finding that collision occurred without negligence of bus company or driver and solely as result of negligence of motorist, court properly charged that doctrine of res ipsa loquitur did not relieve plaintiffs' burden of proving negligence by preponderance of the evidence and that it was not necessary for defendant to overcome inference of doctrine by preponderance of the evidence.

3. Carriers ⇐280(1)

It was duty of bus company as a common carrier to exercise utmost care for safety of its passengers to provide everything necessary for that purpose and to use a reasonable degree of skill to that end. Civ.Code, § 2100.

4. Automobiles ⇐242(2)

The doctrine of res ipsa loquitur may be applicable to suits for personal injuries sustained against owners or operators of different vehicles as joint tort-feasors who are charged with concurrent negligence.

5. Negligence ⇐121(2)

The introduction of evidence by plaintiff tending to affirmatively show actual cause of accident does not necessarily preclude him from benefit of doctrine of res ipsa loquitur.

6. Negligence ⇐121(2)

The inference of negligence of an alleged tort-feasor which may be deduced by jury or trial court on the doctrine of res ipsa loquitur in a proper case is rebutted by adequate evidence or explanation of the cause of the casualty which merely equals or offsets the inference or proof of such negligence.

7. Negligence ⇐121(2), 136(6)

The inference of negligence which jury may draw from an application of the doctrine of res ipsa loquitur, in a proper case, is in the nature of indirect evidence but the conclusion therefrom that negligence exists is not mandatory. Code Civ. Proc. §§ 1957, 1958.

8. Negligence ⇐138(2)

Court correctly used the word "inference" in charging that it was not necessary for a defendant to overcome the inference of negligence arising from the doctrine of res ipsa loquitur by preponderance of the evidence in light of statutory distinction between a presumption and an inference, and properly charged that inference involved was a form of evidence to be weighed by jury. Code Civ.Proc. §§ 1959, 1960.

9. Carriers ⇐320(21)

In action by passengers in bus against bus company and driver for injuries sustained in a collision between bus and automobile, where passengers relied on doctrine of res ipsa loquitur whether prima facie case presented by plaintiffs was adequately met or balanced by affirmative showing of good mechanical condition of bus, the conduct of its driver to avoid collision and circumstances of collision was for jury. Civ.Code, § 2100.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Edgar Armstrong and Jimmie Armstrong against the Pacific Greyhound Lines and others for injuries sustained by plaintiffs while passengers on named defendant's bus in a collision between bus and an automobile operated by defendant Loren P. Boyd. A verdict was returned in favor of plaintiff against defendant Boyd and in favor of defendants Pacific Greyhound Lines and Rodney O. Nelson. From a judgment for defendants, Nelson and Pacific Greyhound Lines, plaintiffs appeal.

Affirmed.

Lloyd Hewitt and Manwell & Manwell, all of Marysville, for appellants.

Gerald M. Desmond, of Sacramento (Philip C. Wilkins, of Sacramento, of counsel), for respondents.

THOMPSON, Justice.

Plaintiffs have appealed from a judgment rendered pursuant to the verdict of a jury in favor of Pacific Greyhound Lines and Rodney O. Nelson, the driver of the bus, in a suit for personal injuries received

by paid passengers thereof as the result of a collision with a Ford automobile driven by the codefendant, Boyd. A verdict was also returned and a judgment rendered against Boyd for the sum of $15,000 and costs. The defendant Boyd has not appealed. The only issue on appeal is the alleged error of the trial court in instructing the jury in regard to the doctrine of res ipsa loquitur that it was necessary only for the Greyhound Lines and its driver of the bus to affirmatively prove facts *sufficient to offset the inference of negligence* created by the application of that principle. In other words, the jury was charged that it was not necessary for the appellants to refute the inference by a *preponderance* of the evidence.

The Pacific Greyhound Lines, a corporation, owned and operated the bus which was involved in the collision with an automobile on the highway between Roseville and Lincoln, at approximately 11:45 o'clock p. m. on November 23, 1943. Rodney O. Nelson, who had been employed as a driver of the Greyhound busses for three years, was operating the bus at the time of the accident. Loren P. Boyd was driving the Ford automobile which caused the accident. The plaintiffs were riding as paid passengers on the bus. The corporation and the drivers of both machines were sued as joint tort-feasors. At the trial the plaintiffs furnished substantial evidence of the cause of the accident and of the negligence of the defendants, but also relied on the doctrine of res ipsa loquitur. There was a conflict of evidence regarding the assumed negligence of the Greyhound Lines and its driver Nelson. Boyd defaulted and he was not present at the trial. Nelson, the driver of the bus, and another disinterested witness, testified to facts tending strongly to refute the respondents' negligence.

There is ample evidence to support the verdict and judgment exonerating the Greyhound Lines and its driver, Nelson, from negligence. That fact is not disputed. James H. Scritchfield, who was a passenger on the bus, testified that the bus was traveling six miles beyond Roseville at about 40 miles an hour on its proper side of a practically straight level highway when he saw the headlights of an approaching machine on its proper side of the highway; that when the Ford machine reached a point about 100 or 150 feet away it began to cross the white line onto the wrong side of the highway; that Nelson, the driver of the bus, applied his brakes and pulled his machine further over to his right-hand side onto the shoulder of the roadway to avoid the collision; that "it happened so quick," and when the witness "saw this Ford was coming over on the bus' side, and I knowed it was going to hit, * * * I threw my hands up like this (indicating) then fell down into the floor." He said that the Ford crashed into the bus and struck about at the front wheel on the left-hand side. Scritchfield's evidence was favorable to the respondents. He testified to no fact that would indicate that the driver of the bus was not thoroughly alert and exercising utmost diligence for the safety of his passengers.

Mr. Rodney Nelson, the driver of the bus testified that he had been employed as a driver for the Pacific Greyhound Lines for three years; that the bus was in good mechanical condition; that he had on board twenty-one passengers, among whom were the plaintiffs; that he left Roseville for Lincoln at 11:15 o'clock p. m., on schedule time, and that he was driving along a straight stretch of highway with his left-hand wheels about two feet from the center white line at approximately 35 or 38, not more than 40, miles per hour; that there was a shoulder on his side of the highway; that when he first saw the approaching machine it was about three-quarters of a mile away traveling on its proper side of the highway; that as it came nearer he saw its headlights "bobbing up and down," from which he concluded it was traveling rapidly; that when it was only about 100 or 150 feet away the Ford machine suddenly swerved across the white line directly toward the bus. He testified that after the Ford machine crossed the white line onto his side of the highway only two or three seconds elapsed before the crash occurred. He said "I didn't have more than time to swing the car and take my foot off the gas, and put on the brake." He estimated that the Ford was traveling

60 or 65 miles per hour. The bus driver testified that he was traveling at a moderate rate of speed, far over on his proper side of the highway; that he used his dimmers to warn the driver of the approaching Ford car when he was half a mile away; that he kept watching him traveling along his proper side of the highway, and that when he suddenly swerved across the white line at a distance of only 100 or 150 feet, he had no time to do more than to pull his bus to the right, to take his foot off the gas and to apply the brake. The crash threw the bus to its right side and locked the steering gear. Nelson was thrown from his seat, but evidently clung to the wheel. The bus became uncontrollable. It ran a short distance and went off the shoulder and toppled over, seriously injuring both the plaintiffs and the bus driver. The driver was confined to a hospital for some time.

[1] The foregoing evidence supports the verdict in favor of the respondents with the implied determination that the accident occurred and the plaintiffs were injured without fault or negligence on the part of the Pacific Greyhound Lines or the bus driver. The appellants do not challenge the sufficiency of the facts to support the verdict. The facts are related only to show the relevancy of the instruction to the jury upon the burden of proof and the weight of evidence, sufficient to refute the inference of negligence which may be deduced by application of the doctrine of res ipsa loquitur.

[2, 3] We are of the opinion the court did not err in charging the jury upon the subject of res ipsa loquitur, or otherwise. The jury was very fully and fairly instructed upon every essential issue of the case. The jury was charged that it was the duty of the Pacific Greyhound Lines, as a common carrier, to exercise utmost care for the safety of its passengers, to provide everything necessary for that purpose, and to use a reasonable degree of skill, to that end. Sec. 2100, Civ.Code. The correctness of those and all other instructions is conceded by the appellants, with the exception of the following statement with respect to the doctrine of res ipsa loquitur:

"In making such a showing, it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

"If such a preponderance in plaintiff's favor exists, then it must be found that some negligent conduct on the part of defendant was a proximate cause of injury; but if it does not exist, if the evidence preponderates in defendant's favor or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant."

The foregoing quoted language is a correct statement of the law. It was a part of the instruction or the subject of res ipsa loquitur, the balance of which is conceded by the appellants to have been proper. It had no application to the plaintiffs' affirmative proof of alleged negligence of the respondents, which was fully covered by other proper instructions. The jury could not have been misled into believing that the foregoing language with reference to the doctrine of res ipsa loquitur deprived it from considering plaintiffs' affirmative evidence tending to show that appellants were guilty of negligence.

[4, 5] It is true that the doctrine of res ipsa loquitur may be applicable to suits for personal injuries sustained, against the owners or operators of different vehicles, as joint tort-feasors, who are charged with concurrent negligence. St. Clair v. McAlister, 216 Cal. 95, 13 P.2d 924; Dieterle v. Yellow Cab Co., 34 Cal.App.2d 97, 93 P.2d 171. Nor will the introduction of evidence by plaintiff, tending to affirmatively show the actual cause of the accident, necessarily preclude him from the benefit of the doctrine of res ipsa loqui-

tur. Leet v. Union Pac. R. R. Co., 25 Cal. 2d 605, 620, 155 P.2d 42, 158 A.L.R. 1008.

[6] The rule is uniformly established that the inference of negligence on the part of an alleged tort-feasor, which may be deduced by the jury or the trial court on the doctrine of res ipsa loquitur, in a proper case, is rebutted by adequate evidence or explanation of the cause of the casualty which merely equals or offsets the inference or proof of such negligence. St. Clair v. McAlister, supra; Scellars v. Universal Service Everywhere, 68 Cal.App. 252, 257; 45 C.J. p. 1219 et seq., secs. 783, 784; 38 Am.Jur., p. 1006 et seq., secs. 309–311. In the St. Clair case the Supreme Court quotes with approval from Scarborough v. Urgo, 191 Cal. 341, 216 P. 584, as follows [216 Cal. 95, 13 P.2d 926]: "'Such a presumption is evidence in the case, but it has no greater or different effect than the testimony of witnesses, and in no degree changes the rule as to the burden of proof, viz. *the burden of producing a preponderance of evidence.*'" (Italics added.)

The court adds to the foregoing quotation the statement that, "The language just quoted as a correct statement of the law need not be questioned."

In the Scellars case, supra, in which a judgment for plaintiff was reversed, the appellate court said regarding the burden of proof and the weight of evidence necessary to refute the inference of negligence where the doctrine of res ipsa loquitur is properly invoked: "In cases where the maxim res ipsa loquitur is applicable the plaintiff is not relieved from the burden of proof generally required in suits for damages; the defendant need only meet plaintiff's proof by evidence of equal weight. (Rathbun v. White, 157 Cal. 248 (107 P. 309); Cody v. Market St. Ry. Co., 148 Cal. 90 (82 P. 666).)"

In 45 Corpus Juris at page 1220 the rule is stated as follows: "The burden on defendant is merely that of going forward with the evidence, as distinguished from the burden of establishing the affirmative of the issue by a preponderance of the evidence, which is sometimes confused therewith, and that defendant has successfully discharged his burden when he has introduced evidence of *sufficient weight to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth.*" (Italics added.)

[7, 8] To the same effect is the text in 38 American Jurisprudence, previously cited, which is supported by numerous authorities from this and other jurisdictions. We are cited to no authority which holds the contrary regarding that rule of evidence. The inference of negligence, which the jury may draw from an application of the doctrine of res ipsa loquitur, in a proper case, is in the nature of indirect evidence, but the conclusion therefrom that negligence exists is not mandatory. Secs. 1957, 1958, Code Civ.Proc. On the contrary "A presumption is a deduction *which the law expressly directs to be made* from particular facts." Sec. 1959, Code Civ. Proc. Our code makes a clear distinction between an inference and a presumption. "An inference must be founded: 1. On a fact legally proved; and, 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." Sec. 1960, Code Civ.Proc. In the present case the term "inference" was properly used in the challenged instruction. It was favorable to the plaintiffs. The court charged the jury that the inference "is a form of evidence," which must be weighed by the jury and that "if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff against the Pacific Greyhound Lines." The jury was elsewhere fully and properly instructed upon the definition of what is meant by the burden of proof. Crooks v. White, 107 Cal.App. 304, 290 P. 497, 499. In the case last cited a judgment for the defendant, involving the doctrine of res ipsa loquitur in an automobile casualty suit, was affirmed. The court said, "All that defendant was required to do was to produce evidence sufficient to offset the effect of plaintiffs' showing." The court further held that the prevailing party is entitled to full weight

of all evidence adduced upon the subject of the prima facie showing of the inference, together with all reasonable inferences that may be drawn therefrom, and that the reviewing court is bound by the determination of the jury in that regard, where there is substantial evidence to support the verdict. It said:

"The rule is well settled that, even though all facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may reasonably be deduced from those facts, there still remains a question of fact to be determined by the jury, and that the verdict of the jury cannot be set aside by a reviewing court on the ground that it is not sustained by the evidence. In reviewing a question of this kind all inferences, reasonably possible from the evidence, favorable to the prevailing party, must be indulged by this court. [Citing authorities.]

"Applying these rules to the evidence in the case at bar, we cannot say, as a matter of law, that the jury's verdict finds no support in the evidence."

In the preceding case the court further said that if the appellants desired further explanatory instructions upon the subject of the weight of evidence or the burden of proof regarding the inference which is created by the doctrine of res ipsa loquitur, it was their duty to request them, and upon failure to do so, they waived that privilege. Many authorities were cited in support of that principle.

[9] In the present case there was a strong affirmative showing on the part of the Greyhound Lines and the driver of the bus that they exercised "utmost care and diligence" and a reasonable degree of skill, for the safety of its passengers, and to avoid the collision. Sec. 2100, Civ.Code. It was the sole province of the jury to determine from all of the evidence adduced, including the inference relied upon, whether the prima facie case thus presented by the plaintiffs was adequately met or balanced by the affirmative showing of the mechanical condition of the bus, the conduct of its driver and the circumstances of the transaction. As is said in Michener v. Hutton, 203 Cal. 604, at page 608, 265 P. 238, 239, 59 A.L.R. 480, the doctrine of res ipsa loquitur applies "'where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used.'" That case further states that the doctrine does not change the rule as to the burden of proof, and that where the inference is properly invoked, all that is necessary is for the defendant to "adduce evidence *to meet the plaintiff's prima facie case.*" (Italics added.)

We conclude that the court did not err in giving to the jury the instruction which included the preceding quoted language with relation to the burden of proof and the weight of evidence necessary to meet the inference of negligence.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



74 Cal.App.2d 236

AYOOB v. AYOOB.

Civ. 7197.

District Court of Appeal, Third District, California.

April 29, 1946.

Hearing Denied June 27, 1946.

1. Frauds, statute of ⇐125(3)

An oral agreement within the statute of frauds is not void but voidable. Civ. Code, § 1624.

2. Frauds, statute of ⇐104

An oral agreement may be taken out of the statute of frauds by a written memorandum executed subsequently, even though the agreement has already been performed by one party. Civ. Code, §§ 178, 1624.

3. Frauds, statute of ⇐106(1)

An oral agreement may be taken out of the statute of frauds by a subsequently executed written memorandum although the

writing fails to make express mention of the precedent oral agreement, and it is sufficient if the proof establishes that together they constitute a single contract. Civ.Code, §§ 178, 1624; Code Civ.Proc., § 1973.

4. Estoppel ⇐68(4)

In action on contract, by asserting the existence of a novation in that a new obligation had been substituted for the contract which changed the rights of the parties, defendant thereby confirmed the validity of the original agreement. Civ.Code, §§ 1530–1533.

5. Husband and wife ⇐29(4)

A promise to marry is an adequate and valuable consideration for a subsequent transfer of property by the promisee.

6. Husband and wife ⇐29(4)

A contract by which deceased agreed to give plaintiff a certain amount of money out of his estate in consideration of plaintiff's agreement to marry deceased was based on a valuable consideration and valid, notwithstanding that the contract further expressed a consideration in that plaintiff agreed to take care of deceased during his lifetime.

7. Husband and wife ⇐35

That deceased husband had fully performed pre-nuptial contract entered into with plaintiff wife was required to be specially pleaded to be available as a defense to action on the contract.

8. Husband and wife ⇐31(2)

A contract by which deceased agreed to give plaintiff a certain sum of money out of his estate in consideration of plaintiff's promise to marry deceased was not fully performed by the conduct of deceased in naming plaintiff as beneficiary of a life insurance policy.

9. Judgment ⇐251(2)

Where the only issues joined in wife's action on pre-nuptial contract were the validity of the contract under statute of frauds and excuse for failure to perform because contract was allegedly superseded by another agreement which had been performed, a finding that original contract had been performed was outside issues and could not support judgment for defendant. Code Civ.Proc. § 956a.

10. Novation ⇐12

The burden of proving a novation is on the party asserting its existence, and the proof in support thereof must be clear and convincing. Civ.Code, §§ 1530–1533.

11. Evidence ⇐271(18)
Novation ⇐12

Where deceased agreed to pay plaintiff a sum of money out of his estate in consideration of plaintiff's agreement to marry deceased, that deceased subsequently procured a life policy for a like amount naming plaintiff as beneficiary and that his will contained statement that plaintiff had been provided for in a way "which is acceptable to her" did not establish existence of a novation, since such statement was merely a self-serving declaration without probative value. Civ.Code, §§ 1530–1533.

12. Husband and wife ⇐34
Evidence ⇐271(18), 471(2)

A statement in deceased's will to the effect that he had made provision for wife which was acceptable to her was insufficient to show wife's intent to waive rights under a pre-nuptial contract, and the circumstance that the statement was received in evidence as part of the will did not give the statement added value nor relieve it of its intrinsic infirmities as a self-serving declaration or conclusion.

13. Evidence ⇐269(1)

Declarations of intent are admissible if, and not unless, the existence of the particular mental state at the time to which the declarations relate is a relevant fact, and such declarations are to be excluded where the intent does not affect the legal result of the transaction.

14. Novation ⇐1

"Novation" is a bilateral contract requiring the mutual assent of all the parties and, as between obligor and obligee, it is the intent of the latter that is controlling on the question of waiver or release of the obligation under the original agreement. Civ.Code, § 1530.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

15. Novation ⇐2

Where deceased had agreed to pay plaintiff a fixed amount of money out of his estate in consideration of plaintiff's agreement to marry deceased, subsequent acts of deceased in changing his life policy by naming plaintiff beneficiary, and inserting in his will provisions relative thereto, were revocable and insufficient to constitute a "novation." Civ.Code, § 1530.

16. Accord and satisfaction ⇐1

An "accord and satisfaction" generally applies only where a right of action has already accrued, and the essential elements of a contract must be present to establish the existence of an accord and satisfaction. Civ.Code, §§ 1521–1523.

See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

17. Accord and satisfaction ⇐26(3)

That deceased had changed his life policy by naming wife as beneficiary, and had stated in his will that provision had been made for wife which was satisfactory to her, was insufficient to establish an "accord and satisfaction" of deceased's obligation under a valid pre-nuptial contract by which deceased agreed to give plaintiff a fixed amount out of his estate in consideration of plaintiff's agreement to marry deceased. Civ.Code, §§ 1521-1523.

18. Novation ⇐12

Although a novation may be established by implication, such implication cannot arise until there is evidence showing facts from which it may reasonably be inferred that such was the intention. Civ. Code, §§ 1530-1533.

19. Husband and wife ⇐49½(7)

A transfer of property from husband to wife is deemed to be made by way of gift rather than in payment of a debt.

20. Husband and wife ⇐34, 49½(7)

Where deceased had named his wife as beneficiary of a life policy, the payment of policy proceeds to the wife upon death of deceased must be deemed to be a gift from deceased and not the discharge of deceased's obligation to wife under a pre-nuptial contract, in the absence of a showing to the contrary.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Adele Ayoob against Olga Ayoob, administratrix with the will annexed, of the estate of Tom D. Ayoob, also known as Tom Ayoob, deceased, to recover on a pre-nuptial contract between plaintiff and the deceased. From an adverse judgment, plaintiff appeals.

Reversed.

Rowland & Craven, of Sacramento, Arthur J. Anderson, of Susanville, and M. C. Kerr, of Quincy, for appellant.

S. C. Young and Wm. M. Mcmillan, both of Quincy, for respondent.

PEEK, Justice.

By this action Adele Ayoob, plaintiff and appellant herein, seeks to recover upon an alleged oral contract evidenced by a written memorandum executed by her husband, Tom D. Ayoob, now deceased, wherein he agreed that the sum of $5,000 of his estate should be left to her in the event of his death.

Tom D. Ayoob, a native of Syria, had resided in Quincy, California, for a considerable number of years, and had amassed an estate which upon his death was appraised at $89,934.64. He had been married before, and left surviving him seven children, all residents of Quincy, as the issue of the former marriage. Subsequent to the death of his first wife, he made a trip to Lebanon, Syria, and there met Adele Malouf. He returned to the United States and sometime prior to 1939 made another trip to Syria, during the course of which he proposed marriage to Adele. According to her testimony he told her that if she would marry him, leave her family and friends, leave her native country, go to America with him, and care for him for the remainder of his life, he would pay her $5,000 from his estate after his death. She agreed to do all of these things, and on September 6, 1939, at Zahleh, Lebanon, they were married. About eighteen months elapsed after the marriage before arrangements could be made for passports so that Mr. Ayoob could bring his wife to the United States. Shortly after the passports were granted, and approximately a week

prior to their leaving Lebanon, Tom Ayoob asked his wife to accompany him to the American Consul at the City of Beirut to have their contract reduced to writing. And on April 26, 1941, decedent, in the presence of the American Consul at Beirut, Syria, signed and acknowledged a writing which reads as follows:

"I, the undersigned, Tom David Ayoob, American citizen * * * of Quincy, California, declare that in the event of my death, the sum of U. S. $5000.—(Five Thousand U. S. Dollars) of my estate should be left to my wife Mrs. Adele Ayoob, nee Adele Malouf, born at Niha, Lebanon, on March 15, 1908, to whom I was married on September 6, 1939, at the Greek Orthodox Church of Mar Nicolo at Zahleh, Lebanon."

After the instrument was executed, the Consul handed the paper to appellant, saying "this is yours, keep it."

Shortly thereafter, deceased with appellant returned to Quincy, where they resided as husband and wife until his death on December 17, 1943.

Appellant testified that during December, 1941, the decedent requested that she give him the writing he had executed in Syria, with the remark that his daughter Olga had raised some question as to his will, although he thought the will was satisfactory. On the following day he handed the writing back to her, saying, "You keep it, you want to need it some day." At the same time he told her he had changed the beneficiary in his $5,000 life insurance policy, which was still in the name of his former wife, and made it payable to herself. He also gave her a copy of a will which at the trial was received in evidence as his last will and testament and bears the date December 16, 1941. By said will, decedent left all his property to his children. The only paragraph relating to appellant, and pertinent to the issues herein, is as follows:

"I declare that all property which I now own, wherever situate was acquired before my marriage to my present wife, Adele Ayoob, and that I have made provision for her, and which is acceptable to her, by naming her as beneficiary in an insurance policy on my life, which insurance policy has been in effect for a great many years, and if such is necessary, I hereby give, devise and bequeath to my said wife, Adele Ayoob, all payments to become due under such policy of insurance, and all accumulations thereof."

After the death of decedent, appellant as beneficiary received from the insurance company the proceeds of said policy, which, with accumulated dividends, amounted to approximately $6,400.

Within the time provided by law appellant filed with respondent as administratrix of the decedent's estate a claim for the payment of the obligation evidenced by the aforesaid writing of April 26, 1941, and upon its rejection filed suit to establish the same and recover the amount thereof. Her complaint alleged among other things, the agreement of September 6, 1939, the written instrument or memorandum of April 26, 1941, the performance by herself of the obligations under the agreement, and the refusal of the respondent to approve or allow the claim.

Respondent answered, admitting the formal allegations of the complaint including the solvency of the estate, and also admitted that "Tom D. Ayoob, * * * died * * * testate, without leaving said sum of $5,000.00 of his estate to the said plaintiff * * *," but denied the averments with regard to the alleged agreement of September 6, 1939, and the writing of April 26, 1941. By way of an affirmative defense, the answer then set up what in legal effect would be a novation, to-wit:

"* * * that said deceased and said plaintiff, long prior to the death of said deceased, agreed as follows, to-wit: The said decedent agreed to change the beneficiary in a policy of Life Insurance, in the principal sum of $5,000.00, payable on his death, from his estate to said plaintiff and to keep all of the premiums thereon paid from proceeds from his separate property, the said plaintiff to receive not only said principal sum but all dividends thereafter accruing, and that in addition thereto the said deceased agreed that he would, during his life time, provide the said plaintiff with reasonable support and care, and the said plaintiff thereupon, and in consideration of

the said agreement of said deceased, agreed to waive all other claim against the estate of said deceased and all other claim or interest in any of his property; that said deceased, in compliance with said Agreement, changed the beneficiary under his policy of Life Insurance from his said estate to the said plaintiff, and otherwise complied fully with all of the terms of said Agreement on his part, and defendant is informed and believes, and upon such information and belief alleges that plaintiff has since the death of said deceased received from the Insurance Company, by which said policy of insurance was issued, payment thereunder in excess of $6,000.00, as the beneficiary under said policy, because of the death of said deceased."

Appellant was the only witness to testify with respect to the obligation sued upon. The written evidence consisted of the writing of April 26, 1941, the decedent's will, introduced by appellant by reference, and a copy of the inventory and appraisement of the assets of the estate.

The trial court found that decedent executed the alleged agreement and that he had substantially performed his obligations to appellant. The findings in which this appears are as follows:

"That prior to the marriage of plaintiff and said Tom D. Ayoob the said Tom D. Ayoob was the owner of a life insurance policy in the New York Life Insurance Company, the beneficiary of which said policy being at said time the former wife of said Tom D. Ayoob who had died several years prior to the marriage of plaintiff and said Tom D. Ayoob; that in compliance with the said instrument executed by the said Tom D. Ayoob on September 6, 1939, the said plaintiff was made the beneficiary of said life insurance and upon the death of said Tom D. Ayoob the plaintiff received and accepted under the terms of said policy the sum of $6400.00, in satisfaction and payment of the agreement hereinabove referred to.

"That the deceased fully performed all of the terms agreed to be performed by him under and by virtue of the said instrument executed by him on September 6, 1939."

It thus appears that the trial court found the existence of the alleged antenuptial agreement of September 6, 1939, characterizing it as a written instrument, perhaps by relation back to the writing of April 26, 1941. The court found further that there had been no breach of the original agreement which was found to have been memorialized, but to the contrary found that there had been a substantial performance thereof. No finding was made on the special defense of novation.

The validity of the contract under the statute of frauds, Civ.Code, sec. 1624, having been put in issue by the general denial contained in the answer, the first question presented by this appeal, therefore, is whether there is sufficient evidence to support the finding of the trial court to the effect that the parties had on September 6, 1939, entered into a valid agreement, evidenced by a subsequent writing, whereby the deceased undertook that $5,000 of his estate should be left to appellant in the event of his death.

[1] It is well established under the law of this state that an oral agreement within the statute of frauds is not void but voidable. O'Brien v. O'Brien, 197 Cal. 577, 588, 241 P. 861; Taylor v. J. B. Hill Co., 67 Cal.App.2d 581, 582, 154 P.2d 926; Turell v. Anderson, 16 Cal.App.2d 445, 449, 60 P.2d 906; Warder v. Hutchison, 69 Cal. App. 291, 293-296, 231 P. 563. In this respect our codes follow the English statute of frauds, and the language, interpretation and application adopted in most of the states of the Union. In re Balfour & Garrette, 14 Cal.App. 261, 265, 267, 111 P. 615. See also 37 C.J.S., Frauds, Statute of, § 223, p. 721.

[2] Under California law, an oral agreement may be taken out of the operation of the statute by a written memorandum executed subsequently, even though the agreement has already been performed by one party. The rule in this regard is well stated in 12 Cal.Jur., p. 905, § 69, where it is said that: "An oral agreement, within the statute of frauds, may be satisfactorily evidenced, by a subsequent writing, notwithstanding the fact that the agreement has already been executed by one

party. This would be the rule, even if the statute were viewed as affecting the substantive validity of the contract. The subsequent written contract relates back to the making of the oral agreement which it embodies, so as to validate the latter under the statute of frauds. This is true, whether the written contract be viewed as merely furnishing the requisite evidence of an oral agreement otherwise valid, or as a confirmation and ratification of a previously invalid agreement."

Among the many decisions supporting this principle are: Rule's Estate, 25 Cal. 2d 1, 12, 152 P.2d 1003, 155 A.L.R. 1319 (oral agreement to employ real estate broker); Coulter v. Howard, 203 Cal. 17, 22, 23, 262 P. 751 (employment of real estate broker); Walsh v. Standart, 174 Cal. 807, 810, 164 P. 795 (contract not to be performed within one year); Offeman v. Robertson-Cole Studios, Inc., 80 Cal.App. 1, 13, 19, 251 P. 830 (agreement not to be performed within one year); Producers' Fruit Co. v. Goddard, 75 Cal. App. 737, 757, 243 P. 686 (contract not to be performed within one year); Kinney v. Jos. Herspring & Co., 53 Cal.App. 628, 636-638, 200 P. 737 (contract of guaranty); In re Balfour & Garrette, supra, 14 Cal.App. at page 265, 111 P. 615 (employment of real estate agent).

[3] The failure of the writing to make express mention of the precedent oral agreement is not material. It is sufficient if the proof establishes that together they constitute a single contract. Thus, in the case of Coulter v. Howard, supra, it was held that an oral agreement by an owner of property for the employment of a real estate broker to obtain a purchaser therefor was made valid and enforceable by written escrow instructions thereafter given, although such instructions did not refer to or mention the oral agreement. In so holding, the Supreme Court reversed the judgment of the trial court, on the ground that there was no evidence to support a finding that the alleged contract did not satisfy the statute of frauds. The court, speaking through Mr. Justice Preston, said, 203 Cal. at pages 22, 23, 262 P. at page 753:

"The first question to be answered is: Did the writing signed by defendant directing the escrow party to pay to plaintiff a 5 per cent. commission at the close of the escrow and out of the funds then due and payable to her, when taken in connection with the facts shown, satisfy the statute of frauds? It must be noted in this connection that a verbal contract of employment was made between defendant and plaintiff. It must also be noted that a written contract executed by the son of defendant was made with plaintiff, and under the evidence there is no escape from the conclusion that defendant well knew of its contents and acted pursuant to its terms in signing at the bank and in the presence of a representative of defendant the escrow offer to sell above noted. Those escrow provisions followed substantially the terms embodied in the writing executed by defendant's son, written authority in whom she disclaimed. In the light of these facts the provision in the escrow offer must be held to be a 'note or memorandum' of the contract which is all the law requires. Civ.Code, § 1624; Code Civ.Proc., § 1973.

"We agree fully with the language of Muri v. Kane, 55 Wash. 131, 104 P. 153, 26 L.R.A.,N.S., 519, 19 Ann.Cas. 1180, as follows: 'The moral obligation to pay for services rendered as a broker in selling real estate, under an oral contract where the statute requires such contract to be in writing, is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations; and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for, because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries, and, to accomplish that purpose, it is required that the evidence of the contract be in writing; but it is not conducive to either fraud or perjury to say that the services rendered under the void contract, or voluntarily, will support a

subsequent written promise to pay for such services.' See, also Carrington v. Smithers, 26 Cal.App. 460, 463, 464, 147 P. 225.

"In this connection the language of Johnson v. Krier, 59 Cal.App. 330, 332, 210 P. 966, 967, is in point, to wit: 'In the present case the agreement to pay commission was not reduced to writing before the rendition of the services by the plaintiffs, but after plaintiffs had procured the purchasers the oral agreement was ratified in writing, and so the bar of the statute of frauds was removed.' In said cause the defendant had written on the back of the contract of sale and purchase the following words: 'I hereby agree to pay Johnson and Temple a commission of $2,000 for the making of the within sale (dated and signed).' See, also, Civ.Code, §§ 2310 and 2311."

The same language might well be applied to the circumstances found in the present case.

It must be kept in mind that the proceeding herein is one between one of the parties to the contract and the personal representative of the other party, and that the rights of strangers, such as creditors, are not involved. The distinction between this situation and one where a transfer in fraud of creditors, though made pursuant to an antecedent agreement, has been held to be absolutely void, is emphasized in certain decisions, such as Sudbrock v. Kroener, 136 Cal.App. 624, 29 P.2d 435, and Hughes v. Hughes, 49 Cal.App. 206, 193 P. 144, cited by respondent and relied upon as authority for the contention that the alleged contract is void and unenforceable under Sections 178 and 1624 of the Civil Code, and Section 1973 of the Code of Civil Procedure.

In Sudbrock v. Kroener [136 Cal.App. 624, 29 P.2d 437], during the pendency of proceedings between a debtor and his creditor, the debtor married and, pursuant to an alleged oral antenuptial agreement, transferred all of his property to his wife, leaving himself insolvent. The creditor secured a judgment and caused execution to be levied on a certificate of deposit, a portion of the property which had been placed in the wife's name. There was no written "note or memorandum" subscribed "by the party to be charged." The question presented was whether or not the transfer of property by the husband to the wife subsequent to their marriage but prior to the levy by the sheriff was such a performance of an oral antenuptial agreement as to relieve it from the operation of the statute of frauds and the provisions of former Section 3442 of the Civil Code, since repealed (see, Stats. 1939, p. 1667). The reviewing court held that the transfer of the property was void under the provisions of said Section 3442, which in part then read: "* * * that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

Following the general rule the court cited and relied on the Note in 41 A.L.R. page 1169, wherein it is said: "The view accepted by all the courts, it seems, is that a postnuptial settlement made in pursuance of an oral antenuptial agreement is not binding upon existing creditors of the grantor, since it is, as to them, a fraudulent conveyance." The court in said case then concluded: "Where a statute declares an oral antenuptial agreement void, it cannot be validated by a postnuptial contract," and cited decisions from other jurisdictions where the statute specifically made such an agreement void, which, as we have previously noted, is not the case in this state where oral antenuptial contracts are held to be voidable only.

In addition, in reaching its conclusion the court applied the principle frequently enunciated in this state to the effect that marriage alone does not constitute such part performance of an oral antenuptial agreement as to take it out of the statute of frauds (Peek v. Peek, 77 Cal. 106, 19 P. 227, 1 L.R.A. 185, 11 Ann.St.Rep. 244); and, since there was no enforceable valid agreement, the transfer of the property involved was purely voluntary and in fraud of creditors.

It also should be noted that, unlike the present case, in none of the California cases relied upon by the court in the Sudbrock case was there a written contract or

a note or memorandum subscribed by the party to be charged.

In the other case cited by respondent on this point, namely, Hughes v. Hughes, supra, the question of the validity of an oral antenuptial agreement arose out of an order sustaining a demurrer to a complaint by the wife for specific performance of such an agreement. It was not alleged that there was any note or memorandum in writing signed by the defendant, although the complaint charged that among the various promises made by the defendant was one to execute a will in her favor, and it was further shown that such a will had been executed, it being alleged that this was the only promise the defendant had performed. The appellate court held that the mere making of the will did not take the contract out of the statute of frauds, and further the provisions in the will did not evidence a performance on the part of the plaintiff, who in the case of an oral agreement would have to show something more than marriage to remove the agreement from the operation of the statute.

Respondent contends further that the agreement is otherwise invalid as being contrary to public policy, in that the consideration therefor was the performance of services which appellant was required by law to perform, and the fact that the promise to marry was a part of the consideration could not save it from its inherent vice.

This is not the position which respondent took in the trial court. No demurrer was interposed to the complaint, nor at the trial was objection made on this ground to the introduction of evidence of the oral agreement. When counsel for respondent on cross-examination asked, "Mrs. Ayoob, why did you marry Mr. Ayoob and come to America?" and, "was the promise to pay or to leave five thousand dollars out of Mr. Ayoob's estate the reason for your coming to America?", and objections thereto were sustained, counsel, in the course of his argument on the ruling, said, "If your Honor please, they [plaintiff and her counsel] have alleged that was the consideration. We are not saying it was an invalid consideration but we are trying to find out if that was the consideration." It thus appears that the earlier objection to the admission of evidence of said agreement on the ground that it was incompetent, irrelevant and immaterial was based on the statute of frauds and not on illegality of consideration.

[4] Furthermore, in asserting and maintaining the existence of a novation, respondent has confirmed the validity of the original agreement which the alleged novation is declared to have superseded. As the author says in 20 California Jurisprudence, page 249, § 4: "Where it is claimed that there has been substituted a new obligation which changes the rights and relation of the parties, such claim of novation presupposes a previous valid obligation."

Nor may we say that the agreement shows on its face such a violation of public policy as to cause this court of its own motion to declare it invalid.

[5] It must be borne in mind that a promise to marry is an adequate and valuable consideration for a subsequent transfer of property by the promisee. 13 Cal. Jur. pp. 809, 810, § 17; 41 C.J.S. Husband and Wife, § 88, p. 561; Conner v. Stanley, 65 Cal. 183, 185, 186, 3 P. 668; Marvin v. Marvin, 46 Cal.App.2d 551, 558, 116 P.2d 151.

[6] The fact that appellant, in the belief that they constituted further consideration, recited in addition certain promises given by her in the course of the making of the asserted antenuptial agreement, such as leaving her home and friends and accompanying decedent to America and caring for him and his home and family, is immaterial. These were vows which she might have put into words at the altar, or before a justice of the peace or other functionary authorized to solemnize a marriage, and which were implicit in her engagement to marry. Surely she should not be penalized for expressing them elsewhere.

In a somewhat comparable case, the Supreme Court of this State has stated that: "The consideration for the transfer was the promise of the respondent to marry the plaintiff, which promise she kept. The averment that she promised to live with him during their joint lives is of no consequence. It was included in the marriage

contract itself, and its separate averment has no significance." Barnes v. Barnes, 110 Cal. 418, 421, 42 P. 904, 905.

To the same effect is the case of In re Estate of Warner, 158 Cal. 441, 443, 445, 446, 111 P. 352, where it appears that the husband in his antenuptial agreement had agreed to care for, keep, maintain, and support the respondent and her son when she should become his wife; yet the Supreme Court was apparently not moved of its own motion to declare the agreement void because such a provision accompanied the operative portions thereof.

The case of In re Estate of Sonnicksen, 23 Cal.App.2d 475, 479, 73 P.2d 643, cited by respondent, is inapplicable to the situation found in the present case because there the agreement was not made in contemplation of marriage.

Equally inapplicable is Brooks v. Brooks, 48 Cal.App.2d 347, 351, 119 P.2d 970. That decision arose from an order of the trial court sustaining a demurrer without leave to amend; and, because of the situation presented by the pleading, the reviewing court determined that the parties had treated their marriage as merely incidental to the rendition by the wife of services as a nurse and the payment therefor of a monthly stipend by the husband, and held the agreement invalid as one squarely within the prohibition of Section 159 of the Civil Code.

Respondent herein by her answer did not plead a performance by herself or by the decedent of the said contract, but on the contrary specifically admitted that the decedent died testate "without leaving said sum of $5,000.00 of his estate to the said plaintiff," at the same time denying generally the averments of the complaint relative to a breach of the alleged agreement and appellant's performance of her obligations thereunder. These allegations of the answer were followed by the paragraph previously set forth, which as it has been held presupposes the existence and validity of the original contract, and then alleges the making of a new agreement involving a change of the beneficiary in the decedent's life insurance policy and the acceptance thereof by plaintiff. In other words, no issue was raised by the pleadings to the effect that the contract on which this suit is brought had been performed. The only issues joined were, (1) the fact of the execution of a contract valid under the statute of frauds, and (2) an excuse for failing to perform the alleged contract because it was superseded by another agreement which has been performed.

[7, 8] However, performance of a contract and an excuse for nonperformance are two different things. In re Estate of Warner, supra, 158 Cal. at page 445, 111 P. 352. In order for a defendant to prove performance, he must plead it specially. 6 Cal.Jur. 486, § 287. The respondent herein has failed to do so. Even if we should interpret the averments of the answer in the light of the proof, it still is apparent that the act of the deceased in naming appellant as the beneficiary of his life insurance policy which otherwise would have been payable to his estate was not a performance of the alleged antenuptial agreement. By this act, he prevented the proceeds from becoming assets of his estate, from which, according to the agreement, appellant was to be paid. 11A Cal.Jur. p. 449, sec. 324; Heydenfeldt v. Jacobs, 107 Cal. 373, 377, 40 P. 492. And the answer and proof conclusively show that appellant did not in fact receive any part of the assets of the decedent's estate, but did receive payment of the obligation of an insurance company under a contract made for the benefit of appellant as a third party.

[9] It follows that the finding of the trial court to the effect that the obligation sued on has been performed is outside the issues made by the pleading and the proof, and cannot support the judgment. As the court stated in Re Estate of Warner, supra, 158 Cal. at page 445, 111 P. at page 353: "If, as is thus held, a party relying upon an excuse for nonperformance must allege his excuse in order to have a basis for proof, it necessarily follows that evidence of such excuse will not support a finding that he has performed. In the case before us the evidence concerning the appellant's waiver of the obligation to support and educate her child was sharply conflicting. On this issue the court has not found and

we cannot, of course, supply a finding. The finding of performance, which was made, would have sustained the judgment; but, since this finding is contrary to the evidence, there must be a new trial."

This brings us to the third and last issue presented by the appeal — that of novation. Respondent pleaded novation affirmatively, and her plea was denied by operation of law. And while the trial court made no finding on this issue, if we should find in the record sufficient evidence of such an agreement, and of the discharge of the obligations thereunder, we could supply the necessary finding. Code Civ.Proc. sec. 956a. However such is not the case.

[10] In the determination of this question, cognizance must be taken of the well established rule that the burden of proving a novation is on the party asserting its existence (Colley v. Chowchilla Nat. Bank, 200 Cal. 760, 770, 255 P. 188, 52 A.L.R. 569; 46 Corpus Juris, pp. 625, 626, § 72), and that the proof in support thereof must be clear and convincing. Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 72, 57 P.2d 1010.

[11, 12] The only evidence herein to which respondent can point as having a tendency to show a novation is the language of the provision of the will above set out, and more particularly the clause "and which is acceptable to her." This clause, however, is nothing more than a self-serving declaration, opinion or conclusion; and while it might be competent to show the intent of the testator if that were material (Whitlow v. Durst, 20 Cal.2d 523, 524, 127 P.2d 530), it is without sufficient probative value under the circumstances of the present case to establish the intent of the appellant (Hartman v. Rogers, 69 Cal. 643, 646, 11 P. 581) or the truth of a fact declared (Chamberland v. Whitney, 19 Cal. App.2d 660, 665, 666, 66 P.2d 220; Citizens' Nat. Trust & Sav. Bank v. Arrowhead Springs Beverage Co., 126 Cal.App. 550, 556, 14 P.2d 821; In re Snowball's Estate, 157 Cal. 301, 308, 107 P. 598), and it is in direct contradiction of the terms of the written memorandum of April 26, 1941. Crowley v. Savings Union Bank & Trust Co., 30 Cal.App. 144, 154, 157 P. 516. Said declaration contained in said will makes no reference to the contract in question nor characterizes it as a part of the res gestae (see Barcroft v. Livacich, 35 Cal.App.2d 710, 718, 96 P.2d 951; 32 C.J.S., Evidence, § 416, p. 44); and the circumstances that it was received in evidence as a part of an admissible document does not give it added value (Bohn v. Gruver, 111 Cal.App. 386, 395, 295 P. 891) nor relieve it of its intrinsic infirmity. See 32 C.J.S., Evidence, § 1034, p. 1077; 64 C.J., p. 230, § 242; Hutchings v. Castle, 48 Cal. 152, 156; In re Estate of Holt, 61 Cal.App. 464, 469, 470, 215 P. 124; O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412, 425.

The case of Whitlow v. Durst, supra, relied upon by respondent, involved conflicting claims to the proceeds of two life insurance policies. The executrix of the insured claimed by virtue of a transfer by the deceased's wife under a property settlement agreement, made at the time the spouses were separated, and a bequest in the will of the decedent leaving said proceeds to the executrix in trust for another. The widow claimed by virtue of an alleged revocation of said property settlement agreement, asserted to have taken place upon the reconciliation of the parties. On appeal, error was sought to be predicated on the action of the trial court in admitting in evidence testimony that shortly after the alleged reconciliation decedent declared that he and his wife were still separated and would never be reconciled. In affirming the ruling of the court below, the Supreme Court stated that as an exception to the hearsay rule the declarations of a decedent are admissible in evidence to show his intent, where that intent is a material element of a disputed fact.

[13] In the present case, it is the intent of appellant and not of the decedent that would be controlling. The fact that decedent may have intended to make the inchoate right to the insurance proceeds a substitute for the binding obligation of the written promise would be ineffectual to change the legal result of the original transaction; and the declaration contained in his will would therefore come squarely within the rule that "Such declarations are admissible if, and not unless, the existence

of the particular mental state at the time to which the declarations relate is a relevant fact; and are to be excluded where the intent does not affect the legal result of the transaction." 31 C.J.S., Evidence, § 256, pp. 1007, 1008.

[14] Novation is a bilateral (or multilateral) contract requiring the mutual assent of all the parties, Civ.Code, sec. 1530; 20 Cal.Jur., p. 249, § 4; and obviously, as between obligor and obligee, it is the intent of the latter that is controlling on the question of waiver or release of the obligation under the original agreement.

[15] Therefore, even if the decedent had intended his original obligation to be superseded by the new acts and promises, such acts or promises would not have been sufficient in law to constitute a novation, since they were only illusory in character and did not amount to an executed consideration. Blumer v. Madden, 128 Cal. App. 22, 24, 25, 16 P.2d 319. The act of the decedent in changing the name of the beneficiary of the insurance policy and his act in inserting in the will provisions relative thereto, were revocable and entirely without binding effect. Section 1698 of the Civil Code provides that a contract in writing may be altered only by a contract in writing, or by an executed oral agreement, and not otherwise. The very finding of the trial court that "upon the death of said Tom D. Ayoob the plaintiff received and accepted under the terms of said policy the sum of $6,400.00, in satisfaction and payment of the agreement hereinabove referred to," demonstrates that whatever new agreement the parties may have entered into could have been consummated in a binding manner only after the death of the testator.

Opposed to respondent's contention that a novation was entered into by virtue of the quoted portion of the will, is appellant's testimony to the effect that, when the insurance policy and the will were discussed between them, nothing was said by either the decedent or herself to indicate that making her the beneficiary of the policy would constitute a satisfaction of the original promise, but on the contrary, she twice stated, the deceased had told her that upon his death she would receive $10,000, $5,000 on the "paper" and $5,000 on the "insurance." Moreover, the very circumstance that appellant was not required to surrender the instrument but retained it in her possession at decedent's suggestion corroborates her testimony and is evidence against the existence of a novation and in favor of the subsistence of the original agreement.

If this was the extent of the acceptance to which the decedent referred in his will, then said language of the will would have constituted nothing more than an attempt to vary by parol the written instrument in question, and it would have been entitled to no consideration whatsoever. Dollar v. International Banking Corp., 13 Cal.App. 331, 343, 109 P. 499.

[16, 17] Respondent's contention, apparently raised for the first time in the oral argument, in support of the judgment, to the effect that in any event the evidence shows an accord and satisfaction, is likewise without persuasive force. In the first place, the alleged new agreement would not come within the ordinary concept of an accord and satisfaction, which generally applies only to a case where a right of action has already accrued. B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 170, 137 P. 624. In the second place, the deficiency of proof of a novation would likewise result in a failure to establish the existence of an accord and satisfaction, since the essential elements of a contract must be present in either case. Civ.Code, secs. 1521-1523, 1530-1533. And see, Hallensleben v. Heine Piano Co., 54 Cal.App. 295, 298, 201 P. 942; Sierra, etc., Power Co. v. Universal Elec. & Gas Co., 197 Cal. 376, 387, 241 P. 76.

The want of sufficient evidence to sustain findings in favor of respondent on the issues herein raised under any tenable theory is emphasized by an examination of the written opinion of the trial court. It appears therefrom that the court was of the opinion that "In Mr. Ayoob's Will, * * * a statement was contained that by making plaintiff the beneficiary of said policy that he had complied with the terms of the agreement and therefore was not making the bequest to her." From this

recital, the court apparently concluded that the respondent had made a prima facie case of substantial performance which could be overcome by appellant only by a showing by her of some other agreement. Specifically the court said: "Unless some other agreement was made, it is apparent that Mr. Ayoob had fully performed the terms of his agreement with plaintiff and that plaintiff had received more than the five thousand dollars to which she would be entitled under the agreement." Then, in evident disbelief of the appellant's testimony to the effect that no novation had been entered into, and while conceding that the statement contained in the will was not binding on appellant, the court nevertheless concluded that said statement could be considered in connection with "all of the other circumstances appearing," and that, taking "all of the circumstances which appear in evidence," he was satisfied that even though any oral agreement made by Mr. Ayoob would be inadmissible in evidence to vary the terms of the written contract, yet "the evidence greatly preponderates against plaintiff's contention"; and determined that plaintiff was not entitled to recover anything by reason of her action.

[18] However, it is to be noted that the will did not contain in express language the statement attributed to it by the court, and it is further to be observed that a prima facie case of substantial performance which such a statement might otherwise have been thought to establish was entirely outside the issues. Likewise, in our view, the record fails to disclose any of those "other circumstances" to which the court referred generally as causing the evidence to preponderate against appellant's contention, if indeed such contention was material. Finally, if the oral evidence to vary the terms of the written contract was either inadmissible or weak, as the court intimated, this would militate against the respondent's assertion of the existence of a novation and not against appellant's denial thereof. In other words, from the language of the will the court did not draw an inference that the parties had entered into a new agreement superseding the original one, but rather that the original agreement had been satisfied. And since the court apparently did not find evidence of the alleged novation, and since we likewise fail to discover in the record the existence of such evidence, the judgment, therefore, is without support. "While it is true that a novation may be established by implication, nevertheless—'such implication cannot arise until there is evidence showing facts and circumstances from which it may reasonably be inferred that such was the intention.'" Colley v. Chowchilla Nat. Bank, supra [200 Cal. 760, 255 P. 192].

[19, 20] Finally, it may be observed in support of appellant's position herein, there is a presumption which obtains between husband and wife—differing from that between strangers—that a transfer of property from the husband to the wife is to be deemed to be made by way of gift rather than in payment of a debt. Note, 71 A.L.R., p. 1025; Hamby v. Brooks, 86 Ark. 448, 111 S.W. 277, 278. The inchoate transfer which the decedent made to appellant by making her the beneficiary of his life insurance policy, and which he permitted to ripen into an executed transaction satisfied by the payment of the proceeds thereof by the insurance company to appellant, must be deemed to be a gift and not the discharge of the obligation which the deceased owed to appellant, in the absence of a showing to the contrary.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

74 Cal.App.2d 312

PETERSON v. PETERSON et al.

Civ. 15084.

District Court of Appeal, Second District, Division 3, California.

April 30, 1946.

Rehearing Denied May 28, 1946.

Hearing Denied June 27, 1946.

1. Evidence ⇐588

Before evidence can be disregarded as inherently improbable, there must exist a physical impossibility of the evidence to be true, or its falsity must be apparent without resort to inferences or deductions, and fact that the testimony may disclose circumstances which are unusual is not sufficient to bring it within the rule.

2. Evidence ⇐589

Inconsistencies in testimony of one of defendants did not stamp her testimony as inherently improbable.

3. Appeal and error ⇐994(3), 1011(1)

Conflicts in the evidence are to be resolved by trier of the facts, and such rule also applies to conflicts and inconsistencies in testimony of an individual witness.

4. Appeal and error ⇐1010(1)

If there is substantial evidentiary support for a challenged finding of fact, it will not be disturbed on appeal.

5. Mortgages ⇐553

Evidence supported finding that defendant was a bona fide purchaser of the property from a purchaser at trust deed foreclosure sale, so that her title was purged of any fraud that might have been engaged in by prior parties in their dealings concerning the property.

6. Mortgages ⇐154(4)

Where agent of plaintiff's decedent was knowingly clothed with indicia of ownership of trust deed and it appeared that agent, in executing assignment of the trust deed, intended to execute such instrument, defendant bank, in making subsequent loan on property to one who purchased the property from purchaser at foreclosure sale with no knowledge of facts as to title of property other than as disclosed by official records in county recorder's office, was a subsequent bona fide encumbrancer, so as to be entitled to have its trust deed lien protected.

7. Jury ⇐13(14)

Where issues presented by two of the causes of action were clearly equitable, but plaintiff's theory of action as stated in other cause of action was obviously legal, a trial by jury was a matter of right as to issues of fact raised by latter cause of action.

8. Action ⇐66

Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested.

9. Jury ⇐13(14)

If a plaintiff requests legal relief in an action that is essentially equitable, the parties are entitled to a jury trial on the legal issues.

10. Trial ⇐4

Where a cause presents both legal and equitable issues, proper trial procedure is to first submit the equitable issues to court for determination and then if any legal issues remain, a jury may be called.

11. Appeal and error ⇐1035

Denial of plaintiff's request for a jury trial on legal issues presented by complaint raising both legal and equitable issues could not be held without prejudice, where evidence would have supported a verdict in favor of plaintiff on the legal issues.

12. Appeal and error ⇐959(1)
Pleading ⇐236(1)

The granting or denying of a motion to amend cause of action is largely a matter of judicial discretion, and ruling thereon will not be disturbed on appeal in absence of clear abuse of discretion.

13. Pleading ⇐236(1)

Refusal to grant plaintiff's motion to amend cause of action by adding allegation that plaintiff was out of possession of premises in question and that certain of the individual defendants were in possession was not an abuse of discretion, where no explanation was offered as to plaintiff's tardiness in making request to so amend,

and no showing was made of how such an amendment would be in furtherance of justice.

14. Witnesses ⇐276

Where one who was sought to be examined by plaintiff under statute as an "adverse party as if under cross-examination", by his disclaimer of interest in property, was no longer an adverse party in the quiet title cause of action and had never been named as a defendant in the action to cancel trust deed, plaintiff was not entitled to examine such person under statute as to either cause of action, though such person was named as a defendant in the cause of action for damages for alleged fraud which was also joined in the complaint. Code Civ.Proc. § 2055.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Carrie Peterson, as administratrix of the estate of Grace Grabel, deceased, against Vernon Wilbur Peterson and others to quiet title to certain real property and for other relief. From judgment in favor of defendants, the plaintiff appeals.

Judgment in accordance with opinion.

David Schwartz, of Los Angeles, for appellant.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

Louis Ballenger, of Glendale, for respondent Frances M. Palmer.

FOX, Justice pro tem.

Plaintiff appeals from a judgment in favor of the defendants. She brought this action as the administratrix of the estate of Grace Grabel, deceased. In her fourth amended complaint she alleges six separately stated causes of action. The first cause of action is to quiet title to certain real property; the second is against only two of the individual defendants and is for the recovery of the reasonable rental value of the property for the period the said defendants are alleged to have been in possession thereof; the third is for conversion of personal property; the fourth is for money had and received; the fifth is to recover damages because of the alleged fraud on the part of the individual defendants by which title to said property became vested in defendant Palmer; and the sixth is for the cancellation of the deed of trust held by the defendant bank on the said property. The third and fourth causes of action were settled.

In 1927 Mike Grabel and his wife, Grace, acquired the real property involved in this litigation from Dolph C. Dodds and his wife, Helen. The property was at that time subject to a deed of trust executed by the Dodds to the Security Housing Corporation, which was later assigned to the Metropolitan Trust Company. The Grabels took the property subject to the balance owing on the trust deed. They continuously resided on the property until 1934, when Mr. Grabel died. Mrs. Grabel continued to occupy the property until her death on June 10, 1940.

The trust deed loan not having been paid, the trust company started foreclosure proceedings in 1935. Thereupon, in October of that year, Mrs. Grabel went to see W. C. Dansie and gave him the money to pay the balance due on the loan and told him to "take the trust deed over for her." He took care of the matter "merely * * * to accommodate Mrs. Grabel." Upon the payment of the balance due the trust company assigned the trust deed to Mr. Dansie and delivered to him the cancelled note. The assignment of the trust deed was not recorded and Dansie turned the papers over to Mrs. Grabel.

In the fall of 1940 (after the death of Mrs. Grabel) defendant Vernon Wilbur Peterson, who had been living at the Grabel home for some time, told Dansie that he wanted to clear the title to the Grabel home and inquired of Dansie if he had any interest in the property. Dansie told him he had no claim on the property. Some time later Peterson came back and he (Dansie) "signed some papers for him" which he now believes "was an assignment of the trust deed to the property involved in this case." Dansie "felt" that he "was helping Mrs. Grabel clear the property."

He did not know that she had passed away until after he had signed the papers. He indicated he would not have signed the papers if he had known that she was dead. Defendant W. H. Beeman was with Peterson on these two occasions. The Dansie assignment of the deed of trust was to defendant Edith Peterson and was recorded on November 19, 1940. She executed a notice of default under said deed of trust on December 31, 1940. It was recorded at the request of the trustee on January 7, 1941. The trustee thereafter duly gave notice of sale; held its trustee's sale; executed and delivered its trustee's deed to Edith Peterson as purchaser at said sale. Later, Edith Peterson, who was represented in the foreclosure proceedings and sale by defendant, W. H. Beeman, sold the property to defendant Palmer for $3,350. Thereupon, defendant Palmer borrowed $1,800 from the bank and executed the trust deed as security therefor, which is involved in the sixth cause of action.

The court found that defendant Palmer was a good faith purchaser for value, and that the defendant bank's trust deed encumbrance on the property was valid. Plaintiff challenges the sufficiency of the evidence to support the finding in favor of Mrs. Palmer and contends that the court erred in holding that the bank's trust deed constitutes a valid lien on the property. Neither of these contentions is well founded.

There is no evidence that defendant Palmer knew the chain of circumstances leading up to the acquisition of title by Edith Peterson. She was simply told that Mrs. Peterson had obtained the property "through foreclosure."

On the question as to the amount paid for the property both Mrs. Peterson and Mrs. Palmer testified that the purchase price was $3,350. Mrs. Palmer testified that she paid $2,000 of this amount to Mrs. Peterson in cash. There was also a trust deed encumbrance against the property which was placed thereon by Mrs. Peterson and which required about $1,223 to satisfy. This obligation was paid through escrow by the bank out of the $1,800 loan which the bank made Mrs. Palmer on the property. She also paid taxes of approximately $50 and a special assessment of some $40. It is thus clear that substantial value was paid for the property by Mrs. Palmer, and the price paid by her does not appear to have been out of line with the fair value of the property at the time of the sale.

[1-5] Plaintiff makes a strong attack upon the testimony relative to the purchase price paid for the property as inherently improbable and therefore of no evidentiary value. She bases this conclusion upon the relationship of the parties, the manner in which the transaction was handled, and certain inconsistencies in the testimony of Mrs. Peterson and Mrs. Palmer. She emphasizes the fact that Edith Peterson is the mother of Vernon Wilbur Peterson and that Ruth Beeman is her niece; also that some months after the sale to Mrs. Palmer she married Vernon Wilbur Peterson, whom she did not meet, however, until about a week before she became interested in the property. These were matters for the trial court to take into consideration in passing on the credibility of the witnesses. There is no rule of law that stigmatizes the testimony of persons so related as inherently improbable. Plaintiff attacks the testimony of Mrs. Palmer, relative to the price she paid for the property, as inherently improbable because the sale was not handled through an escrow. Mrs. Palmer stated by way of explanation on this point that she felt she did not need an escrow because the property "had just been taken through foreclosure." Plaintiff also challenges as inherently improbable her testimony that she paid Mrs. Peterson $2,000 in cash. Such testimony does not come within the rule of inherent improbability. Before evidence can be disregarded as inherently improbable there must exist a physical impossibility of the evidence being true, or its falsity must be apparent without resort to inferences or deductions. Poe v. Lawrence, 1943, 60 Cal. App.2d 125, 140 P.2d 136; Collier v. Los Angeles Ry. Co., 1943, 60 Cal.App.2d 169, 140 P.2d 206; Powell v. Powell, 1919, 40 Cal.App. 155, 180 P. 346. The fact that the testimony may disclose circumstances which are unusual is not sufficient to bring it within the rule. Kidroski v. Anderson,

1940, 39 Cal.App.2d 602, 103 P.2d 1000. Plaintiff points to certain inconsistencies in the testimony of Mrs. Palmer as to who, if anyone, was present when she paid Mrs. Peterson the $2,000. These inconsistencies do not stamp her testimony as inherently improbable. Jones v. Re-Mine Oil Co., 1941, 47 Cal.App.2d 832, 119 P.2d 219. Conflicts in the evidence are, of course, to be resolved by the trier of the facts. This rule also applies to conflicts and inconsistencies in the testimony of an individual witness. Showalter v. Western Pacific R. R. Co., 1940, 16 Cal.2d 460, 479, 106 P.2d 895; People v. Moulton, 1945, Cal.App., 162 P.2d 317. The net result is that there is substantial evidentiary support for the challenged finding. Hence it will not be disturbed on appeal. Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 45 P.2d 183. Since, therefore, defendant Palmer was a bona fide purchaser, her title was purged of any fraud that may have been engaged in by prior parties in their dealings concerning the property. Marlenee v. Brown, 1943, 21 Cal.2d 668, 675, 134 P.2d 770.

[6] Plaintiff's attack on the validity of the bank's trust deed lien is based upon the theory that the fraudulent procurement of a deed will not operate to pass title. Hence, subsequent purchasers and encumbrancers, even though they are in good faith and for value, will not be protected. In support of her proposition, plaintiff cites Gould v. Wise, 1893, 97 Cal. 532, 32 P. 576, 33 P. 323 and Promis v. Duke, 1929, 208 Cal. 420, 281 P. 613. In the latter case the grantee got possession of the deed from the escrow-holder without the knowledge or consent of the grantor and without complying with the agreed conditions for the delivery of the deed. In the Gould case the grantee surreptitiously got possession of the deed without the grantor's consent. There was no delivery of the deed in either of these cases, hence no title passed. That principle, however, is not applicable here. In the instant case Dansie was Mrs. Grabel's agent. He paid the mortgagee the balance that was due and requested that the trust deed be assigned to him. This was done and the assignment, together with the cancelled note, were delivered to him. These papers in turn were delivered to Mrs. Grabel. Thus Dansie was clothed with the indicia of ownership of the trust deed at his request and was permitted to remain so clothed with the full knowledge and consent of Mrs. Grabel. He may have been negligent in executing an assignment of the trust deed to Edith Peterson at the request of Vernon Wilbur Peterson in 1940, or he may have been induced to execute the assignment through misrepresentation of the purpose for which the assignment was desired. But in any event the evidence supports the inference that Dansie intended to execute the assignment. Certainly the evidence does not, as a matter of law, require a contrary finding. There is no contention that the bank had any knowledge of any fraud on the part of any of the individual defendants or of any facts as to the title of the property other than as disclosed by the official records in the county recorder's office. Therefore, the bank as a subsequent bona fide encumbrancer is entitled to have its trust deed lien protected. Fly v. Cline, 1920, 49 Cal.App. 414, 193 P. 615; Blaisdell v. Leach, 1894, 101 Cal. 405, 35 P. 1019, 40 Am.St.Rep. 65, 25 Cal.Jur. 820.

[7-11] When the case was called plaintiff requested a jury, the fee therefor having been previously deposited. The court denied this request "as to the causes of action in equity" and proceeded to try the first and sixth causes of action without a jury. The court also disposed of the two remaining causes of action, viz., the second and fifth. This was error insofar as the fifth cause of action is concerned as to all of the individual defendants except the defendant Palmer.

Plaintiff's first cause of action to quiet title presented purely equitable issues. The allegations of this cause of action are in the usual form. The facts, however, on which it was based, appear in the fifth cause of action. It is there alleged among other things, that the property of plaintiff's intestate was subject to a deed of trust; that a trustee's sale had been held thereunder; and that the defendants Palmer and the bank had succeeded to the title of the purchaser at the trustee's sale. Obviously, only a court of equity could set

aside this legal title of record in the defendants and adjudicate that the Grabel estate was the owner of the real property in question. The sixth cause of action (against the bank alone) was for the cancellation of the bank's trust deed and the lien thereby created. The issues thus presented by the first and sixth causes of action and the relief sought were clearly equitable.

The fifth cause of action, however, is to recover as damages the alleged value of the property on the theory that the individual defendants "conspired together for the purpose of cheating and defrauding the said estate of Grace Grabel * * * out of said property" and that pursuant to their fraudulent plan and scheme they did defraud the estate out of said property. The relief sought on this cause of action is a money judgment against the individual defendants. Plaintiff's theory of action, as stated in her fifth cause of action, is obviously an action at law for damages against each person connected with the alleged fraud. Hutchason v. Marks, 1942, 54 Cal.App.2d 113, 118, 128 P.2d 573. As to the issues of fact raised by that cause of action a trial by jury was a matter of right. Pacific Western Oil Co. v. Bern Oil Co., 1939, 13 Cal.2d 60, 87 P.2d 1045. In Crouser v. Boice, 1942, 51 Cal.App.2d 198, at page 200, 124 P.2d 358, at page 360, it is said that: "Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested. Thus, even though the action is essentially equitable, if the plaintiff requests legal relief, the parties are entitled to a jury trial on the legal issue." In Connell v. Bowes, 1942, 19 Cal.2d 870, 871, 123 P.2d 456, the court points out that "It is now established in this state * * * that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause." In such circumstances, however, "the equitable issues are tried first and then, if any legal issues remain, a jury may be called." Connell v. Bowes, supra, 19 Cal.2d at page 872, 123 P.2d 457; Angus v. Craven, 1901, 132 Cal. 691, 699, 64 P. 1091; and Thomson v. Thomson, 1936, 7 Cal.2d 671, 62 P.2d 358, 117 A.L.R. 1. The practical reason for this procedural rule is that the trial of the equitable issues may obviate the necessity of a trial of legal issues. 15 Cal.Jur. sec. 13, p. 337. The practicability of this procedure is manifest in the instant case. In her first cause of action plaintiff seeks to establish her intestate's title to the property in question and that the defendants' claims thereto are without right. In her second cause of action she seeks to recover from the defendant Palmer and her husband the reasonable rental value of the property for the period they were in possession thereof. The determination, however, of the first cause of action adversely to the plaintiff and that defendant Palmer had purchased said property in good faith and for value had the effect of also establishing that plaintiff was not entitled to any relief against Mrs. Palmer on either the second or fifth causes of action. When the equitable issues were thus settled no legal issues remained to be tried as to Mrs. Palmer and the bank. See, Connell v. Bowes, supra; Thomson v. Thomson, supra, 17 Cal.2d at page 683, 62 P.2d 358, 117 A.L.R. 1. The trial of the equitable issues did not, however, determine the plaintiff's right to damages on the fifth cause of action for the alleged fraud of the Petersons and Beemans by which, it is claimed, they cheated the estate out of said property. On these legal issues the parties were entitled to a jury trial. Pacific Western Oil Co. v. Bern Oil Co., supra; Connell v. Bowes, supra. It cannot be said that the denial of a jury trial on the legal issues was without prejudice. It is not disputed that Mr. and Mrs. Grabel purchased the property in 1927 subject to a trust deed encumbrance; that they lived together on the property until the death of Mr. Grabel in 1934, during which time they made various improvements thereon; that in 1935 Mrs. Grabel gave Dansie the money to pay off the said encumbrance; that Dansie paid off the balance due on the said trust deed note and took an assignment of the trust deed in his own name; and that Mrs. Grabel continued to occupy the property until her death in June, 1940. It is thus clear that at the time of her death Mrs. Grable held the equitable title to the property, and that her agent, Dansie, held the assignment of the trust

deed for her use and benefit. She was entitled to possession, and was in possession. Any finding of the trial court that her interest in and right to said property and the possession thereof was less than here stated is without evidentiary support. The evidence would have supported implied findings by the jury (had there been one) that Peterson secured the assignment of the trust deed from Dansie through fraud and misrepresentation; that Beeman was a party thereto; that no consideration was paid Dansie for said assignment; that Edith Peterson paid no consideration for said assignment; that she was a party to and familiar with the alleged fraudulent plan and scheme of her son and Beeman; that the latter handled the foreclosure proceedings for her and financed the same; that he caused her to execute a trust deed in favor of Eva Nelson which, however, was assigned to his wife, Ruth, as security for the money he had advanced in connection with the foreclosure proceeding; that he assisted Mrs. Peterson in selling the property to Mrs. Palmer; and that as a result of the concerted and fraudulent acts of the Petersons and Beemans the estate of Mrs. Grabel lost the said property. Under such implied findings the verdict of the jury would necessarily have been in favor of the plaintiff.

[12, 13] When the court denied plaintiff's motion for a jury trial "as to the equitable causes of action" and indicated its intention to proceed with the trial of the first cause of action without a jury, the plaintiff then made a motion to amend said cause of action by adding the allegation that the plaintiff was out of possession of the said premises and that certain of the individual defendants were in possession. The court denied the motion. Plaintiff's claim of error in this ruling is without merit. This was the fourth amended complaint and the trial had opened. The granting or denying of such a motion to amend is largely a matter of judicial discretion, and the ruling will not be disturbed on appeal in the absence of a clear abuse of such discretion. No such abuse is here shown or suggested. No explanation is offered as to the plaintiff's tardiness in making the request to further amend and no showing is made of how such an amendment would be in furtherance of justice.

[14] At the outset of the trial the defendants W. H. Beeman and Ruth F. Beeman disclaimed any interest in the property. Later the plaintiff sought to examine W. H. Beeman as an "adverse party as if under cross-examination." This request, which was based on section 2055, Code of Civil Procedure,[1] was denied. Plaintiff assigns this ruling as reversible error. Her position, however, is not well taken. As to the cause of action to quiet title and the cause of action to cancel the trust deed of the bank the plaintiff was not entitled to examine Beeman under section 2055, Code of Civil Procedure. By his disclaimer Beeman was no longer an adverse party in the quiet title cause of action (Johnston v. St. Sure, 1920, 50 Cal.App. 735, 195 P. 947), and he was not even named as a defendant in the cause of action to cancel the trust deed. He was not a defendant in any of the other causes of action except the fifth, which is for damages for having fraudulently deprived the Grabel estate of the property. As to that cause of action he is one of the real parties in interest and, under our decision, he must stand trial thereon before a jury. Upon such new trial Beeman will, of course, be subject to examination under section 2055, Code of Civil Procedure.

Although Beeman was still "a party to the record" the plaintiff does not appear to have suffered any prejudice by the court's refusal to permit him to be examined "as if under cross-examination," insofar as the first and sixth causes of action were concerned. The real question was whether defendant Palmer was, in fact, a good faith purchaser for value of the property. Beeman, according to the testimony of defendant Edith Peterson, represented her in the trust deed foreclosure sale by which she

1 Section 2055 of the Code of Civil Procedure reads in part as follows: "Examination of adverse party. A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended * * * may be examined by the adverse party as if under cross-examination, * * *."

acquired title to the property and in the sale to defendant Palmer. There is no suggestion that he also represented defendant Palmer in the transaction.

Plaintiff also contends that the court erred in rejecting certain documents that were offered in evidence. Neither the relevancy nor the materiality of these documents on the issues involved in the first and sixth causes of action is made to appear.

The judgment is affirmed except on the fifth cause of action as to defendants Vernon Wilbur Peterson, Edith Peterson, W. H. Beeman and Ruth Beeman, and as to said defendants on said cause of action the judgment is reversed, appellant to recover costs against said defendants.

SHINN, Acting P. J., and WOOD, J., concur.



74 Cal.App.2d 183

JONES v. CITY OF LOS ANGELES.

Civ. 14992.

District Court of Appeal, Second District, Division 1, California.

April 26, 1946.

1. **Municipal corporations** ⇐817(1)

The existence of a conspicuous defect or dangerous condition of a street or sidewalk for a considerable length of time will create a presumption of constructive notice.

2. **Municipal corporations** ⇐791(2), 821(16)

"Constructive notice" of a dangerous or defective condition in a sidewalk can be shown by the long continued existence of the condition, and it is for jury to determine whether the condition complained of has existed for a sufficient time to give a municipality constructive notice thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

3. **Municipal corporations** ⇐821(16)

Evidence was sufficient to present issue to jury as to whether hole in sidewalk causing pedestrian to fall was large enough and had existed for a sufficient time to give municipality constructive notice thereof, where there was evidence that the hole measured 17 by 24 inches with a depth of at least 1¾ inches, and that it had existed about three years.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Mrs. Agnes Jones against City of Los Angeles for injuries sustained by plaintiff as result of an accident allegedly caused by defective sidewalk. From a judgment for defendant, the plaintiff appeals.

Reversed.

J. E. Simpson and J. Q. Gilchrist, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Leonard Husar, Deputy City Atty., all of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages for injuries sustained by plaintiff as the result of an accident caused by a defective sidewalk. A jury trial resulted in a verdict for defendant and from the judgment that followed, plaintiff appeals.

The appeal presents but one question. Appellant submits that, "Plaintiff relies upon the refusal of the court to instruct the jury, in any manner, upon the doctrine of constructive notice, as grounds for reversal of the judgment."

The record reveals that plaintiff, while walking "on a public sidewalk along the south side of West 28th Street between Hope Street and Grand Avenue, in the City of Los Angeles", stepped into a hole and broke her ankle. There was evidence that the hole measured 17 by 24 inches; various estimates of the depth ranged from 1¾ inches to 4 inches. There was also evidence that it had existed about three years. Photographs of the alleged defective condition were in evidence.

[1] It is argued by respondent that, "The defect complained of was of a minor nature as regards the application of the rule of constructive notice. There was a complete absence of proof as to the method or period of inspection, the character of the use made of the walks in the neighborhood, neglect by the City of its duty of inspection, and of any prior event or knowledge of facts which would have put the City on inquiry as to the existence of the hole in the sidewalk, or of its dangerous character. No attempt was made to charge the City with actual notice. * * * There was no testimony relative to performance, or nonperformance by the City of its duty of reasonable supervision and inspection of the streets of the City as a whole, or of the neighborhood in which the defect existed, or that if such duty had been properly performed the City would have had actual knowledge of the defect. There was a complete absence of proof as to the method or period or reasonableness, or lack thereof, of inspection of the neighborhood in which the defect existed. It is not enough to show simply the existence of the defect and its size and location upon the sidewalk and the time for which it had existed." It is further contended by respondent that, "The question involved in the case at bar is clearly governed by the law as determined by the Supreme Court in Nicholson v. City of Los Angeles, 5 Cal. 2d 361 [54 P.2d 725, 727]." The last-mentioned case does not uphold respondent's contention. Indeed, the court there affirms the rule that "the existence of a conspicuous defect or dangerous condition of a street or sidewalk for a considerable length of time will create a presumption of constructive notice." Other decisions cited by respondent are of little help; the facts, in the final analysis, govern.

[2] As was declared by the court in Lorraine (Brown, Adm'r) v. City of Los Angeles, 55 Cal.App.2d 27, 130 P.2d 140, 142, "With respect to appellant's lack of knowledge or notice of the dangerous character of the defect in the sidewalk, there was evidence that the hole was large enough to be conspicuous—large enough for a man to put his entire shoe inside it, and also that such defective condition had existed for a month or six weeks prior to the date of Mrs. Lorraine's fall. It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition, and it is a question of fact for the jury to determine whether the condition complained of has existed for a sufficient time to give the public agency constructive notice."

[3] There can be no question that the evidence was sufficient to entitle plaintiff to present the issue to the jury and the refusal to instruct accordingly, as requested, was error.

The judgment therefore is reversed.

YORK, P. J., and WHITE, J., concur.



74 Cal.App.2d 160

MORTIMER, Building and Loan Com'r, v. LOYNES et al.

Civ. 14606.

District Court of Appeal, Second District, Division 3, California.

April 25, 1946.

Rehearing Denied May 23, 1946.

Hearing Denied June 20, 1946.

1. Jury ⇐13(1)

The pleadings must be considered in their entirety in determining whether action is one at law in which plaintiff is entitled to a jury trial as a matter of right.

2. Building and loan associations ⇐42(16)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld by defendants from association in connection with sale of its apartment building, equitable principles furnished the standard by which to measure the conduct of defendants.

3. Jury ⇐13(1)

Where legal relief is sought in form of judgment for a specific amount, the fact that equitable principles are used to establish alleged liability of defendant does

not necessarily render action equitable, rather than action at law, in which plaintiff is entitled to jury trial, since law courts recognize and apply and grant relief based on equitable principles.

4. Jury ⇐14(2)

An action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld by defendants from association in connection with sale of its apartment building was an action at law, and plaintiff was entitled to a jury trial. Const. art. 1, § 7.

5. Jury ⇐14(2)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld by defendants from association in connection with sale of its apartment building, allegations that defendants received a secret profit and that exact amount remitted by the defendant president to the defendant broker as his share of money wrongfully appropriated was unknown to plaintiff did not make action one in equity so as to deprive plaintiff of right to jury trial. Const. art. 1, § 7.

6. Building and loan associations ⇐42(16)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld from association by defendants in connection with sale of association's apartment building, if liquidator was able to establish alleged fraudulent scheme, his recovery against broker would not be limited to amount that the broker got out of the deal.

7. Jury ⇐14(3, 5)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld from association in connection with sale of its apartment building, allegations of amended complaint regarding president's acquisition of a yacht in exchange for trust deed notes obtained in his dealings with association and prayer for general relief did not entitle liquidator to decree declaring that yacht was held in trust for association or for an accounting of profits in the yacht transaction, and hence did not render action equitable and deprive liquidator of right to jury trial. Gen.Laws, Act 986, § 6.02 et seq.; Const. art. 1, § 7.

8. Limitation of actions ⇐100(12), 179(2)

The word "discovery" within statute requiring institution of action based on alleged fraud within three years after discovery of facts constituting fraud is not synonymous with "knowledge", and averment of lack of knowledge of such facts within statutory period is insufficient to toll statute, but plaintiff must allege that he had no means of knowledge or notice which, if followed by inquiry, would have disclosed circumstances on which cause of action was founded, and when and how facts concerning fraud became known to him. Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Discovery" and "Knowledge".

9. Limitation of actions ⇐179(2)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been fraudulently withheld from association in connection with sale of its apartment building, amended complaint, alleging circumstances under which and when defendants' alleged fraud was discovered, alleged sufficient facts to toll three year statute of limitation, in view of confidential relationship between president and other officers of association. Code Civ.Proc. § 338.

10. Appeal and error ⇐1035

In action by liquidator of building and loan association against association's president and broker for amount alleged to have been wrongfully withheld from association in connection with sale of its apartment building, where evidence disclosed that a building and loan commissioner had made settlement with defendant president but indicated that settlement related only to other transactions, the denial of jury trial was not harmless, especially where defendants did not allege in answer that they had made settlement of liquidator's claim. Const. art. 1, § 7.

11. Building and loan associations ⇐42(16)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld from association by defendants in connection with sale of its apartment building, defendants' contention that cause of action was based on only part of transaction and that remainder involving president's disposition of trust deed notes and acquisition of a yacht had been abandoned and hence established no ground for damages was without merit in view of evidence that trust deed notes and yacht matters were separate transactions.

12. Building and loan associations ⇐42(16)

In action by liquidator of building and loan association against association's president and a broker for amount alleged to have been wrongfully withheld from association by defendants in connection with sale of its apartment building, evidence that association suffered a loss was sufficient for jury.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Frank C. Mortimer, as Building and Loan Commissioner and as liquidator of the Mutual Building & Loan Association against R. R. Loynes, also known as Richard R. Loynes, and another, to recover an amount alleged to have been wrongfully withheld by defendants from the association in connection with the sale of its apartment building and to recover actual and exemplary damages. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion, 162 P.2d 479.

Robert W. Kenny, Atty. Gen., and Joseph A. Ball, of Long Beach, for appellant.

Clock, Waestman & Clock and Swaffield, Swaffield & Madden, all of Long Beach, for respondents.

FOX, Justice pro tem.

This is an appeal by the plaintiff from a judgment in favor of the defendants.

The action, generally speaking, is prosecuted by the plaintiff, Building and Loan Commissioner, as liquidator of the Mutual Building & Loan Association of Long Beach, for the purpose of recovering $7,398.59, alleged to have been wrongfully withheld by the defendants from the association in connection with the sale of a furnished apartment house that belonged to the association.

In view of the questions that must be considered it is necessary to set forth the allegations of the amended complaint in considerable detail. It is alleged that defendant Loynes was president, general manager and a director of the association from May 10, 1933, to January 13, 1937, and "was during all of said time vested with and exercising the power to control and manage the business affairs and property of said Association"; that he "dictated and controlled the policies and affairs" of the association; and that "the other officers and directors had implicit faith in the supposed honesty and integrity" of said defendant. For several months prior to September 11, 1934, the association owned a piece of property in the city of Los Angeles which was improved with a fully furnished four-story brick apartment building known as the Chatham Arms Apartments. It is further alleged that on or about August 1, 1934, one Fred M. Cox, a licensed real estate broker, representing one Lillian Mercer, submitted to defendant Loynes, personally, as president and managing agent of the association, an offer to purchase said property for $62,000 net cash; that thereafter the Beverly Hills National Bank & Trust Company, as escrow agent for said Mercer, forwarded to defendant Loynes certain proposed escrow instructions which provided for the sale of said property to said Mercer for said net cash amount; that on or about August 30, 1934, the said Cox, as agent for said Mercer, offered to pay the sum of $63,500 net cash for said property; that said last-mentioned offer was communicated to defendant Loynes; that none of the other officers or directors of the association had any knowledge of either of said offers or escrow instructions; that said proposed escrow instructions were destroyed by de-

fendant Loynes shortly after their receipt by him. It is then alleged that at or about the time of said last-mentioned offer the defendant Loynes entered into a secret parol agreement with defendant Eaton, a real estate broker of Los Angeles, whereby Eaton agreed to act, under the direction of Loynes, as a pretended purchaser of the apartment house and Loynes agreed to arrange the pretended sale to him for a sum considerably less than $63,500 and that Eaton would then sell the property to Lillian Mercer, through Cox, the real estate broker, for $63,500, and that Eaton's profit on the transaction would be divided between him and Loynes. It is further alleged that in pursuance of said agreement with defendant Eaton, the defendant Loynes, in utter disregard of the trust and confidence reposed in him as an officer and director of said association, arranged for a pretended sale of the apartment house and furnishings and certain trust deed notes belonging to the association to Eaton, through an escrow at the Farmers & Merchants Bank of Long Beach at a cash price of $55,329.06, less certain title and escrow charges. The transaction was to be handled through the National Company, Ltd., which was alleged to be a wholly owned subsidiary of the association; that on August 31, 1934, Loynes caused an application to be filed with the then Building & Loan Commissioner, Louis Drapeau (now Judge Drapeau of Ventura County), for approval of a transaction involving the exchange of said Chatham Arms Apartments and a certain trust deed note upon which there was a balance due of $9,196.18, known as the association's loan No. 12156, for outstanding certificates of the association of the face value of $147,900, naming the defendant Eaton as the purchaser. (Under an amendment to the Building and Loan Law in 1933, chapter 31 of the Statutes of 1933, building and loan associations were permitted, during the period here involved, to exchange their properties for their outstanding investment certificates, subject, however, to the approval of the Building and Loan Commissioner. At the time of the transaction herein alleged, the investment certificates of the said association were apparently selling on the market at or about forty per cent of their face value.) The said application was approved by the commissioner. It is further alleged that Loynes advised Cox, the broker, that Eaton had an exclusive listing on the Chatham Arms Apartments, and that Eaton had authority to enter into an escrow for the sale of the property on his own behalf and that all further negotiations should be with Eaton; that accordingly on August 30, 1934, Eaton, pursuant to directions from Loynes, entered into an escrow at the Beverly Hills Bank and Trust Company, whereby he agreed as owner to sell said apartment house property to Lillian Mercer for $63,500 in cash, less certain deductions for title and escrow charges; that on September 11, 1934, Loynes caused the association to execute a grant deed to the Chatham Arms Apartments and a bill of sale to its furnishings, conveying said property direct to Lillian Mercer; that said deed and bill of sale were delivered into escrow in the Farmers & Merchants Bank at Long Beach and that on September 14, 1934, said bank, acting upon instructions of the defendants, transmitted said deed and bill of sale to the Eaton-Mercer escrow in the Beverly Hills Bank and Trust Company, with instructions to remit the net proceeds to the Long Beach bank; that on October 3, 1934, the Beverly Hills bank forwarded to the escrow at the Long Beach bank $63,294.64 cash; that the Long Beach bank paid $54,858.55 of this sum to the National Company, through which the association handled the deal; that the balance of $7,398.59 was paid by check to Eaton on October 4, 1934; that he cashed said check in the presence of Loynes and delivered the money to Loynes "who thereupon appropriated the same to his own use and benefit as a secret profit for which he gave no consideration whatever"; that thereafter a portion of said sum, the exact amount of which is unknown to plaintiff, was remitted by Loynes to Eaton as the latter's share of the money thus wrongfully appropriated.

It is also alleged that at some time prior to September 28, 1934, the defendant Eaton, acting under the instructions of Loynes, caused fully secured trust deed notes of the aggregate value of $11,177.36, which he had acquired in connection with

said transaction, to be transferred to certain third parties in exchange for the yacht "Phantom" which said yacht was transferred to the Sierra Investment Company, a corporation wholly owned and controlled by Loynes; that said yacht was reasonably worth the price paid therefor, to wit: $11,177.36; that between the 11th and 28th days of September, Loynes, acting for himself and in his personal interest, deposited $4,773.79 in an escrow in the Long Beach bank as the sole consideration paid by him or the Sierra Investment Company for said yacht and on said last mentioned date said sum was, pursuant to the request and instructions of Loynes, remitted by said bank to said National Company as the consideration purportedly paid by Eaton for said trust deed notes. It is then alleged that the aggregate sum of $59,632.34 (consisting of $54,858.55 realized from the Chatham Apartments deal and $4,773.79 realized from trust deed notes), which was remitted to the National Company, was used to purchase outstanding investment certificates of the face value of $147,900, which said certificates were delivered to the association and cancelled in accordance with the petition for the exchange of property for certificates which had been approved by the Building and Loan Commissioner; that due to the clever manner in which said transaction was manipulated by the defendants, nothing appeared upon the books or records of the association to indicate any irregularity in said transaction.

It is further alleged that throughout said transaction the defendant Eaton acted purely as a dummy and that no part of the purchase price for said property was advanced by him; that the defendants concealed from the other officers and directors of the association the fact that an offer had been made to purchase the Chatham Arms Apartments and furnishings for any sum in excess of that for which the property was purportedly sold to Eaton, to wit, the net sum of $54,858.55 in cash; that none of the other officers and directors had any knowledge whatever of the actual price paid by Mercer for said property; that the defendants represented to the other officers and directors of the association that the sale to Eaton was bona fide; that Eaton, after having purchased said property and while the transaction was still in escrow, but before the association had executed its deed, had sold it to Mercer; and that by means of said fraudulent scheme the association was defrauded of the sum of $7,398.59.

By his pleading plaintiff also lays a foundation for the recovery of exemplary damages because of the alleged fraud of the defendants.

Plaintiff prays judgment against the defendants for "actual damages" in the sum of $7,398.59, together with interest thereon from October 4, 1934, at the rate of 7 per cent per annum; "exemplary damages" in the sum of $10,000; and costs of suit "together with such other and further relief as the court may deem just and proper."

By their answer the defendants denied the charges of fraud and the retention of secret profits and pleaded the statute of limitations in bar of the action. They did not seek any affirmative relief.

[1] Plaintiff's first contention is that the court erred in denying his plea for a trial by jury. He bases this contention upon the theory that this is an action at law and that he is therefore entitled to a jury trial under the Constitution. Defendants, however, contend that plaintiff's alleged cause of action is in equity and hence he is not entitled to a jury trial as a matter of right. Considering the pleadings in their entirety (Hutchason v. Marks, 1942, 54 Cal.App.2d 113, 128 P.2d 573), it is our opinion that the plaintiff's position must be sustained.

Notwithstanding the complexity of the transactions and the circuitous procedure adopted to accomplish the simple transfer of ownership of the Chatham Arms and its furnishings from the association to Lillian Mercer and the allegations of the amended complaint with reference to the disposition of certain trust deed notes and the acquisition for defendant Loynes of the yacht "Phantom," plaintiff's cause of action may nevertheless be reduced to very simple terms, viz., an action to recover a judgment against the defendants for $7,398.59 (plus interest), which represents the amount the defendants are charged with

having personally received out of the Chatham Arms deal through their alleged fraudulent handling of that transaction but which should have gone to the association or have been used for its benefit in the purchase of its outstanding investment certificates.

[2-5] It is true that the basis of the action is the breach of fiduciary duty in that Loynes was one of the officers of the association and hence owed to it the duty of fair dealing and is alleged to have violated that duty and, with the aid of defendant Eaton, to have profited personally at the expense of the association. Equitable principles furnish the standard by which to measure the conduct of the defendants in this transaction. When this standard is applied the result is, insofar as the pleadings are concerned, that the defendants have a specific sum of money out of which they have defrauded the association, and which, therefore, they are not entitled to retain. Western States Life Ins. Co. v. Lockwood, 1913, 166 Cal. 185, 135 P. 496; Bainbridge v. Stoner, 1940, 16 Cal. 2d 423, 427, 106 P.2d 423. From the fact that equitable principles are thus used to establish the alleged liability of the defendants, it does not necessarily follow that the action to enforce that liability is equitable. The law courts now recognize and apply many equitable principles and grant relief based thereon where, as here, legal relief is sought in the form of a judgment for a specific amount. See Philpott v. Superior Court, 1934, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; McCall v. Superior Court, 1934, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019; Crouser v. Boice, 1942, 51 Cal.App. 2d 198, 124 P.2d 358; and Money Had and Received, an Equitable Action at Law, by Judge Edward T. Bishop, 7 So.Cal.L.Rev. 41. None of the extraordinary powers of a court of equity are required in order to give plaintiff the relief that he seeks. A court of law can afford complete relief. It is thus apparent that this action is one at law. Austin v. Wilcoxson, 1906, 149 Cal. 24, 84 P. 417; Fallon v. Sockolov, 1921, 55 Cal.App. 33, 202 P. 909; Johnstone v. Morris, 1930, 210 Cal. 580, 292 P. 970.

In support of their theory that this is an action in equity the defendants point to the allegation in the amended complaint where the $7,398.59 here sought to be recovered from the defendants is referred to as "a secret profit." Such is not an inappropriate designation or description. According to the amended complaint a profit in that amount was made on the Chatham Arms deal by the defendants and it was secretly made. But it does not follow that in order to recover said amount plaintiff must go into a court of equity for relief since all he asks is a personal judgment against the defendants. Furthermore, the designation of this money as "a secret profit" loses any equitable significance it might otherwise have when the context in which it is used is considered. The allegation is that "the sum of $7,398.59, was paid by check on October 4, 1934, to the said Eaton, who then and there cashed said check in the presence of the defendant Loynes and paid and delivered said sum in money to the defendant Loynes who thereupon appropriated the same to his own use and benefit as a secret profit for which he gave no consideration whatever." It is plain from this language that the gravamen of the allegation is that Loynes wrongfully appropriated the said money to his own use and benefit, and without giving any consideration therefor.

[5, 6] In further support of their theory that this is an equitable action defendants point to the allegation that "thereafter a portion of said sum [realized from cashing the aforesaid check], the exact amount of which is unknown to plaintiff, was remitted by the defendant Loynes to the defendant Eaton, as his share of the money thus wrongfully appropriated." It is argued that since plaintiff does not know the amount Eaton got out of this transaction, there should be an accounting to determine the amount plaintiff is entitled to recover from him. The fallacy of this argument is that if plaintiff is able to establish the fraudulent scheme which he has alleged, his recovery against Eaton will not be limited to the amount the latter got out of the deal. Swasey v. L'Etanche, 1936, 17 Cal. App.2d 713, 718, 62 P.2d 753.

Defendants rely upon Western States Life Ins. Co. v. Lockwood, supra; Winchester v. Howard, 1902, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am.St.App. 153; Dean v. Shingle, 1926, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156; Woolsey v. Woolsey, 1932, 121 Cal.App. 576, 9 P.2d 605; and DeGarmo v. Goldman, 1942, 19 Cal.2d 755, 123 P. 2d 1. None of these cases sustain their contention. The Lockwood case was an action to recover an alleged secret profit which it was claimed the defendant, as president and director of the plaintiff corporation, had made at its expense. A judgment on the pleadings was granted on the ground that the complaint did not state facts sufficient to constitute a cause of action. The sufficiency of the complaint, says the court, was the only question presented on the appeal. The court held that a good cause of action was stated since "under well settled equitable principles, no director could lawfully make any secret profit for himself" in violation of his fiduciary duty to the corporation. This principle, of course, directly supports the plaintiff's position in the instant case. There is no suggestion, however, in the Lockwood case that such recovery could only be had in an equity court. The Winchester and Dean cases were brought under section 3 (since repealed on November 4, 1930) of Article XII of the State Constitution to enforce the liability of corporate directors to creditors and stockholders for money misappropriated by the officers of the corporation. These actions were held to be properly on the equity side of the court "where all the creditors are parties or are represented, and in which there can be an accounting, and equities adjusted after all the facts have been ascertained." Winchester v. Howard, supra, 136 Cal. at page 441, 64 P. 692, 69 P. 77, 79, 89 Am.St.Rep. 153; Dean v. Shingle, supra, 198 Cal. at page 660, 246 P. 1049, 46 A.L.R. 1156. Any recovery would constitute a fund for the benefit of all the creditors. If, after satisfying their claims, any of the fund remained, it would belong to the stockholders. In the instant case there is no need for an accounting nor are there any equities to adjust. In the Woolsey case [121 Cal.App. 576, 9 P.2d 606], the action, says the court, was "instituted to declare a trust in a joint savings bank account." It is therefore plainly a case in equity. In the DeGarmo case the court held that an action to remove directors of a corporation under section 310, Civil Code, for gross abuse of their authority and for alleged fraudulent and dishonest acts is of equitable cognizance. The case, however, has no application to our problem.

[7] Defendants point to the allegations of the amended complaint with reference to the manner in which defendant Loynes is alleged to have acquired the yacht "Phantom" in exchange for trust deed notes of $11,177.36, which he obtained in his dealings with the association for $4,773.79, and insist that under these allegations and plaintiff's prayer for general relief he would have been entitled to a decree that the yacht was held in trust for the association or for an accounting of Loynes' profits in the transaction. The amended complaint did not pray for such relief and it does not appear that the formal prayer for general relief was intended to be an appeal to the equitable powers of the court. It was not alleged that the purchase of the yacht was embraced within the alleged plan and agreement of Loynes and Eaton, nor was it alleged that there had been a belated discovery of the facts in the yacht transaction, which would have been necessary in order to state a cause of action arising out of it. The plaintiff, therefore, was not entitled to any relief based on the yacht transaction. Neither the amended complaint nor the answer alleged that the sale of the apartment property and the sale of the trust deed notes constituted a single transaction. As previously noted the apartment property was sold to Lillian Mercer. That transaction was concluded on October 4, 1934, when the Long Beach bank paid the National Company $54,858.55 from the proceeds of said sale and delivered to Eaton the check for $7,398.59. Mrs. Mercer did not acquire any of the trust deed notes. She did not own the yacht "Phantom." The yacht deal was made with other parties. The money which was paid for the trust deed notes, according to the allegations of

the amended complaint, was transmitted to the National Company by the Long Beach bank "pursuant to the request and instructions" of Loynes, on September 28, 1934. This was six days before the bank made the payments to the National Company and Eaton on the sale of the apartment property. The inclusion of the association's loan No. 12156 with the apartment property in the application to the Building & Loan Commissioner for authority to exchange said properties for outstanding investment certificates of the association of the face value of $147,900 does not make one transaction out of that which the amended complaint shows was, in fact, two separate deals. No facts were alleged which would have made it necessary to inquire into the purchase of the yacht.

The court received evidence offered by defendants for the evident purpose of showing that any profits made in the real estate sale were used in the purchase of the yacht and that the association received the full benefit of them. The answer did not plead this defense but if all the facts testified to had been pleaded, the action would still have been one at law. In this action for money, proof that there had been an expenditure of the money, authorized by the association and for its benefit, would have constituted a good defense, but a judgment sustaining it would not have required the exercise of the equitable powers of the court.

Plaintiff was entitled to a trial by jury. Cal.Const. art. I, sec. 7; Farrell v. City of Ontario, 1919, 39 Cal.App. 351, 178 P. 740; Pacific Western Oil Co. v. Bern Oil Co., 1939, 13 Cal.2d 60, 87 P.2d 1045; Connell v. Bowes, 1942, 19 Cal.2d 870, 123 P.2d 456; Hutchason v. Marks, supra.

[8] The defendants contend, however, that even if the plaintiff were entitled to a trial by jury, nevertheless the error was not prejudicial because the amended complaint shows on its face that the alleged cause of action is barred by the three-year statute of limitations. Code Civ.Proc. § 338. As previously noted the transaction on which plaintiff bases his cause of action took place during August, September and October, 1934, and the complaint was not filed until June, 1940. In order to maintain his action it was therefore necessary for plaintiff to plead that he did not discover the facts constituting the fraud until within three years prior to the date he filed his complaint. As pointed out in Bainbridge v. Stoner, supra, 16 Cal.2d 423, 430, 106 P.2d 423, 428: "The word discovery as used in the statute is not synonymous with knowledge. And the court must determine as a matter of law when, under the facts pleaded, there was a discovery by the plaintiff, in the legal sense of that term. Consequently, an averment of lack of knowledge within the statutory period is not sufficient; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740." For a comprehensive treatment of these questions and an exhaustive collection of the authorities thereon, see Hobart v. Hobart Estate Co., 1945, 26 Cal.2d 412, at page 436, et seq., 159 P.2d 958.

[9] For the purpose of complying with these rules and showing that his cause of action is not barred by the statute of limitations, plaintiff repeated certain allegations with respect to the confidence of the other officers and directors in Loynes, and their reliance on his honesty and integrity; that he concealed from them the fraudulent plan and scheme by which he and Eaton made a profit from the transaction; that the other officers and directors did not know that an offer had been made by Cox to purchase the apartment house property for $63,500; that throughout the transaction Loynes represented to the other officers and directors that said property was being sold to defendant Eaton at the best price obtainable; that from May, 1933, to January, 1937, Loynes, as president, director and manager, personally managed and controlled all the business of the association and its subsidiary, the National Company, Ltd. It is further alleged that none of the other officers or directors had or acquired

any knowledge of the secret profit obtained by the defendants or that the property was sold for a sum less than was originally offered therefor and that nothing appeared in the books and records of the association to indicate these facts. In this connection it is further alleged that the Building and Loan Commissioner examined the affairs of the association at least once each year as required by law, and that the books of the association were audited by certified public accountants at least once each year, but that in none of said examinations or audits were any facts or circumstances discovered which caused or should have caused a person exercising reasonable care to discover the fraudulent conduct of the defendants; that in the course of an investigation into the affairs of the association in the early part of 1936 a deputy investigator of the Building and Loan Commissioner discussed the transaction in question with the defendants, Loynes and Eaton, and at that time both of said defendants stated that the sale of the Chatham Apartments to Eaton was bona fide and that Eaton had actually purchased said property on his own account and had actually furnished the money with which to purchase the same; that neither of said defendants ever revealed to the Building and Loan Commissioner, or any of his deputies or agents, or to any of the other officers, directors or stockholders of the association, the fact that a larger offer had been made for the purchase of said property than was actually received by the association, or the fact that Eaton had paid all or any part of the profit made in the transaction to Loynes.

With respect to the facts and circumstances leading to the discovery of the alleged fraudulent acts on the part of the defendants, the amended complaint shows that on or about the 17th day of April, 1940, Eaton was being questioned by C. Roy Smith, one of the attorneys for plaintiff (the association had been taken over in January, 1940, for liquidation by the predecessor in office of the plaintiff herein, and Smith was attorney for the then commissioner as such liquidator). It is further alleged in the amended complaint "that in the course of said examination the defendant, Eaton, at first asserted that he had purchased said Chatham Apartments in his own behalf and that he had furnished the money himself but after a considerable number of questions had been asked and answered said defendant became panicky when asked whether he had reported the profits made on said transaction in his Federal Income Tax Return for the year 1934 and finally stated to said Smith: 'I am simply tired covering up Dick's (meaning the defendant, Loynes) shady deals; I am too old and I am going to tell you the truth about the whole thing'; that thereafter said defendant admitted that he participated in said transaction merely as an accommodation to the defendant, Loynes, that he had signed all of the documents and entered into the various escrows at the request and upon the direction of the defendant, Loynes, and that he had cashed the $7,398.59 check in the presence of and paid the entire proceeds to the defendant, Loynes. That the only persons who had any knowledge of the fact that the defendant, Loynes, made the secret profit in question were the defendants, Loynes and Eaton, and that neither plaintiff nor any of the directors, officers or stockholders of said Association had any way of discovering said facts until the defendant, Eaton, consented to reveal the same as heretofore related. That the defendant, Loynes, always has and still does refuse to admit the fact that he received any portion of said secret profits or that the defendant, Eaton, was not a bona fide purchaser of said property or that either of the defendants have been or are guilty of any breach of trust or fraudulent conduct."

The foregoing allegations clearly show under what circumstances and when, in fact, the alleged fraud of the defendants was discovered. The allegations are also sufficient to show why it was not sooner discovered. The other directors and officers had confidence in and relied on the honesty and integrity of the defendant Loynes. There was no reason for them to suspect that the Chatham Arms was not being sold to Eaton for the best price obtainable. There was nothing in the books or records of the association to indicate a better price had been offered or that a secret profit had been made. There is, therefore, no rea-

son shown or suggested as to why the other officers and directors should have investigated this particular transaction. It does not appear from the allegations of the amended complaint that the annual audits of the association revealed any irregularities with respect to the deal. It does appear that in examining into the affairs of the association in 1936 a representative of the Building and Loan Commissioner discussed the transaction with the defendants and was told that Eaton had purchased the property on his own account and had furnished the money with which to make said purchase. It was not revealed to the representative of the commissioner that a larger offer had been made for the purchase of the property or that any portion of the profit had been paid over to Loynes by Eaton. It seems clear from the allegations of the amended complaint that Loynes took pains to conceal the alleged fraudulent character of the transaction. In this connection it is alleged that Loynes destroyed the proposed escrow instructions that were sent to the association by the Beverly Hills Bank which contained the first Mercer offer of $62,000. It is also alleged that the fraudulent plan and scheme of the defendants "was secretly executed"; and that they were the only persons who knew that a secret profit had been made. The transaction on its face appeared regular. There was no reason to suspect fraud on the part of the defendants. They contend, however, that when the other officers and directors learned that Eaton had resold the apartment property before the purported sale to him had been completed they should have investigated the transaction. It is not unusual for the purchaser of real property, and particularly a person engaged in that business, to sell, exchange or trade property he is acquiring before his purchasing escrow is closed. Hence, it cannot be said as a matter of law that the reported resale by Eaton should have caused the board of directors to suspect that the trusted and respected president and manager of the association had been a party to any fraudulent scheme in disposing of said property and that therefore they should have investigated the transaction. Hobart v. Hobart Estate Co., supra, 26 Cal.2d 412, 440, 159 P.2d 958.

Under the circumstances as disclosed by the allegations of the amended complaint it is difficult to see how the other officers and directors of the association could have been expected to make or cause to be made any other or further investigation into the particular transaction, or how they can be charged with knowledge or notice of facts or circumstances which, if reasonably pursued, would have led to the discovery of the alleged fraud. In this connection it is to be noted that Loynes is alleged to have "personally managed and controlled all the business of said association and its said subsidiary, the National Company" and that he did not sever his connection until more than two years and three months after this transaction was concluded. In view of his relation to the association the observation of the court in Bainbridge v. Stoner, supra, 16 Cal.2d 423, 106 P.2d 423 is particularly applicable. It is there said (16 Cal.2d at page 430, 106 P.2d at page 428) that the "rule has been somewhat relaxed, so far as the requirement of allegations stating the circumstances which are relied upon by the plaintiff as excusing discovery of the fraud are concerned, in cases involving confidential relationship." In the Hobart case, supra, 26 Cal.2d at page 440, 159 P.2d at page 973, the court points out that it is recognized that in cases involving a fiduciary relationship "facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required." The defendants, however, seek to avoid the full effect of this principle by pointing out that Loynes severed his connection with the association in January, 1937, and that this action was not filed until June, 1940. They argue that no diligence is shown on the part of the officers and directors, after Loynes was no longer head of the association, to discover the alleged fraud in the Chatham Arms transaction and that no sufficient reason appears why the discovery was not sooner made. In passing on these questions consideration must be given to the way the deal was handled, the time that had elapsed, the previous and subsequent

audits, the investigations that had been made of the association's affairs, the investigation of this particular transaction in 1936 by a representative of the Building & Loan Commissioner who talked to the defendants about it, and the other matters to which we have alluded. It is unnecessary to repeat them. No facts were alleged which would have caused the officers or directors to suspect any dishonesty in the transaction. The allegations of the amended complaint are sufficient as against the plea of the statute of limitations.

[10] Defendants further contend that the alleged appropriation by them was settled and liquidated by the Building & Loan Commissioner with the full knowledge of the association, hence no prejudice could be suffered by the denial of a jury trial. This contention is based on the fact that in 1936 following a report dated June 15, 1936, to Building and Loan Commissioner Drapeau, by Milton O. Shaw, chief examiner, the commissioner required Loynes to turn over to the association additional investment certificates in the face amount of $13,714. An examination of said report and consideration of the testimony of Judge Drapeau, Examiner Shaw, witness Madson and the several entries in the association's books with respect to the Hanson trust deed note, would have furnished ample support for a finding by the trier of fact (a jury, had there been one) that the settlement related only to an alleged profit made by Loynes in connection with the sale of the trust deed notes and the acquisition of the yacht "Phantom" in the name of Sierra Investment Company on September 28, 1934, and had nothing whatever to do with the Chatham Arms deal which was closed on October 4, 1934. Furthermore, defendants did not allege in their answer that they had made a settlement of plaintiff's claim; they only denied that they had made a profit, as alleged. No finding was made with reference to the claimed settlement.

[11] Defendants also contend that plaintiff has based his cause of action on only a part of the transaction and has abandoned the remainder, hence no ground for damages could possibly be established. This argument is founded on the proposition that the sale of the Chatham Arms Apartments, and the disposition of the trust deed notes and the acquisition of the yacht "Phantom" and the other matters in relation thereto constituted a single transaction. However, a jury might reasonably have come to the conclusion from the testimony of Eaton, his statements to witnesses Smith and Shaw and from the several escrows, that the two transactions were in fact separate deals. This contention is therefore without merit.

[12] Defendants also argue that the evidence shows without contradiction that the association suffered no loss. We do not so view the evidence. As pointed out above, a jury might reasonably have concluded that the sale of the Chatham Arms, and the deal involving the trust deed notes and the yacht were separate transactions. With substantial evidentiary support, a jury could also have concluded that defendant Loynes arranged to handle the Chatham Apartment deal through Eaton so as to net the association less than had previously been offered by Cox on behalf of Lillian Mercer, and that the defendants personally kept the difference. Under such implied findings a jury would necessarily have concluded that the association did suffer a loss and return a verdict accordingly for the plaintiff. Proof that the association had received all that it was entitled to as the price of the trust deed notes would not establish the fact that it had not sustained a loss in the real estate transaction by its failure to receive the full amount for which the property was sold.

In their briefs, which consist of approximately 400 pages, counsel for the respective parties have devoted considerable space to arguing whether or not the evidence supports the findings. In view of our conclusions it is not necessary to consider that question.

The judgment is reversed.

SHINN, Acting P. J., and WOOD, J., concur.

74 Cal.App.2d 178

STEVENS v. DILLON.

Civ. 3180.

District Court of Appeal, Fourth District, California.

April 25, 1946.

1. Appeal and error ⇐994(3), 1012(1)

Credibility of witnesses, or weight to be given the evidence, are matters for trial court.

2. Appeal and error ⇐1012(1)

Reviewing court cannot reverse judgment if there is substantial evidence or any reasonable inferences to be drawn from such evidence supporting findings and judgment, notwithstanding that it may appear to reviewing court from a study of the cold record that a decided preponderance of evidence is with appellant.

3. Contracts ⇐1

An "agreement" is a manifestation of mutual assent by two or more persons to one another and has a wider meaning than contract, bargain, or promise, and a manifestation thereof may be by word or any other conduct or, under some circumstances, by silence. Civ.Code, §§ 1549, 1550, 1581.

See Words and Phrases, Permanent Edition, for all other definitions of "Agreement".

4. Landlord and tenant ⇐157(1)

Evidence sustained finding of an agreement between lessor and lessee that leased property could be properly irrigated with two wells and that lessee was thereby released by his covenant to drill three wells on leased premises and install pumps therein after having performed the covenant as to two wells. Civ.Code, §§ 1549, 1550, 1581.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Minnie Stevens against W. E. Dillon to recover damages for breach of that part of a lease contract which required defendant to drill certain wells on the leased property. From a judgment for defendant, plaintiff appeals.

Affirmed.

Wild, Carlson & Reeve and Alan D. Christensen, all of Fresno, for appellant.

Rae B. Carter, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of defendant in an action for damages brought against him for breach of a written contract which required defendant to drill three wells on leased property and install an electrically driven pump in each. The recovery sought is the cost of drilling one well and the value of one pump as only two wells and pumps were on the property when defendant gave up his lease. The sole question presented is the sufficiency of the evidence to support the findings and judgment.

Plaintiff owned 160 acres of farming land in Tulare County which she leased to defendant on December 1, 1936, for a term ending on January 1, 1941. In addition to a small cash rental to be paid to plaintiff, defendant agreed to put down the three wells and install in each of them a new fifteen horsepower electrically driven turbine pump.

As found by the trial court, the lease contained the following provisions:

"'At the end of the third year of this lease, (lessee to) give to the party of the first part herein * * *', (that is to say less*ee* Minnie Stevens, plaintiff above named) 'a clear bill of sale to said pumps, showing the same free and clear of all encumbrances * * *' and that defendant W. E. Dillon would turn over said pumps in good condition, reasonable wear and tear excepted, to plaintiff Minnie Stevens.

"It is likewise true that said lease further provided as follows: "It is further understood and agreed with respect to the placing of the three water wells on said premises by party of the second part,' (that is to say lessee and defendant, W. E. Dillon) 'that in the event that it is hereafter mutually agreed that said property and all thereof can be properly irrigated with only two wells, that then and in that event and upon such mutual agreement party of the second part shall only be obligated hereunder to place two wells on said property instead of the three wells as hereinbefore provided.'"

After taking possession of the property defendant found a water well in good condition, the existence of which was unknown to either party at the time the lease was executed. He drilled two new wells and installed three electrically driven pumps in the three wells. One of the new wells caved in during the first 24 hours of operation and was not thereafter usable. Defendant removed the electrically driven pump so that at the end of the period of the lease there were only two wells with pumps in them delivered to plaintiff.

The trial court further found:

"It is true that lessee and defendant W. E. Dillon properly irrigated said leased premises and the whole thereof with said two wells, and that during the term of said lease and the occupancy of said premises by defendant and lessee W. E. Dillon, plaintiff and defendant above named mutually agreed that said property and the whole thereof could be properly irrigated with and from said two wells."

This finding is attacked by plaintiff as being unsupported by any evidence of an agreement between the parties that the property and the whole thereof could be properly irrigated with and from two wells.

In 1937 defendant planted 155 acres to cotton. There is evidence supporting the conclusion of the trial judge that the whole of this acreage was sufficiently irrigated from the two wells so that about one bale of cotton to the acre was produced. During the remaining three years of the term of the lease only about half of the property was planted and irrigated, due to federal regulations limiting plantings, and the balance was left idle. During the next three years the property was leased to other parties and there is no evidence as to the acreage planted and irrigated. In 1944, 110 acres were planted to cotton which was irrigated. The balance was planted to barley which was not irrigated.

Defendant testified that he took plaintiff to the property "in late 1937"; that he showed her the caved-in well which could not be operated; that "I said to Miss Stevens—now this was at the—at the time was well past the irrigation, the major portion of the irrigation season for that crop year. I said, 'Miss Stevens, I am covering the entire acreage with the two pumps, and getting sufficient quantities of water to those crops, and we don't need the three pumps on this property any more than we need five wheels to a wagon.'

"Mr. Carter: Q. What did she say? A. At that time she—I didn't press the matter any further, and I can't recall her exact reply then. But she didn't question whether—that I was getting water in sufficient quantities."

We do not understand that defendant maintains that this amounted to any agreement between the parties that two wells were sufficient to irrigate all of the property. The conclusion on his part that there was such an agreement is based on a conversation which defendant testified he had with plaintiff early in 1938 after the 80 acres, which he was permitted to plant, was prepared for planting. He detailed this conversation as follows:

"I said to Miss Stevens, 'Miss Stevens, we don't need more than two pumping plants on this property. If we have three pumping plants it will increase the assessed valuation of the property and make your taxes higher every year, and if you operate those three plants instead of two, you will always be in the wrong bracket, power bracket, as far as rates are concerned.'

"Q. What do you mean by that? A. Well, if you operate a pumping plant continuously, the year through, the consumption of power will be great enough to bring it within a lower rate schedule.

"Q. I see. A. If you have two pumping plants sharing in that, why each plant won't consume as much power as the one plant alone would consume, to cover the entire acreage.

"Q. I see. Then do you mean if you increased that to three, the consumption in each plant would not be sufficient to bring it down into the lower rate bracket? A. That is the idea.

"Q. Very well. What, if anything, did Miss Stevens say at that time, Mr. Dillon? A. And I said—now, I just want to continue my conversation with her. I said, 'I have irrigated every acre of this land adequately the previous year, sufficient wa-

ter, and I don't need three pumps.' And Miss Stevens said, 'Mr. Dillon, I see that it is not necessary to have three pumping plants.' And nothing more was said about that. I considered the matter closed. I didn't ask Miss Stevens to give me a written statement to that effect. I took her word for it."

Plaintiff did not remember any such conversation early in 1938, but thought it might have occurred, if at all, in the fall of that year. She testified that both she and defendant knew that only about half of the property could be planted to cotton and irrigated and that any such conversation, if it occurred, related to the sufficiency of the water from the two wells to irrigate the eighty acres that could be planted and irrigated and not to the irrigation of all the leased property.

She also testified that defendant had purchased a vineyard and was in financial difficulties; that at his request she postponed the delivery to her of the bills of sale of the two pumps until after the date specified in the lease for their delivery, and also postponed the drilling and equipping of the third well so as not to cause him financial embarrassment.

Plaintiff argues that defendant's statement to her to the effect that he had irrigated every acre of the land the previous year, and that he did not need three pumps, and especially her reply, "Mr. Dillon, I see that it is not necessary to have three pumping plants," must be weighed and measured by the conditions both knew were then existing, namely, that only eighty acres were to be cultivated and irrigated so that her reply could not be twisted into an assent to the proposition that the two wells furnished sufficient water to irrigate the entire 160 acres. On the other hand defendant maintains that plaintiff knew that during the 1937 cropping season he had planted and irrigated all of the 160 acres except the parts occupied by ditches; that his statement particularly referred to that year; that her assent must be construed as a reply and assent to the exact statement made by him which amounted to an agreement that only two wells were necessary to irrigate all of the leased land, which agreement waived the third well and pumping plant.

[1, 2] Other arguments are made by both counsel on other questions which are merely corroborative of the foregoing and in the final analysis amount to little more than discussion of conflicts in the evidence. The important question confronting us is whether or not the foregoing testimony of defendant is sufficient to support the finding of the trial court that there was an agreement between the parties that two wells furnished sufficient water to irrigate the entire 160 acres. In this connection it should be observed that we have nothing to do here with the credibility of the witnesses or the weight to be given the evidence. Those are matters settled in the trial court. Although it may appear to us from a study of the cold record that a decided preponderance of the evidence is with the plaintiff we cannot reverse the judgment if there is substantial evidence or reasonable inferences to be drawn from such evidence supporting the findings and judgment.

[3] In Restatement of the Law, Contracts, Section 3, we find "Agreement" defined as follows:

"An agreement is a manifestation of mutual assent by two or more persons to one another.

"a. Agreement has a wider meaning than contract, bargain or promise. The word contains no implication that legal consequences are or are not produced. It applies to transactions executed on one or both sides, and also to those that are wholly executory. The word contains no implication of mental agreement. Such agreement usually but not always exists where the parties manifest assent to a transaction.

"b. Manifestation of assent may be made by words or by any other conduct. (See sec. 21) Even silence under some circumstances is such a manifestation. (See sec. 72)" See also, sections 1549, 1550, 1581, Civil Code.

In Holmes v. Jennison et al., 39 U.S. 540, 14 Pet. 540, 572, 10 L.Ed. 579, it was said:

"The word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be

in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.'"

[4] Measured by the foregoing rules we must conclude that the quoted conversation detailed by defendant, while furnishing meager evidence, is sufficient to sustain the finding to the effect that there was an agreement between the parties that all of the leased property can be properly irrigated with two wells so that defendant was released from his covenant to drill a third well and install a pump in it.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



74 Cal.App.2d 233

GOSSMAN et al. v. GOSSMAN et al.

Civ. 15081.

District Court of Appeal, Second District, Division 3, California.

April 29, 1946.

1. Appeal and error ⇐102, 103, 113(1)

Orders denying defendant's motion to vacate final judgment for plaintiffs and sustaining demurrers to, and motions to strike from, defendant's amended answer, counterclaim and cross-complaint, were not appealable, but only appeal available to defendant was from final judgment. Code Civ.Proc. § 963.

2. Appeal and error ⇐544(3)

Where record on appeal consists solely of clerk's transcript, appellate court is limited to determination of questions presented by judgment roll.

3. Judgment ⇐106(1)

In quiet title action, allegation of answer that defendant owns property involved puts in issue material question, so as to require trial and preclude default judgment. Code Civ.Proc. § 585.

4. Judgment ⇐106(7)

In quiet title action, defendant, failing to amend his answer further after sustaining of demurrer to amended answer alleging his ownership of properties involved, was in position of standing on such answer, and default judgment thereafter entered was erroneous as depriving him of right to prove his title. Code Civ.Proc. § 585.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Alfred E. Paonessa, Judges.

Action by Walter A Gossman and others against George Joseph Gossman and wife to quiet title to certain properties, in which named defendant filed a counterclaim and cross-complaint. From a default judgment for plaintiffs and orders denying named defendant's motion to vacate the judgment and sustaining demurrers to, and motions to strike from, such defendant's amended answer, counterclaim and cross-complaint, he appeals.

Judgment reversed.

George Gossman, in pro. per.

Harry E. Templeton, Leonard M. Comegys, and William W. Kaye, all of Los Angeles, for respondents.

DESMOND, Presiding Justice.

On December 14, 1944, Walter Gossman, his brother Otto, and his sister, Emma Healey, suing in her own behalf and as executrix and trustee under the will of their mother, Rosa Miller, joined as plaintiffs in filing a complaint to quiet title to various properties in which they were respectively interested. They named as defendants their brother, George Joseph Gossman, also known as Joseph G. Gossman and his wife, Jett G. Gossman. Although the record shows that service of the complaint was made upon George's wife, she never answered or appeared and her default was entered on February 17, 1945.

George Gossman, appearing in propria persona, filed a demurrer in his own behalf which, on December 29, 1944, was overruled with ten days allowed to answer. On January 8, 1945, he filed an answer and counterclaim as well as a cross-complaint,

to all of which demurrers were filed. Motions to strike from the answer and the cross-complaint were also filed and the demurrers and motions were placed upon the calendar for January 24, 1945. At that time, Honorable Alfred E. Paonessa, sitting in the Law and Motion Department, ordered off calendar both motions to strike and the demurrer to the answer and counterclaim, an amended answer and counterclaim having been filed on the preceding day, January 23rd. The judge then sustained the plaintiff's demurrer to the cross-complaint allowing ten days for amendment. Notice of the court's action and ruling was served on George Gossman under date of January 29th.

On January 30th plaintiffs filed a demurrer to the amended answer and counterclaim, which was considered by Judge Paonessa and sustained on February 5th, ten days being granted the defendant for amendment. Notice of this action was served on defendant that same day, but it does not appear from the record that another amended answer was filed, and twelve days later, on February 17th, default of the defendant was entered upon the formal request of plaintiffs. On February 5th defendant had filed his amended cross-complaint "but without having served same upon plaintiffs or their attorney," according to the decree of the court. On March 2nd this amended cross-complaint was stricken on motion of plaintiffs. On March 13th, Hon. Emmet H. Wilson signed a decree in which the foregoing procedural matters and orders are recited, "the default of said defendant having been duly entered, and evidence having been introduced and heard in open court, and the Court being satisfied that the allegations of the complaint are true and that the relief asked for should be granted." Accordingly, it was ordered, adjudged and decreed that each of the plaintiffs is respectively the owner of and entitled to possession of the property alleged in the complaint as belonging to him, to her, or to the estate of Rosa A. Miller, deceased, recognizing also the right of Mrs. Healey to have distributed to her, as trustee, the last mentioned property. It was further decreed that "the title of the plaintiffs in and to said lands or properties herein above described is good and valid and the title of plaintiffs is adjudged to be quieted against all claims and demands of said George Gossmann also known as George Joseph Gossman and Jett G. Gossman, or either of them," etc.

A motion of defendant to set aside and vacate the judgment quieting title was denied on April 16, 1945.

Defendant has claimed an appeal from the judgment, "from the ruling denying my motion to vacate same; * * * from the rulings or orders sustaining demurrer to and motion to strike from the ammended answer and counterclaim * * * from the orders or rulings sustaining demurrer to amended cross-complaint and motion to strike therefrom." He also takes "exceptions to all such proceedings herein as may be deemed excepted to, and is claiming for the enforcement of his rights, under the Constitution and Statutes with the same force and effect as if herein set forth and repeated at length."

[1-4] So far as we can determine the only appeal that was available to the defendant in this case is provided for in section 963, Code of Civil Procedure: "From a final judgment entered in an action, or special proceeding, commenced in a superior court * * *." Consequently, we disregard the other purported grounds of appeal. The record on this appeal consists solely of the clerk's transcript, and in such a situation this court is limited in its determination to the questions presented by the judgment roll. 2 Cal.Jur. 690. Since defendant failed to file a second amended answer within the time allowed a default judgment was in order under section 585, Code of Civil Procedure, unless the trial judge erred when, on February 5th, he sustained the general demurrer to the amended answer and counterclaim. While, in our opinion, the ruling was correct as to the counterclaim it was not, as to the answer, for therein the defendant "denies that the claims of the Defendants are without any right whatever; alleges that he is the Official Recorded Owner of said properties." In a quiet title action the allegation of an answer that the defendant is the owner of the property puts in issue the material question in the case.

The settlement of this issue required a trial. Having failed to further amend his answer, defendant was in the position of standing upon it. By the default, which was entered after the failure to amend, he was deprived of the right to prove his title if any he had. The judgment which followed the entry of the default is hereby reversed.

SHINN and WOOD, JJ., concur.



74 Cal.App.2d Supp. 967

PEOPLE v. SAFFELL et al.

No. Cr. A. 2170.

Appellate Department, Superior Court, Los Angeles County, California.

April 23, 1946.

1. Criminal law ⇐1024(1)

An appeal from judgment of dismissal as to one count of criminal complaint may be taken although other counts are not disposed of.

2. Criminal law ⇐970(5)

A defendant, by motion in arrest of judgment, cannot take advantage of defects in form in a complaint, which defects in form include defects consisting merely in the absence of that particularity which might be necessary to enable defendants to prepare for and make their defenses. Pen.Code, § 1452.

3. Indictment and information ⇐133(7)

A motion to dismiss complaint is not a proper mode for raising objections which go to mere uncertainty. Pen.Code, §§ 1385, 1387.

4. Indictment and information ⇐146

The general scope of demurrer to complaint authorized in municipal court, justice's court, or police court, aside from joinder of offenses, is the same as that of a demurrer in superior court. Pen.Code, §§ 1004, 1428.1 to 1428.3.

5. Indictment and information ⇐147

The only grounds of demurrer allowed are those specifically named in the statute. Pen.Code, §§ 1004, 1428.1 to 1428.3.

6. Indictment and information ⇐57

Where section 952 was amended as a part of a program for simplification and liberalization of rules of pleading in criminal cases, section 1426, to which was added the words of section 952 in its amended form, for the same purpose, was required to be construed according to fair import of its terms to effectuate that purpose. Pen.Code, §§ 4, 952, 1426.

7. Statutes ⇐147

Where no part of original Penal Code section was deleted when section was amended, legislative intent not to repeal old section completely was indicated, so that old and new were required to be construed together with effect given to each as far as possible so as to make a consistent whole. Pen.Code, § 1426.

8. Statutes ⇐147

Where a Penal Code section is amended by addition, without deletion of any provisions of old section, and it is impossible to reconcile old and new in their entirety and there is no other indication of legislative intention, the new parts of section are controlling to the extent that reconciliation is impossible.

9. Indictment and information ⇐110(3)

Where courts had previously recognized general rule that it is sufficient to charge an offense in language of statute defining it, except where words used in statute have no technical meaning or where particular facts or acts which constitute offense are not specified, in which case it is necessary to set forth the acts constituting the offense, the enactment of such general rule into statute without any exception disclosed legislative intent to abolish the exception. Pen.Code, §§ 952, 1426.

10. Indictment and information ⇐110(3)

In a municipal, justice's, or police court a complaint in the words of statute creating offense is sufficient, and defendant cannot demand under it any further particulars than are necessary to make

complaint sufficient under the statute, although complaint is still required to set forth such particulars of time, place, person, and property as to enable defendant to answer the complaint, subject to demurrer for failure to set forth such information. Pen.Code, §§ 1426, 1428.1.

11. Indictment and Information ⚿147

A demurrer may reach any uncertainty which would prevent defendant from answering, but will not reach any other uncertainty where offense is described in manner sanctioned by the Penal Code. Pen. Code, §§ 1426, 1428.1.

12. Constitutional law ⚿265

Where first and only official information a defendant receives in a proceeding before a municipal, justice's, or police court concerning charge against him is the complaint, due process of law requires that information therein be adequate to enable him to answer the charge and Legislature cannot by statute authorize a form of complaint which is lacking in such respect.

13. Constitutional law ⚿265

The Penal Code section authorizing the pleading of conclusion in criminal complaint in municipal, justice's, and police courts does not deprive defendant of due process in light of further provision requiring, in those matters which would serve to identify the charge, such particulars as to enable defendant to answer the complaint. Pen.Code, § 1426.

14. Constitutional law ⚿257

"Due process of law" does not require a state to adopt any particular form of procedure so long as it appears that accused has had sufficient notice of accusation and an adequate opportunity to defend himself in the prosecution.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

15. Injunction ⚿230(2)

Allegation in words of code section that defendants willfully disobeyed a restraining order issued by the Superior Court on an application for preliminary injunction carried with it all facts necessary to be proved on the points involved and was sufficient against demurrer. Pen.Code, § 166, subd. 4; § 1426.

16. Injunction ⚿228

One not included in terms of a restraining order or injunction, who does not act in concert with any of parties enjoined or in support of their claim, but is moved by some independent purpose of his own, cannot be held in contempt of court because he does some act forbidden to those who are bound by the restraining order or injunction. Pen.Code, § 166, subd. 4.

17. Injunction ⚿157

Provisions in restraining order directed not only to defendants in action, among whom is included at least one unincorporated association, apparently a labor union, but also the agents, employees, representatives, organizers, attorneys, and servants of defendants and officers and members of defendant association and persons acting in concert with them or any of them, are valid as simply making injunction effectual against all through whom enjoined parties may act.

18. Injunction ⚿221

Service of a restraining order or injunction need not be shown to establish a charge of contempt against one who with knowledge of the order or injunction does some act forbidden by it and who comes within one of the classes of persons who are subject to the order or injunction. Pen.Code, § 166, subd. 4.

19. Injunction ⚿228

Where contempt of court is charged as a crime, the code section making principals of all persons concerned in commission thereof and aiders and abettors applies, so that one who is not otherwise subject to injunction or restraining order may be charged as a principal if he aids or abets in its violation. Pen.Code, § 31; § 166, subd. 4.

20. Injunction ⚿221

A charge of one as a principal to the contemptuous violation of an injunction or restraining order because he aided or abetted in the violation involves, as a matter of proof, knowledge by person so charged of order he is accused of violat-

ing, for without such knowledge he could not be an abettor, but it does not require a further allegation in the pleading than would be necessary against the principal. Pen.Code, § 31; § 166, subd. 4; § 1426.

21. Indictment and Information ⇐148

Demurrer must be specific in stating objections. Pen.Code, §§ 1005, 1428.2.

22. Injunction ⇐230(2)

Where demurrer to complaint charging contempt for violation of a restraining order specified that it could not be ascertained from complaint how defendants received knowledge of or knew of existence of something not clearly described, but obviously meant to be order in question, demurrer had sufficient particularity. Pen. Code, § 166, subd. 4; §§ 1005, 1428.2.

23. Injunction ⇐230(2)

Complaint for criminal contempt, charging that defendants did willfully and unlawfully and knowingly disobey a lawful order of superior court, was sufficient against demurrer interposed on ground that complaint did not specify that defendants had knowledge of the order; the words "willfully and unlawfully" alone being sufficient for that purpose. Pen.Code, § 166, subd. 4; § 1426.

24. Injunction ⇐230(2)

Where restraining order listed a series of acts which were prohibited, mere statement in complaint charging criminal contempt for violation of restraining order that order had been disobeyed was sufficient to inform defendants of nature of charge and enable them to answer. Pen.Code, § 166, subd. 4; § 1426.

25. Statutes ⇐231

Rules established for proceedings under another code have no application to a proceeding instituted under the Penal Code, unless special reference is made to them in the Penal Code or they are expressly made applicable to criminal actions.

26. Contempt ⇐40

On a charge of criminal contempt, court will apply rules of pleading established by Penal Code and decisions under it without reference to provisions concerning contempt contained in Code of Civil Procedure. Pen.Code, § 166; Code Civ. Proc. §§ 1209 et seq., 1211, 1212.

27. Constitutional law ⇐90

Peaceful picketing is an exercise of the constitutional guaranty of freedom of speech.

28. Constitutional law ⇐90
Injunction ⇐101(1)

Where past picketing has become so irrevocably blended with acts of violence, physical intimidation, or other unlawful conduct as to give rise to a justifiable belief that future picketing is likely to result in a continuance of the illegal acts, an injunction restraining a labor organization from any and all picketing lies within equitable civil power of court and does not constitute an infringement of right of free speech.

29. Injunction ⇐230(2)

Where complaint charging criminal contempt for violation of a restraining order directed against picketing alleged that the order was a "lawful order" constituting substantially an allegation in the words of the enactment referring to an order lawfully issued, complaint imported that order was made on such a state of facts as would render it lawful, so as to make complaint sufficient against demurrer. Pen. Code, § 166, subd. 4; § 1426.

30. Injunction ⇐230(2)

Complaint for criminal contempt, charging that defendant violated that part of restraining order which preserved for plaintiff and its visitors the right of ingress and egress to and from its premises was sufficient against demurrer as stating a public offense of which defendants could be convicted on sufficient evidence even though another clause of order might eventually appear to be invalid as violative of constitutional guaranty of free speech. Pen. Code, § 166, subd. 4; § 1426.

Appeal from Municipal Court of Los Angeles; Byron J. Walters, Judge.

Melvin T. Saffell and others were charged under three counts of a complaint with criminal contempt of court. From an or-

der sustaining a demurrer to one count and from a subsequent judgment of dismissal as to such count, the people appeal.

Reversed with directions.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant.

W. B. Esterman, Katz, Gallagher & Margolis, and John W. Porter, all of Los Angeles, for respondents.

SHAW, Presiding Judge.

[1] The defendants are prosecuted in this criminal action on a complaint containing three counts. They filed a demurrer to the complaint, which was overruled as to Counts I and III, and sustained as to Count II, with leave to amend. The People having failed to amend within the time allowed therefor judgment of dismissal of Count II was entered, from which the People appeal. Such an appeal from the judgment entered on one count is proper although the other counts are not disposed of. (People v. Ring, 1937, 26 Cal.App.2d Supp. 768, 770, 70 P.2d 281.)

[2, 3] At the threshold of our consideration of this appeal we are confronted with the question, what defects or objections to the complaint in a criminal action in a municipal, justice's or police court—the practice is the same in all (Penal Code, sec. 1461a)—may be raised and considered on a demurrer to the complaint? Prior to 1945 there was no provision for a demurrer to such a complaint in those courts, and objections to the complaint were made either by a motion in arrest of judgment or by motion to dismiss. The motion in arrest of judgment is expressly provided for by section 1452 of the Penal Code, and the defendant can found it on "any substantial defect in the complaint." By this motion a defendant cannot take advantage of defects in form in a complaint. (People v. Rosenbloom, 1931, 119 Cal.App.Supp. 759, 763, 2 P.2d 228.) All defects consisting merely in the absence of that particularity which might be necessary to enable the defendants to prepare for and make their defense are to be regarded as defects in form and cannot be raised by such a motion. (People v. Welton, 1922, 190 Cal. 236, 240, 211 P. 802.) Under section 1385 of the Penal Code, the court may dismiss an action "in furtherance of justice," and under section 1387 such order may be "for the purpose of amending the complaint." Under these sections the practice grew up of objecting to the sufficiency of a complaint to state an offense by motion to dismiss. Such a motion is not a proper mode for raising objections which go to mere uncertainty or want of particularity.

But by amendment of the Penal Code in 1945, sections 1428.1, 1428.2, and 1428.3 were added, which are applicable in all the courts above mentioned. These sections provide for a demurrer to the complaint, its permissible grounds, and the procedure thereon. Section 1428.1 reads as follows: "At any time prior to entry of a plea, the defendant may demur to the complaint when it appears upon the face thereof either: 1. That the court has no jurisdiction of the offense charged thereon; 2. That it does not substantially conform to the requirements of Section 1426 of this code; 3. That the facts stated do not constitute a public offense; 4. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

[4, 5] "Failure to make the objections above mentioned by demurrer when they appear upon the face of the complaint, shall constitute a waiver thereof, except that after a plea of guilty or a verdict or finding of guilty the objection to the jurisdiction of the court, or objection that the facts stated do not constitute a public offense, may be taken on a motion in arrest of judgment." The permissible grounds of demurrer here set forth are substantially the same as those allowed in the superior court by section 1004, and they appear to have been borrowed from that section, except that the charging of more than one offense is not made a ground of demurrer, as it is in the superior court. Obviously the general scope of the demurrer so authorized is, aside from the joinder of offenses, the same as that of a demurrer in the superior court in a criminal action. It is settled that the only grounds of de-

murrer allowed are those specifically named in the statute (People v. Schmidt, 1883, 64 Cal. 260, 261, 30 P. 814; People v. Tibbitts, 1925, 71 Cal.App. 709, 712, 236 P. 217; People McAllister, 1929, 99 Cal.App. 37, 44, 277 P. 1082). It is to be noted that uncertainty is not made a ground of demurrer by section 1428.1, except in so far as it constitutes a failure to conform to section 1426.

[6-8] Section 1426 reads as follows: "All proceedings and actions before a justice's or police court, or a municipal court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." In construing this section it is to be noted that prior to 1931 it contained only the present first sentence (except the words "or a municipal court"), and that everything else now appearing in it was added by the amendment of 1931. The matter so added, except for the reference to a municipal court, was simply a copy of section 952, applicable in the superior courts, as that section had been amended in 1929, which amendment, following that of 1927, omitted the requirement that a pleading be direct and certain. These amendments of section 952 were made as part of a program for simplification and liberalization of the rules of pleading in criminal cases. (People v. Pierce, 1939, 14 Cal.2d 639, 645, 96 P.2d 784; People v. Beesly, 1931, 119 Cal.App. 82, 85, 6 P.2d 114, 970.) No doubt the addition of the words of section 952 in its amended form to section 1426 was made for the same purpose, and it should be construed according to the fair import of its terms, to effectuate that purpose. (Penal Code, section 4.) But we cannot overlook the fact that in this amendment no part of the old section 1426 was deleted from the amended section. This indicates that the legislature did not intend to repeal the old section completely. The old and new must, therefore, stand, and be construed together and effect must be given to each, as far as possible, so as to make a consistent whole. (Donlon v. Jewett, 1891, 88 Cal. 530, 534, 535, 26 P. 370; Smith v. Board of Trustees, 1926, 198 Cal. 301, 306, 245 P. 173.) Should it prove impossible to reconcile the old and the new in their entirety, and there is no other indication of the legislative intention, then to that extent the new parts of the section must be regarded as controlling. (Donlon v. Jewett, supra.)

[9-11] Looking now at the new part of the section, we note the provision that the statement that the accused has committed a public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense" etc. When this same provision was put in section 952 it was undoubtedly intended to reverse a rule previously declared by the courts on this point. While recognizing the rule that in general it is sufficient to charge an offense in the language of the statute defining it (14 Cal.Jur. 49, 50), the courts had also held that where the words used in the statute have no technical meaning, or where the particular facts or acts which constitute the offense are not specified, it is necessary to set forth the acts constituting the offense. (People v. Mahony, 1904, 145 Cal. 104, 106, 78 P. 354; People v. Perales, 1904, 141 Cal. 581, 583, 75 P. 170; People v. Neil, 1891, 91 Cal. 465, 467, 27 P. 760; People v. McKenna, 1889, 81 Cal. 158, 160, 22 P. 488; People v. Butler, 1917, 35 Cal.App. 357, 362, 169 P. 918; 14 Cal.Jur. 49, 50.) Since the general rule of following the statutory definition was thus recognized except in the one class of cases, without any statu-

tory provision to that effect, the purpose of enacting the rule into statute *without any exception* must have been to abolish the exception and let the rule stand in complete generality, and section 952 is so construed. (People v. Pierce, supra, 1939, 14 Cal.2d 639, 644, 96 P.2d 784; People v. Mitchell, 1940, 40 Cal.App.2d 204, 210, 104 P.2d 545.) In People v. Steel, 1939, 35 Cal.App.2d Supp. 748, 751, 92 P.2d 815, and People v. Smith, 1939, 36 Cal.App.2d Supp. 748, 753, 92 P.2d 1039, it is held that under the provisions of section 1426 as they now stand a complaint in the words of the statute is sufficient, and in the Smith case it is further held that the provisions of section 1426 to that effect are valid. But the scope of this part of the enactment is limited to this purpose, as, indeed, plainly appears from its words; that is, it covers only the matter of describing the offense, or in the words of the old part of section 1426, it goes only to "the character of the offense." It does prescribe quite definitely what allegations in that respect shall be sufficient, and thus it must be regarded as limiting the effect of the first, or old, part of the section so that the defendant cannot demand under it any further particulars "to enable him to understand distinctly the character of the offense complained of" than are declared sufficient by the last, or new, part thereof. But under the first (the old) part of the section the complaint is still required to set forth "such particulars of time, place, person and property as to enable the defendant * * * to answer the complaint." If it fails to do so, the complaint is subject to demurrer under the second subdivision of section 1428.1, and no doubt such demurrer may reach any uncertainty in any of these matters which would prevent the defendant from answering; but we see in the section no authorization for objecting by demurrer to any other uncertainty, where the offense is described in the manner sanctioned by the last, or new, part of section 1426.

No doubt in many a complaint describing the character of the offense in the manner above mentioned some of the facts which must be proved to support it will be set forth only by way of conclusion, either of law or fact. Numerous cases may be found holding that conclusions of law are insufficient in an indictment or information; that the facts must be stated. (See People v. Mahony, supra, 1904, 145 Cal. 104, 108, 78 P. 354; People v. Neil, supra, 1891, 91 Cal. 465, 468, 27 P. 760; People v. McKenna, 1889, 81 Cal. 158, 159, 22 P. 488; People v. Butler, supra, 1917, 35 Cal. App. 357, 367, 169 P. 918.) But these cases were decided before the Penal Code amendments of 1927 and 1929 to which we have referred, and are superseded by them. The allegation expressly permitted by sections 1426 and 952 as a charge of theft is manifestly a mere conclusion of law, especially when applied to a case of embezzlement or obtaining money by false pretenses, both of which are now, by the terms of section 484, included in theft. In the cases last mentioned a great many facts which must be proved are wrapped up in the mere conclusion of law that the taking was unlawful. Under former rules of criminal pleading such an allegation would have been held insufficient as a description of the character of the offense (see for an instance, People v. McKenna, supra, 1889, 81 Cal. 158, 160, 22 P. 488), but now by force of the statute so providing it is held sufficient. (People v. Fewkes, 1931, 214 Cal. 142, 149, 4 P.2d 538; People v. Dunn, 1940, 40 Cal.App.2d 6, 12, 104 P.2d 119, certiorari denied, 1940, 311 U.S. 701, 61 S.Ct. 139, 85 L.Ed. 454; People v. Robinson, 1930, 107 Cal.App. 211, 218, 290 P. 470; People v. Wickersham, 1929, 98 Cal. App. 502, 505, 277 P. 121; People v. Plum, 1928, 88 Cal.App. 575, 582, 587, 263 P. 862, 265 P. 322.) Likewise, in charging the very grave offense of murder, section 951, Penal Code, as amended in 1927, permits the essence of the charge to be embodied in the one word "murdered," which is a mere legal conclusion, and this allegation has been held sufficient. (People v. Magsaysay, 1930, 210 Cal. 301, 291 P. 582; People v. Coen, 1928, 205 Cal. 596, 603, 271 P. 1074.) The legislature, having thus confronted and expressly legalized conclusions of law in regard to murder and theft, cannot be thought to have stopped short of doing the same thing when it authorized the use of the words of the statute, etc.,

without any qualification or exception of cases where the authorized words state a conclusion of law.

[12-14] Some of the cases which uphold indictments and informations in the form now prescribed by section 952 comment, in doing so, upon the fact that the defendant must, under other provisions of the code, be given a copy of the transcript of the evidence before the grand jury or at the preliminary examination preceding the information, as the case may be, and say that he can obtain from that the details which are omitted from the pleading. (See People v. Pierce, supra, 1939, 14 Cal.2d 639, 646, 96 P.2d 784; People v. Mitchell, supra, 1940, 40 Cal.App.2d 204, 210, 104 P.2d 545; People v. Curtis, 1939, 36 Cal. App.2d 306, 317, 98 P.2d 228; People v. Humphrey, 1938, 27 Cal.App.2d 631, 638, 81 P.2d 588; People v. Gilbert, 1938, 26 Cal. App.2d 1, 8, 78 P.2d 770; People v. Yant, 1938, 26 Cal.App.2d 725, 730, 80 P.2d 506; People v. Beesly, supra, 1931, 119 Cal.App. 82, 85, 6 P.2d 114, 970; People v. Plum, supra, 1928, 88 Cal.App. 575, 587, 263 P. 862, 265 P. 322.) In the courts to which section 1426 is applicable there is, as defendants point out, no corresponding procedure. The first and only official information a defendant there receives before trial of the charge against him is the complaint. Due process of law requires that this information be adequate to enable him to answer the charge, and the legislature could not by statute authorize a form of complaint which was lacking in this respect. However, it has not purported to do so, for section 1426 still contains the provision requiring, in those matters which would serve to identify the charge, such particulars as to enable the defendant to answer the complaint. None of the cases just cited declares that the statutory form of pleading would be bad even if the defendant received no transcript of the testimony. In other cases the present statutes and the forms sanctioned by them have been upheld as constituting due process of law, without any reference to the provision for delivering a reporter's transcript to the defendant. (People v. Covington, 1934, 1 Cal.2d 316, 319, 320, 34 P.2d 1019; People v. Dunn, supra, 1940, 40 Cal.App.2d 6, 12, 13, 104 P.2d 119, in which certiorari was denied by the United States Supreme Court in 1940, 311 U.S. 701, 61 S.Ct. 139, 85 L. Ed. 454; People v. Wiezel, 1940, 39 Cal. App.2d 657, 665, 104 P.2d 70; People v. O'Neal, 1934, 2 Cal.App.2d 551, 557, 38 P.2d 430; People v. Robinson, supra, 1930, 107 Cal.App. 211, 217, 218, 290 P. 470; People v. Berg, 1929, 96 Cal.App. 430, 433, 274 P. 433.) "Due process of law," said the United States Supreme Court, in Garland v. Washington, 1914, 232 U.S. 642, 645, 34 S.Ct. 456, 58 L.Ed. 772, 773, 775, "does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." As the court said in People v. Covington, supra, "The state has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states"—a statement which was also made in People v. Robinson, supra. An analogous question was answered in People v. Nolan, 1904, 144 Cal. 75, 80, 77 P. 774, where it was held that the provisions of section 971, Penal Code, that an indictment or information may charge an accessory before the fact in the same words used to charge the principal, without more, do not violate the Fourteenth Amendment, but provide sufficient notice to the defendant of the accusation against him and constitute due process of law.

Count II of the complaint here attempts, at least, to charge the defendants with contempt of court as a misdemeanor, under section 166 of the Penal Code. That section reads, as far as material here, as follows: "Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor: * * * 4. Willful disobedience of any process or order lawfully issued by any court."

Count II alleges that the defendants on a certain date "did wilfully and unlawfully and knowingly * * * [stating place] disobey a lawful order of the Superior Court of the State of California, in and for the County of Los Angeles, in that

* * * [they] disobeyed certain provisions of that certain order of the above named court, made * * * [giving the date, the name of the judge making the order and the title of the case in which it was made] which said order was then and there in full force and effect, and which said provisions provided as follows: That pending the hearing of said application for preliminary injunction the defendants, and each of them, their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them, are and each of them is hereby restrained and enjoined and commanded to cease, desist and refrain from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever, any or all of the following acts, to wit:

"'4. Obstructing plaintiff or its employees, customers or tenants, or other persons, from ingress and egress into and out of plaintiff's places of business by walking, marching or standing in groups or in any other manner.

"'5. Standing, marching or walking in groups or columns before or across the ordinary places of ingress to and egress from plaintiff's places of business in such manner as not to leave between adjacent elements of such groups or columns ample space for the passage of persons or of vehicles seeking access to or from plaintiff's place of business; which space shall be not less than twenty-five feet (25') in the case of places of ingress and egress customarily used for vehicular traffic and fifteen (15') feet in the case of places of ingress and egress customarily used solely for pedestrian traffic.'"

[15-17] The demurrer in this case specified several objections to the complaint. We are informed by the statement on appeal that the trial court sustained the demurrer for the reason that no one would be in contempt of a court order "unless he is a party to the action out of which the court order emanated" nor unless he was "served with the order in legal fashion," and that these facts were not alleged. Defendants do not advance these reasons in support of the ruling, but do rely strongly on the point that the complaint does not state *any* facts which would show that they are bound to obey the order. The propositions relied on by the trial court and that argued by appellant are all covered by what we have already said. The allegation in the words of section 166 that defendants wilfully disobeyed the order carries with it all facts necessary to be proved on these points. However, lest we be misunderstood, and that these matters may be properly dealt with at the trial which may result from our reversal of the judgment, we now declare our disapproval of the reasons given by the trial court for sustaining the demurrer. One who is not a party to an action and who has never been formally served with a restraining order made therein may, nevertheless, be guilty of contempt of court in violating such order, under some circumstances. For the purpose of this discussion, we assume, as do the parties, that the defendants herein were not parties to the action in which the restraining order was issued, although that fact does not appear from the complaint herein. It is true, as held in Berger v. Superior Court, 1917, 175 Cal. 719, 721, 167 P. 143, 15 A.L.R. 373, that one not included in the terms of a restraining order or injunction, who does not act in concert with any of the parties enjoined or in support of their claims, but is moved by some independent purpose of his own, can not be held in contempt of court because he does some act forbidden to those who are bound by the restraining order or injunction. But, according to the complaint here, the restraining order was directed not only to the defendants in the action, among whom was included at least one unincorporated association, apparently a labor union, but also to "their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them." Such provisions in a restraining order are held valid in Berger v. Superior Court, supra, where the court says, "* * * the whole effect of this is simply to make the injunction effectual against all through

whom the *enjoined party* may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party*, who are in fact *his* aiders and abetters. As we have said, this practice is thoroughly settled and approved by the courts, and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction." To the same effect is Morton v. Superior Court, 1884, 65 Cal. 496, 4 P. 489. In re Morford, 1934, 137 Cal.App. 662, 666, 31 P.2d 406, also holds "that a person not a party to the action may nevertheless be bound by an injunction if he had knowledge of it, provided he acted in collusion with the person directly restrained by the order."

[18] It is also well settled that service of a restraining order or injunction need not be shown to establish a charge of contempt. One who, with knowledge of the order or injunction, does some act forbidden by it, and who comes within one of the classes of persons already mentioned who are subject to the order or injunction, is guilty of contempt. (Shibley v. Superior Court, 1927, 202 Cal. 738, 741, 262 P. 332; McFarland v. Superior Court, 1924, 194 Cal. 407, 423, 228 P. 1033; In re Brambini, 1923, 192 Cal. 19, 36, 218 P. 569; Berger v. Superior Court, supra, 1917, 175 Cal. 719, 721, 167 P. 143, 15 A.L.R. 373; Lake v. Superior Court, 1913, 165 Cal. 182, 192, 131 P. 371; Mitchell v. Superior Court, 1912, 163 Cal. 423, 425, 125 P. 1061; Golden Gate Con. H. M. Co. v. Superior Court, 1884, 65 Cal. 187, 190, 3 P. 628; In re Bray, 1932, 125 Cal.App. 363, 366, 13 P.2d 813.

[19, 20] Plaintiff also contends, and we agree, that where contempt of court is charged as a crime, under section 166 of the Penal Code, section 31 of that code is applicable, and one who is not otherwise subject to the injunction or restraining order may be charged as a principal, if he aids and abets in its violation. Of course, this involves, as a matter of proof, knowledge by the person so charged of the order he is accused of violating, for without such knowledge he could not be an abettor (7 Cal.Jur. 889); but it does not require any further allegation in the pleading than would be necessary against the principal.

[21, 22] Defendants argue, in support of the demurrer, that the complaint is bad because it does not allege that they had knowledge of the order. Plaintiff in its brief declines to discuss this point or any point other than those raised by the trial court, on the ground that they are not raised by the demurrer, pointing to the provision of section 1428.2, Penal Code, that "the demurrer * * * must set forth with particularity the reasons why the complaint is insufficient or it may be disregarded." It has been held that in the superior courts, where there is a like provision (Penal Code, section 1005), the demurrer must be specific in stating objections (People v. Bradbury, 1909, 155 Cal. 808, 813, 103 P. 215.) But this rule does not avert inquiry into the point just stated, for the demurrer does specify that it cannot be ascertained from the complaint how the defendants or any of them "received knowledge of, or knew of the existence of" something not clearly described but obviously meant to be the order in question. This we regard as sufficient particularity.

[23] The answer to this argument of defendants follows from the foregoing discussion. The essence of the charge here is that the defendants "did wilfully and unlawfully and knowingly * * * disobey a lawful order of the Superior Court." This includes substantially the words of the statute, although it substitutes "lawful order" for the statutory phrase "order lawfully issued." This charge includes such knowledge on defendants' part as is necessary to hold them in contempt. The words "wilfully and unlawfully" alone are sufficient for that purpose (People v. Odom, 1937, 19 Cal.App.2d 641, 646, 66 P.2d 206); in addition to which the complaint here alleges that the defendants "knowingly" disobeyed the order. This word also gives the defendants notice of the offense charged, and satisfies section 1426, as far as the matter of knowledge is concerned.

[24] Defendants further contend that the complaint must fall because it does not allege what acts they did by way of dis-

obeying the restraining order. This objection also is set forth with particularity in the demurrer. But we find nothing in section 1426 which requires such an allegation. The acts enjoined by the restraining order are such that the mere statement that it was disobeyed, meaning, of course, that some or all of the forbidden acts were done, is sufficient to inform the defendants of the nature of the charge and enable them to answer. To violate the restraining order defendants must have obstructed ingress or egress to or from the places of business of the plaintiff in the action by walking, marching or standing. Further certainty would not be required by section 1426, and the lack of it would, therefore, not be a ground of demurrer. The allegation here resembles that passed on in Ex parte Winston, 1911, 160 Cal. 18, 21, 116 P. 390, where the court held that a complaint charging battery, which merely alleged that the defendant "did unlawfully and wilfully use force and violence upon the person of the affiant," without stating the particular acts of force and violence, "certainly discloses the *character* of the offense charged." We find particularly applicable here this statement applied by the Supreme Court to a murder charge, in People v. King, 1865, 27 Cal. 507, 510, 87 Am.Dec. 95, "If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense." This language was quoted with approval in People v. Hong Ah Duck, 1882, 61 Cal. 387, 389; People v. Dunn, supra, 1940, 40 Cal. App.2d 6, 13, 104 P.2d 119; People v. Beesly, supra, 1931, 119 Cal.App. 82, 85, 6 P.2d 114, 970; People v. Plum, supra, 1928, 88 Cal.App. 575, 586, 263 P. 862, 265 P. 322; and People v. Malley, 1920, 49 Cal.App. 597, 604, 194 P. 48. It was approved without exact quotation in People v. Cronin, 1867, 34 Cal. 191, 200, and the approval in the Cronin case was quoted approvingly in People v. Welton, supra, 1922, 190 Cal. 236, 239, 211 P. 802; and People v. Evanoff, 1919, 45 Cal.App. 108, 114, 187 P. 54.

[25, 26] Defendants cite Berger v. Superior Court, supra, 1917, 175 Cal. 719, 167 P. 143, 15 A.L.R. 373, which reviewed a civil proceeding taken under the Code of Civil Procedure, and an order made therein finding the petitioner guilty of contempt of court for violating an injunction. The court there stated the familiar rule that the affidavit by which such a proceeding is instituted must, in order to support an adjudication of contempt, state facts constituting the contempt, and annulled the order in question because the affidavit did not show why the defendant, who was not a party to the injunction action, should be held bound by the injunction. In re McDonald, 1932, 217 Cal. 29, 16 P.2d 995, also cited, was a similar case. Other cases are cited where the party complaining was charged with contempt under the provisions of sections 1209 et seq. of the Code of Civil Procedure, all holding that the affidavit which charges a constructive contempt must state every fact necessary to constitute the contempt. We have no doubt that the complaint here would be entirely insufficient, if filed under the provisions of the Code of Civil Procedure, to support an adjudication of contempt, but we do not regard the rule in such cases as having any application to the procedure in a criminal action. The legislature has prescribed no rule of pleading for summary contempt proceedings under the provisions of the code last cited relating to constructive contempt, except that the charging affidavit must state "the facts constituting the contempt" (Code of Civil Procedure, sec. 1211). Following this the decisions on which defendants rely have established the rule above referred to. But here we have a different code to consider, and its provisions regarding pleading are very different. A violation of section 166 of the Penal Code is a misdemeanor and as such it is to be prosecuted in the same manner as other misdemeanors. That manner is determined by the Penal Code, and rules established for proceedings under another code are not applicable unless special reference is made to them in the Penal Code or they are expressly made applicable to

criminal actions. Neither of those conditions exists here; hence we apply the rules of pleading established by the Penal Code and the decisions under it. Such a course is plainly indicated in Re Morris, 1924, 194 Cal. 63, 67, 69, 227 P. 914, where the distinction between the two modes of procedure for punishing contempt is pointed out, and it is held that proceedings under the Penal Code are not subject to the mode of procedure prescribed by section 1212 of the Code of Civil Procedure. See also In re Bruns, 1936, 15 Cal.App.2d 1, 5, 58 P.2d 1318, holding that the provisions of the Code of Civil Procedure generally relating to contempt have no application to prosecutions under section 166 of the Penal Code.

[27, 28] Defendants further contend that the parts of the order which they are accused of violating prohibited conduct which was beyond the power of the court to enjoin, and that they are therefore void and defendants committed no contempt in disobeying them. The right to engage in peaceful picketing as an exercise of the constitutional guaranty of freedom of speech is now firmly established (McKay v. Retail Automobile S. L. Union No. 1067, 1940, 16 Cal.2d 311, 319, 106 P.2d 373; Ex parte Bell, 1942, 19 Cal.2d 488, 497, 122 P.2d 22; Thornhill v. Alabama (1940), 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093, 1102). The portion of the order designated "4," set forth in the complaint as above quoted, does not materially differ from an injunction held to be an infringement of this constitutional right in Pezold v. Amalgamated, etc., Workmen, 1942, 54 Cal.App. 2d 120, 126, 128 P.2d 611. It is also the same in scope as the ordinance held to infringe this constitutional right Ex parte Bell, 1942, 19 Cal.2d 488, 497, 122 P.2d 22. Were the order to be regarded as one to which the rule of these cases is applicable, we must hold it to be void. But there is another matter to be considered. In Steiner v. Long Beach Local No. 128, 1942, 19 Cal.2d 676, 683, 123 P.2d 20, the court, following Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 1941, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 842, 132 A.L.R. 1200, laid down the further rule that "* * * where past picketing has become so irrevocably blended with acts of violence, physical intimidation or other unlawful conduct as to give rise to a justifiable belief that future picketing is likely to result in a continuance of the illegal acts, an injunction restraining a labor organization from any and all picketing lies within the equitable power of the court and does not constitute an infringement of the right of free speech."

[29] Under this rule, an order such as we have in clause 4 could be properly made. The record on which the order was made is not before us, so we cannot now ascertain the fact of this matter. But the complaint alleges that the order was "a lawful order." This, while not in the exact words of section 166, Penal Code, which refers to an order "lawfully issued," is so near to these words as to be substantially an allegation "in the words of the enactment" (Penal Code, sec. 1426); and hence, under the rules of pleading already discussed, it imports that the order was made on such a state of facts as would render it lawful.

[30] Furthermore, the part of the order designated as "5." is unquestionably valid. Its purpose is merely to preserve for plaintiff and its visitors the right of ingress and egress to and from its premises, and no constitutional provision stands in the way of such an order. The complaint alleging a wilful disobedience of this part of the order states a public offense of which defendants can be convicted on sufficient evidence, even though clause 4 may eventually appear to be invalid.

The judgment is reversed with directions to the Municipal Court to overrule the demurrer to Count II of the complaint and permit the defendants to plead to it.

BISHOP and KINCAID, JJ., concur.

28 Cal.2d 61

PACIFIC GREYHOUND LINES et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

S. F. 17225.

Supreme Court of California, in Bank.

April 23, 1946.

1. Dismissal and nonsuit ⇐60(1)

The statute requiring dismissal of action after due notice to plaintiff or on court's own motion, unless brought to trial within five years after filing thereof, except where parties have stipulated in writing that time may be extended, is mandatory. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⇐60(3)

In computing statutory five-year period, during which action must be brought to trial to avoid dismissal, time during which going to trial would be impossible for all practical purposes, whether because of total lack of jurisdiction in strict sense or because it would be both impracticable and futile, must be excluded. Code Civ. Proc. § 583.

3. Dismissal and nonsuit ⇐60(1)

The purpose of statute requiring dismissal of action, unless brought to trial within five years after filing thereof, except where parties have stipulated in writing that time may be extended, is to prevent avoidable delay for too long a period, not to close proceeding arbitrarily at all events after such time. Code Civ.Proc. § 583.

4. Dismissal and nonsuit ⇐60(6), 71

An oral stipulation between parties' attorneys that action, which was forced off jury trial calendar because of defendants' failure to deposit jury fees, would remain off calendar pending return of one defendant from military service, was not competent to defeat dismissal of action for failure to bring it to trial within five years after filing of complaint, but was material evidence on issues whether it was impossible, impractical, and futile to bring action to trial during such defendant's military absence and whether his presence was necessary to prosecute action properly. Code Civ.Proc. § 583; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

5. Mandamus ⇐187(9)

The reasonable inferences from making of oral stipulation by parties' attorneys that action would remain off trial calendar pending one defendant's return from military service, in light of other evidence, were for trial court to determine on defendant's motion to dismiss action for failure to bring it to trial within five years after filing of complaint. Code Civ.Proc. § 583; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

6. Army and navy ⇐34

The Soldiers' and Sailors' Civil Relief Act leaves discretion in trial court to determine whether plaintiff's ability to prosecute action, or defendant's ability to conduct defense is materially affected by reason of his military service, but in effect places burden of proof on party resisting postponement of trial because of party's military absence and makes postponement mandatory on application by or for such party, unless his ability to prosecute or defend is not materially affected in court's opinion. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

7. Dismissal and nonsuit ⇐73

Defendants' failure to apply to court for stay of action under Soldiers' and Sailors' Civil Relief Act during period of one defendant's military service did not preclude court from determining, on defendants' motion to dismiss action for failure to bring it to trial within five years after filing of complaint, whether such stay would have been mandatory under all circumstances. Code Civ.Proc. § 583; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

8. Mandamus ⇐187(9)

Whether it was impracticable and futile to bring action on for trial during absence in military service of one of defendants, in view of issues raised by separate answers of absent defendant and other defendants, representation by defendants' counsel that matter would have to remain

off trial calendar during such defendant's absence, and other evidence, was fact question for trial court, in defendants' mandamus proceeding to compel dismissal of action as not brought to trial within statutory time. Code Civ.Proc. § 583; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

9. Mandamus ⇐43

A writ of mandate to compel dismissal of action by superior court may properly issue only when there is entire absence of any showing of good cause for dismissal on hearing of motion to dismiss in such court.

Proceeding by the Pacific Greyhound Lines and others for a writ of mandamus to compel the Superior Court of the City and County of San Francisco to reverse its order denying petitioners' motion to dismiss an action against them for personal injuries and property damage sustained in an automobile collision.

Alternative writ discharged, and peremptory writ denied. Prior opinion, Cal. App., 160 P.2d 577.

Cooley, Crowley & Supple, of San Francisco, for petitioners.

A. Brooks Berlin and Alvin A. Lobree, both of San Francisco, for real parties in interest.

SCHAUER, Justice.

Petitioners, who are defendants in an action for personal injuries and property damage resulting from an automobile collision on June 18, 1939, moved in the superior court for dismissal of the action on the ground that it had not been brought to trial within five years after filing of the complaint. (Code Civ.Proc., § 583.) Such motion was resisted, and the trial court denied it, presumptively upon the ground that one of the defendants was in the military service at all times subsequent to the first fifteen months after the complaint was filed and that it had been and was impossible or impracticable to try the case during the military service of such defendant. Petitioners, hereinafter referred to as defendants, now seek mandate to compel, in effect, reversal of the order denying dismissal. We have concluded that upon the record before us the writ must be denied.

[1, 2] Section 583 of the Code of Civil Procedure, so far as material here, provides that "Any action * * * shall be dismissed by the court in which the same shall have been commenced * * * after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended * * *." There is no question but that such section is mandatory when it is applicable. (Andersen v. Superior Court (1921), 187 Cal. 95, 97, 200 P. 963.) Likewise there is no question but that, in computing the five-year period, time during which "for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile," is to be excluded. (Christin v. Superior Court (1937), 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153.)

[3] As stated in the last cited case (9 Cal.2d at page 532, 71 P.2d at page 208): "The purpose of the statute is plain: to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation. And, as we have already pointed out, despite the mandatory language implied exceptions are recognized. Are these exceptions based upon the technical concept of *jurisdiction,* and applicable only where the court is completely lacking in the legal power to proceed, or do they arise from the fact that the party is unable, from causes beyond his control, to bring the case to trial? The carefully reasoned opinion in [Re] Estate of Morrison [125 Cal.App. 504, 14 P.2d 102, wherein contestants of a will were induced by fraud to consent to a dismissal of their contest, later had the dismissal vacated, and the court held that the time between the dismissal and the rein-

statement of the action was to be excluded in computing the five-year period] is illuminating here. The court declared that the case of Kinard v. Jordan [175 Cal. 13, 164 P. 894], had 'established the precedent of disregarding the time during which the jurisdiction of the trial court was suspended, thereby setting reality above artificiality.' * * *

"The theory of this decision seems to us to be equally applicable to a situation where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile. In this connection, a useful analogy may be drawn from the rules on impossibility as a defense in the enforcement of contract obligations. Modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense." Again in Judson v. Superior Court (1942), 21 Cal.2d 11, 14, 129 P.2d 361, 363, the rule was stated: "The courts have recognized that the statute relating to dismissals although mandatory in form, should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been *impracticable* for the plaintiff to have brought the action to trial" (Italics added.) See, also, Westphal v. Westphal (1943), 61 Cal.App.2d 544, 550, 143 P.2d 405, 408, wherein it was held that it would have been "practically futile" and "for all practical purposes * * * impossible" for certain plaintiffs to go to trial while their coplaintiffs' appeal was pending.

The superior court action with which we are concerned was filed January 29, 1940; the motion to dismiss was made on February 21, 1945, twenty-three days after the completion of the calendar five-year period; this petition for writ of mandate was filed March 27, 1945, fifty-seven days after completion of the calendar five-year period. The sole question necessary for us to determine is whether petitioners have established that the evidence before the trial court on the motion to dismiss was as a matter of law insufficient to sustain its implied finding that for more than twenty-three days of the calendar five-year period it was "impossible," or "impracticable and futile" either in an objective sense or "due to excessive and unreasonable difficulty or expense," to proceed to trial.

[4, 5] The motion for dismissal made in the trial court was determined upon an affidavit filed by one of the attorneys for defendants therein (petitioners herein), a counteraffidavit made by the attorney for plaintiffs, and, of course, the files, papers, proceedings and records of the case in the court. The allegations of the affidavit in behalf of the motion were that the complaint was filed January 29, 1940; that more than five years had elapsed; that the action had not been tried or brought to trial within the five-year period; that "there was and is no stipulation in writing that the time may be extended beyond the period of five years"; and that "said action has not been tried by reason of * * * the laches, neglect and delay of the plaintiffs." The counteraffidavit in opposition to the motion states "that on or about the 20th of December, 1940, plaintiffs filed a memorandum to set aside cause for trial, and thereafter defendants made a demand for jury trial and the matter was thereafter put on the regular jury calendar; that the trial of the above action was set for hearing for March 3, 1941, but due to defendants' failure to deposit jury fees was forced to go off calendar;

"Subsequent thereto, and on or about April 9, 1941, defendants' attorney * * informed plaintiffs' counsel, affiant herein that the co-defendant Earl Bagby, Jr. had enlisted in the Armed Services in March of 1941, and [such attorney] * * further stated that the matter would have to remain off calendar; it was thereupon orally stipulated between counsel for plaintiffs and defendants that said matter would remain off calendar pending the return of Earl Bagby, Jr. to civilian status.

"That from time to time affiant made inquiry as to Earl Bagby, Jr.'s status, and was informed on several occasions by defendants' attorney that said defendant was still in the Service; that affiant is informed and believes that the said Earl Bagby, Jr.

is still serving in the Armed Forces of the United States as of this date; *that to continue to prosecute the case during the military absence of said defendant Earl Bagby, Jr. was impossible, impractical and a futile gesture; that the presence of Earl Bagby, Jr. is necessary to properly prosecute this action.*" (Italics added.)

In support of their allegation that it was "impossible, impractical and a futile gesture" to bring the case to trial while defendant Earl Bagby, Jr. (sometimes hereinafter referred to as the defendant Bagby) was serving in the armed forces plaintiffs rely upon section 521 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. Appendix, to the effect that "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and *shall, on application to it by such person or some person on his behalf, be stayed* as provided in this Act, *unless, in the opinion of the court,* the ability of plaintiff to prosecute the action or the defendant to conduct his defense is *not materially affected* by reason of his military service." (Italics added.) The petition for the writ alleges that "none of the defendants have * * * *filed* any proceedings for the stay of any trial of the * * * action under the Soldiers' and Sailors' Relief Act" (italics added) but defendants do not deny the allegations of the plaintiffs' counteraffidavit relative to the representations which were made by them (through their counsel) concerning the military status of defendant Earl Bagby, Jr. or the asserted statement "that the matter would have to remain off calendar" because of Bagby's status. Likewise, it is not denied that because of Bagby's status and the provisions of the Soldiers' and Sailors' Civil Relief Act "it was thereupon orally stipulated between counsel for plaintiffs and defendants that said matter would remain off calendar pending the return of Earl Bagby, Jr. to civilian status." Furthermore, there is no denial of the direct averment "that to continue to prosecute the case during the military absence of said defendant Earl Bagby, Jr. was impossible, impractical and a futile gesture; that the presence of Earl Bagby, Jr. is necessary to properly prosecute this action."

Certainly the oral stipulation "that said matter would remain off calendar pending the return of Earl Bagby, Jr. to Civilian status" is not, as such, competent to defeat the dismissal (Miller & Lux, Inc., v. Superior Court (1923), 192 Cal. 333, 338, 219 P. 1006; Smith v. Bear Valley, etc., Co. (1945), 26 Cal.2d 590, 599, 600, 160 P.2d 1), but the fact of the making of such oral stipulation was material evidence upon the issue as to whether it "was impossible, impractical and a futile gesture" to bring the action to trial during the defendant Bagby's military absence and, also, on the precise issue as to whether "the presence of Earl Bagby, Jr. is necessary to properly prosecute this action." The reasonable inferences to be drawn from the making of such stipulation, in the light of the other evidence, were for the trial court to determine.

[6, 7] The Soldiers' and Sailors' Civil Relief Act, supra, leaves discretion in the trial court in resolving the issue as to whether "the ability of plaintiff to prosecute the action or the defendant to conduct his defense is * * * materially affected by reason of his military service" but it, in effect, places the burden of proof upon the party resisting a postponement and "*unless,* in the opinion of the court, the ability of * * * [the party to prosecute or defend] is *not* materially affected" a postponement of the trial by the court is mandatory "on application to it by such person or some person on his behalf." (The section provides that on such application, *unless* the court is of the view stated, the action or proceeding "*shall* * * * be stayed as provided in this Act.") Here no application for a stay was actually made to the court but the failure to apply for a stay did not preclude the court, upon the motion to dismiss, from determining whether, under all the facts and circumstances, a stay would have been mandatory if it had been applied for. The real issue before it was the question as to whether it was "impractical and futile" to proceed with the

case during the military service of the defendant Bagby, Jr. It is a fair inference from all the facts shown that the parties, through their counsel, agreed in recognizing that a stay would be mandatory if the application were made, that the presence of defendant Earl Bagby, Jr. was necessary, and that it "was impossible, impractical and a futile gesture" to "continue to prosecute the case during the military absence of said defendant." The trial court in denying the motion to dismiss, having before it the affidavits mentioned and the files of the case, including the complaint and the answers of the defendants, must be presumed *not* to have been of the opinion that the ability of the defendant Earl Bagby, Jr. to conduct his defense was "not materially affected by reason of his military service" and must further be presumed to have concluded, in accordance with the averments of the affidavit on behalf of plaintiffs, that "the presence of Earl Bagby, Jr. was necessary" and that it "was impossible, impractical and a futile gesture" to "continue to prosecute the case during the military absence of said defendant."

[8, 9] It appears from the petition for the writ that the defendant Earl Bagby, Jr. filed an answer separate from that filed by the defendants Earl Bagby, Sr. and Pacific Greyhound Lines. Whether, in the light of the issues raised by such pleadings, in the further light of the representation made by defendants' counsel "that the matter would have to remain off calendar," and the other evidence before the trial court, it was "impracticable and futile" (Christin v. Superior Court (1937), supra, 9 Cal.2d 526, 533, 71 P.2d 205, 208, 112 A.L.R. 1153) to bring the case on for trial during the military service of defendant Bagby Jr., was a question of fact which the trial court resolved in favor of plaintiffs. As declared for this court by Mr. Justice Shenk in Charles L. Donohoe Co. v. Superior Court (1927), 202 Cal. 15, 18, 258 P. 1094, 1095, "It is only when there is an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss that a writ of mandate to compel the dismissal of the action may properly issue." Here we cannot say, contrary to the trial court, that there was "an entire absence of any showing constituting good [ground]." Particularly is this true in view of the fact that the files, papers, proceedings and records of the trial court, other than the affidavits hereinabove summarized, are not before us.

The alternative writ is discharged and the application for peremptory writ denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, J., concurred in the judgment.



28 Cal.2d 69

In re MARKHAM'S ESTATE.

CHRISTIAN SCIENCE BENEV. ASS'N v. PALMER.

L. A. 19201.

Supreme Court of California, in Bank.
April 30, 1946.

1. Wills ⇐729

An "annuity," when provided in a testamentary trust, is a periodic payment which is payable unconditionally, there being no contingency present, so that if fund or property out of which annuity is payable fails, in whole or in part, resort may be had to the general assets of the estate. Probate Code, § 161(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity".

2. Wills ⇐684(9)

The beneficiary of a testamentary trust to pay income or the legatee of an income is ordinarily dependent upon existence of income, the amount received by him fluctuating with the income.

3. Trusts ⇐273

A trust provision that payment shall be made from net income of trust property compels conclusion that neither corpus nor income in future years may be used unless

there is a clear expression to the contrary in trust instrument.

4. Wills ⇐435

A will must be taken as it is executed.

5. Wills ⇐684(6)

Where will provides that periodic payments are to be made from income and annual income is insufficient to meet such payment, to authorize an invasion of corpus and use of future income, there must be a strong and express indication that such was intention of testator.

6. Wills ⇐684(6)

Where will directed testamentary trustee to pay to testator's sister a monthly sum during life from net income of estate but will contained no provision for a resort to principal or future income in the event that income of estate during any particular year was insufficient for specified payment, invasion of corpus or use of future income to make up deficiencies was not authorized.

7. Wills ⇐684(6)

A gift over of corpus upon death of beneficiaries is a factor indicating testamentary intent that corpus is not to be subject to claim of beneficiaries to stipulated amounts payable from income.

8. Wills ⇐684(6)

The gift of corpus and accumulated income of testamentary trust to another on death of beneficiary, indicates that testator desired to benefit remaindermen.

9. Wills ⇐684(6)

Where will stipulated that from remaining income after certain beneficiaries were paid designated monthly sums should be given to testator's widow, will implied that a surplus was contemplated and that no recourse to principal would be necessary.

10. Wills ⇐684(6)

Where will directed testamentary trustee, for the benefit of specified children, to accumulate during her life any income not applicable to testamentary trust, testator indicated that rather than have corpus invaded or future income used because of deficiencies in payment under testamentary trust, excess income was to be accumulated for benefit of specified children.

11. Wills ⇐684(6)

Testator's use of the word "remainder," describing estate passing to specified children in relation of such estate to a testamentary trust, did not require conclusion that principal was to be used to pay beneficiaries of trust in the event trust income was not sufficient to cover payments provided or destroy the efficacy by gift over by implying that corpus or future income was to be used.

See Words and Phrases, Permanent Edition, for all other definitions of "Remainder".

12. Wills ⇐684(6)

Where will clearly disclosed testamentary intent that beneficiaries be paid out of net income of corpus of testamentary trust, testator's use of the sentence "all of the above bequests are payable as soon after my death as funds are available" was not sufficient to overcome previously expressed intent to permit a resort to corpus and future income to pay beneficiaries, the meaning of "funds available" being found by reference back to what funds were to be used.

13. Wills ⇐684(7)

The rule which precludes a beneficiary of a testamentary trust from suing to recover income during period of administration relates only to time at which trustees may be compelled to make payment and does not determine date at which right to income commences.

14. Wills ⇐684(6)

Where plain language of will indicated that payments under testamentary trust in favor of testator's sister were to be made from trust income and testator indicated a primary regard for specified children, who were strangers to his blood, spendthrift provision in testamentary trust, even if it indicated that trust was for support of sister, was insufficient to defeat plain language of will and require invasion of corpus or use of future income when in any particular year income was insufficient to make full payment to sister.

15. Wills ⇐684(6)

Where will provided for creation of a testamentary trust with payments to des-

ignated beneficiaries from income of trust with remainder to designated remaindermen, and provided for payment of part of corpus to remaindermen before trust beneficiaries were completely paid, corpus could not be invaded to make any designated payments to beneficiaries, net income was to be computed on annual basis and resort could not be had to income in future years to make up past deficiency.

16. Appeal and error ⇐169

Contention raised for the first time when brief was filed in Supreme Court, was not timely.

17. Trusts ⇐324

Contention of income beneficiaries of testamentary trust that there was error in computation of net income during certain years in which income beneficiaries were not paid the specified sums and that a proper computation charging expenses against corpus would have permitted payment in full of amount to which beneficiaries were entitled, raised many years after deficiencies, after death of executrix and distribution of estate, was too late.

SCHAUER and SPENCE, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of the estate of William F. Markham, deceased, for the construction of a testamentary trust, wherein the Christian Science Benevolent Association filed a petition for an order requiring Harlan G. Palmer, Sr., trustee, to pay installments of an annuity which were in arrears. From a judgment denying the petition, petitioner appeals.

Affirmed.

Prior opinion, 158 P.2d 62.

Lindstrom & Bartlett and Ralph G. Lindstrom, all of Los Angeles, for appellant.

Harlan G. Palmer, Sr., Guy S. Pratt, O'Melveny & Myers, and Pierce Works, all of Los Angeles, for respondent.

CARTER, Justice.

William F. Markham died in 1930. By his will admitted to probate in that year, he named his wife executrix thereof, and trustee of a trust created thereby. The will devised the home property and furnishings to his wife for life, remainder to the children of Mr. and Mrs. Harlan G. Palmer, Sr., and the residue to his wife in trust as follows: "From the gross income received or derived from the trust estate, or from the principal thereof, if the Trustee deem that necessary or advisable, there shall first be paid and discharged all taxes, assessments, costs, attorney fees, charges and expenses incurred in the care, administration, distribution and protection of the trust estate and the protection of this trust and its defense against legal or equitable attack by any person, both during and after probate administration upon my estate. "From the net income of said estate, shall be by said Trustee paid, the following: (1) To my daughter, Maud L. O'Brien * * * ($250.00) a month during her natural life. (2) To my son, Leigh H. Markham, * * * ($250.00) a month during his natural life. (3) To my sister, Louise Markham, * * * ($100.00) a month during her natural life. (4) To my friend and chum, Ben S. Sprague, * * * ($250.00) a month during his natural life. (5) To my gardener, Ed. Jenkins, the sum of One Hundred Fifty Dollars ($150.00) a month, during such time as he is employed by my Executrix or Trustee for work in connection with the estate hereby left by me. (6) To my niece, Isa Markham, * * *($150.00) a month during her natural life. (7) To my friend and foreman, E. S. Roe, * * * ($150.00) a month during his natural life. (8) To my wife, Blanche C. Markham, such part of the remaining income as she may desire to use for any or all of the following purposes: for the maintenance, care and protection of the homestead; for her personal pleasure, support, maintenance and enjoyment of the best of clothing, automobiles, travel and luxuries contributing to her happiness and comfort.

"All of the above bequests are payable as soon after my death as funds are available.

"I direct that my said Trustee shall accumulate, during her natural life, any income from trust moneys or trust property

not applicable under any of the trusts, powers, or provisions herein contained, by investing the same, and all the resulting income thereof, from time to time, in or upon any such stocks, funds or securities as are hereinbefore authorized for investments, for the benefit of the children of the union of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer, share and share alike.

"Upon the death of my wife and Trustee, * * * I direct that Harlan G. Palmer, Sr., shall succeed her as trustee and that he shall hold of my estate such part as may be approved by court as ample to provide income for the payments directed in subdivisions one (1) to seven (7) in this 'Fourth' clause, and shall distribute, free from this trust, the balance of the estate, together with any undistributed net income, to the children of the union of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer, share and share alike.

"Upon the completion of all the trusts mentioned in clauses one (1) to eight (8) in this 'Fourth' clause, I direct that the remainder of my estate, together with any undistributed net income thereon, be given free from this trust, to the said Palmer children, share and share alike.

"Each and every beneficiary under this trust is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any manner affect or impair his, her or their beneficial and/or legal rights, titles, interests, claims or estates in or to the income and/or principal of the trust estate during the entire term hereof, nor shall the rights, titles, interests or estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor liable to any process or law or court, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely and exclusively and personally to the above designated beneficiaries hereunder at the time entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder shall be a condition precedent to the payment or delivery of the same by said Trustee to such beneficiary."

Mr. Palmer, mentioned in the will, was the testator's friend and personal attorney for many years. The corpus of the trust had a value of over a million and a half dollars. Maud L. O'Brien, was eliminated from the rights granted her by the first clause of the trust listing the beneficiaries by reason of her contest of the will. See In re Estate of Markham, 46 Cal.App.2d 307, 115 P.2d 866.

Decedent's wife served as executrix and trustee until her death in 1937, when she was succeeded by the public administrator, and in 1941, the decree of distribution was entered distributing the trust property to Palmer in trust "upon the conditions and directions set out in the will of the decedent." Payments were made in full to the beneficiaries from the date of decedent's death until the end of 1932. In the years 1933–1936, the payments to the beneficiaries were less than the amounts specified in the will, resulting in a deficiency as to Louise Markham of $1,420. During the years thereafter the beneficiaries were paid in full. Louise Markham died in 1940, leaving her claim to that deficiency to petitioner and appellant.

On May 4, 1944, petitioner filed a petition for an order directing the trustee to pay it the deficiency claimed to be payable to its predecessor, Louise Markham. The court denied the petition on all grounds raised in objection thereto, namely, that the claim was barred by the statute of limitation, that pursuant to the spendthrift provisions of the trust the amount of the deficit could not pass by will to petitioner from the beneficiary, that it was not the intent of the testator that either future net income or the corpus of the trust could be used to make up deficiencies, and that the orders settling the annual accounts of the trustee were res adjudicata on the last-mentioned issue.

[1-6] In ascertaining whether or not the corpus of a testamentary trust or the excess income in future years may be used to pay the amount specified in the trust as payable to the beneficiary, it has been customary to state the issue in terms of

whether the instrument established an annuity or a trust to pay income. An annuity is a periodic payment which is payable unconditionally, there being no contingency present. If the fund or property out of which the annuity is payable fails, in whole or in part, resort may be had to the general assets of the estate. (Prob. Code, § 161(3). On the other hand the beneficiary of a trust to pay income or the legatee of an income is ordinarily dependent upon the existence of income, the amount received by him fluctuating with the income. The rule is and should be that a provision that payments shall be made from the net income of the trust property compels the conclusion that neither the corpus nor income in future years may be used unless there is a clear expression to the contrary in the trust instrument. See In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; In re Estate of Phelps, 179 Cal. 703, 178 P. 846; In re Estate of Brown, 143 Cal. 450, 77 P. 160; In re Estate of Mackay, 107 Cal. 303, 40 P. 558; In re Estate of Lockhart, 21 Cal.App.2d 574, 69 P.2d 1001; Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870; cf. In re Estate of Roberts, 27 Cal.2d 70, 162 P.2d 461; Crew v. Pratt, 119 Cal. 131, 51 P. 44; In re Estate of Watson, 32 Cal.App.2d 594, 90 P.2d 349; In re Estate of Bourn, 25 Cal.App.2d 590, 600, 601, 78 P.2d 193; In re Estate of Oliver, 21 Cal.App.2d 106, 68 P.2d 735; see 2 Am.Jur., Annuities, § 19; cases collected L.R.A.1917E, 580; 136 A.L.R. 69. The will must be taken as it was executed, and when it provides that the periodic payments are to be made from income, and the annual income is insufficient to meet such payments, there must be a strong and express indication that it was the intention of the testator in such event to authorize an invasion of the corpus and use of future income. The testator was free to provide for a resort to the principal and future income if he so desired. In the instant case he made no such provision. To read such a provision into the will would require a clear indication from other terms of the will compelling such interpretation. As stated in Estate of Platt, supra, 21 Cal.2d at page 351, 131 P.2d at page 829, where the issue was whether or not income for other years could be used to make up past deficiencies, we said: "The plan of the testator undoubtedly contemplated an accounting period, at which time the income of the estate, less the cost of administering the trust, would be computed and distributed. In a provision of the will which authorizes advances to either beneficiary in the event of illness or other emergency, the testator refers to the source of the monthly payments to them as *'net income.'* In accordance with common business practice, the inference may properly be drawn that the testator, unquestionably an experienced business man, contemplated an *annual period* in which the expenses of administration would be deducted from the gross income received from the principal of the trust and the balance, the net income, paid to the beneficiaries. And as he disposed of all income *with no provision to meet any deficiency in the stated monthly payments to the wife,* each accounting period must be regarded separately and the net amount earned by the trust property in each year paid to the beneficiaries as provided by the will. *Any other interpretation would require the court to write into the will provisions which the testator did not make either expressly or by implication.*

"A somewhat similar situation was presented in Re Estate of Chapin, 47 Cal.App. 2d 605, 118 P.2d 499. * * * In answer to the wife's contention that any arrearages should be paid to her before the three children, other than the son, received any payments, the court held that since the will itself did not make provision for a reserve to pay a minimum amount, *the court would not provide one by interpretation.*" [Emphasis added.] See, also, In re Estate of Roberts, 27 Cal.2d 70, 162 P.2d 461. In the instant case the trustee is to pay the expenses of administering the trust from the gross income *or from the principal* if he deems it necessary, indicating that the testator had in mind a situation where the principal might be used. However, when he came to provide for the beneficiaries, he expressly states that they be paid "from the net income of said (trust) estate." In the 8th beneficiary clause reference is again made to "remain-

ing income" as being payable to his wife. Again reference is made to accumulation of "income from trust" property not applicable under any of the terms of the trust. Income is later referred to in speaking of the amount to be held by Palmer, the successor trustee of his wife, that amount being enough to provide income to pay the beneficiaries.

[7-11] Moreover, in the present case there are factors supporting rather than negating the foregoing conclusion drawn from the provision in the will limiting the payments to the annual net income. A factor indicating that the corpus is not to be subject to the claim of the beneficiaries to the stipulated amounts is a gift over of the corpus upon the death of the beneficiaries. See In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Lynn Safe Deposit & T. Co. v. Martin, 308 Mass. 443, 32 N.E.2d 247; First Nat. Bank of Toms River v. Levy, 123 N.J.Eq. 21, 195 A. 820; cases collected 136 A.L.R. 69. The gift of the corpus and accumulated income to another on the death of the beneficiary indicates that the testator desired to benefit the remaindermen, and if the corpus or future excess income is consumed in making the periodic payments to the beneficiary, the remaindermen will receive that much less. The will under consideration stipulates that any remaining income after the first seven beneficiaries, including Louise Markham, have been paid, shall be given to the testator's wife, implying that a surplus was contemplated and that no recourse to the principal would be necessary. His wife, the natural object of his bounty, received nothing else under the will except the home property. The trustee-wife was directed to accumulate during her life any income not applicable to the trust for the benefit of Palmer's children, thus indicating that rather than have the corpus invaded or future income used, the excess income was to be accumulated for the benefit of those persons. Palmer, the successor trustee, was directed to "hold" sufficient of the trust property to provide *"income"* to make the payments to the beneficiaries, distributing the balance of principal and accumulated income to the Palmer children, thus contemplating that the remaindermen should commence to share in the trust before the beneficiaries' rights had ceased by reason of their deaths. The Palmer children were not required to wait until the beneficiaries were all satisfied and then receive what was left of the remainder, if any. If the sum set aside by Palmer for the trust was insufficient to raise the income necessary, the beneficiaries would be the sufferers inasmuch as the balance would have been paid to the Palmer children. Finally, upon the completion of the trust, which, must mean upon the death of the beneficiaries, the remainder including accumulated income was given absolutely to the Palmer children. It is true the testator refers to the "remainder" of the estate passing to the Palmer children, but the use of that term does not require the conclusion that the principal was to be used to pay the beneficiaries or destroy the efficacy of the gift over by implying that the corpus or future income was to be used. By referring to any undistributed income as well as the remainder of the principal, it appears that he intended the remaindermen to have the principal intact. In view of the heretofore discussed reference to net income, and the solicitude for the Palmer children as shown by the fact that they were the chief objects of his bounty, and were to receive some benefits even during the life of the other beneficiaries, we do not believe that the use of the term "remainder" should be construed to mean that the remaindermen were to receive only what was left after the beneficiaries had been paid by resorting to the principal.

Appellant relies upon In re Estate of Emerson, 139 Cal.App. 571, 34 P.2d 800, 802, but in that case the will provided that the real property, which formed the bulk of the estate, should be sold and government bonds bought instead, and the deficiency of income arose out of the fact that this provision of the will was not followed and the income of the real property was decreased to an extent that the bequests of income could not be met although they could have been met had the will been properly executed. Thus the question was whether the beneficiaries of the income or the remaindermen should be

affected by the deficiency which arose from improper execution of the will and the court solved that question by concluding from the will "that the testatrix was more solicitous about the welfare of the two annuitants than she was of the remaindermen." Moreover, the court in the Emerson case failed to give due consideration to the source of the payment as being the net income, the importance of which we have mentioned above.

[12, 13] Appellant urges that the sentence: "All of the above bequests are payable as soon after my death as funds are available," requires a resort to the corpus and future income. That is not sufficient basis for overcoming the clear meaning of the direction that the beneficiaries be paid out of net income. The meaning of funds available must be found by reference back to what funds are to be used. Those funds are the net annual income and hence are not the corpus or future income. Moreover, it relates to the time that the trustee's duty arises to pay the income—that he may be compelled to pay it rather than specifying the source of payment, and, as said in Estate of Platt, supra, 21 Cal.2d at page 346, 131 P.2d at page 827: "In a majority of cases it has been held that, unless the testamentary trust was created for the support or maintenance of the beneficiary, the income accrues from the date of distribution. * * * Apparently the controlling factor in the decision of these cases was the inability of the beneficiary to compel the payment of any income prior to the distribution of the trust property to the trustees. That fact, however, is not determinative of the question for, as has been recently stated, the rule which precludes a beneficiary from suing to recover income during the period of administration relates only to the time at which the trustees may be compelled to make payment, and does not determine the date at which the right to income commences. In re Estate of Marre, 18 Cal.2d 184, 190, 114 P.2d 586."

[14] The argument is made that by reason of the kinship of Louise Markham, the sister of the testator, it is to be assumed that she would be preferred by the testator to the Palmer children, strangers in blood; that the existence of the spendthrift provisions are a basis for inferring that the payments to the beneficiaries were for their support and maintenance; and that therefore the testator intended the use of the corpus and future income where the annual income was insufficient. In our discussion heretofore we have shown that the testator expressed a primary regard for the Palmer children rather than his sister. Assuming the spendthrift provision in the will is a basis for concluding that the allowances to the beneficiaries was for maintenance, it does not follow that the corpus or future income may be reached on their behalf. If the testator had wished to insure their support he could have authorized resort to those sources. He did not do that. He showed a concern for the Palmer children. There is no compelling public policy that requires that we write into the will such a clause. If he had been so solicitous of his sister, as contended by appellant, he could have expressed himself clearly to that effect. To arrive at the result that the corpus and future income are subject to the beneficiaries' claim, it must first be inferred from the spendthrift provision that the trust was for support and maintenance. From that it must be inferred that the testator intended that these sources be used. There is no compelling policy requiring such intricate deduction to escape the plain language of the will directing the payment from net income. It is insufficient to defeat that language.

[15] We conclude therefore that the corpus may not be invaded, that the net income is to be computed on an annual basis, and resort may not be had to income in future years to make up past deficiencies.

Appellant earnestly contends that Estate of Platt, supra, is distinguishable from the case at bar. It refers to the clauses in the instant will specifying that payments are to be made as soon as funds are available, that the trustee is to accumulate income not applicable under the trust, and the gift over of remainder in trust on

completion of it. Those matters have been discussed above. Reference is made to the much greater value of the trust estate and income in the instant case as contrasted with the Platt case. But that should not compel the interpretation sought by appellant. As above seen, there is nothing to overcome the requirement that payment be made from net income.

It cannot be said that Estate of Platt, supra, is distinguishable on the ground that there was a disposition of all of the income each year or that those who were to receive the excess income were strangers to the testator. While it is true in the instant case that the accumulated income would go to the Palmer children, still, like Estate of Platt, clause (8) of the trust, provides that testator's wife shall receive such part of the "remaining" income as she may "desire" to use. The preceding clauses give a certain amount to each beneficiary. If for several years the income was insufficient, the wife might not receive anything if the income in future years were used to pay past deficiencies in the payments to the first seven beneficiaries. We do not believe the testator had any such intention.

[16, 17] Finally, it appears that appellant claims there was error in the computation of the net income for the years 1933–1936 (when the payments to the beneficiaries were deficient) in that expenses were charged against the gross income which should have been charged against the corpus; that properly computed there would have been a net income for those years from which to pay the beneficiaries in full, and that subsequent excess income or the corpus should be used to make up those arrearages. However that contention was raised for the first time on this appeal. Indeed it was not raised until the brief was filed in this court on hearing granted after decision by the District Court of Appeal. The appellant's petition in the court below, while asserting there is presently excess income to meet prior deficiencies, does not allege that there was sufficient income during the years of deficiency, 1933–1936. Also it must be remembered that many years have passed since the alleged deficiencies, the executrix is dead, the estate is distributed, and diligence has not been shown in attempting to correct the asserted error in computation of the income. For those reasons the point will not be considered.

The judgment is affirmed.

GIBSON, C. J., SHENK, and TRAYNOR, JJ., and PETERS, Justices pro tem., concurred.

SCHAUER, Justice (dissenting).

The majority opinion, as its controlling premise, announces that "The rule is and should be that a provision that payments shall be made from the net income of the trust property *compels* the conclusion that neither the corpus nor income in future years may be used *unless there is a clear expression to the contrary in the trust instrument.*" (Italics added.) Without now debating the accuracy or soundness of such announced rule of construction so far as concerns "income in future years," or the efficacy of the authorities cited in support thereof, it seems sufficient to show, as I believe the ensuing discussion does, that in the trust instrument here involved "there is a clear expression to the contrary."

As a further basis for its conclusion the majority opinion declares the proposition that "the Palmer children * * * were the chief objects of his [the testator's] bounty." With this proposition I take issue. It seems obvious to me, from a reading of the will, that the testator never contemplated that his wife or the other beneficiaries might be reduced to want over a period of years in order to preserve and augment the estate for the residuary legatees. Rather, does it seem that he wanted the residuary legatees to take only after the provisions for the others (whatever those provisions may mean) had been paid in full. It seems apparent that the testator never in reality contemplated that the net income from his large holdings would be insufficient to discharge all bequests. In other words, he intended that all bequests should be paid in full.

It is my view that in construction of the will it should be borne in mind that such document was prepared by the present trustee, the respondent herein (who was the personal attorney for the testator and who is the father of the principal residuary beneficiaries), from a "written memorandum in Mr. Markham's handwriting." O'Brien v. Markham (1940), 37 Cal.App. 2d 381, 392, 99 P.2d 583, 587. The scrivener of the will, as succeeding trustee and father of the principal residuary beneficiaries, was not a wholly disinterested person, and certainly is not in a favorable position to claim that any ambiguities in the language in which the trust structure is phrased are to be resolved in favor of him or his children.

In language which seems reasonably clear the will directs that the small annuity with which this appeal is concerned shall be paid "From the net income of said estate * * * (3) To my sister, Louise Markham, * * * $100.00 a month during her natural life." One hundred dollars a month *"during her natural life"* seems to me to establish that it was the testator's intent that his sister should receive from his estate $100 for each and every month she lived after his demise. To now construe the reference to payment from net income as amounting to a proviso or exception to the effect that the net income of the estate should be permanently relieved from liability for such payments as accrued during periods when there was a deficiency of net income but that the corpus should be augmented for the benefit of the residuary legatees by any surpluses of net income during prosperous years, seems to me to amount to a departure from the testamentary plan. Under this theory the immediate beneficiaries, the relatives of the testator including his widow, who were the natural objects of his bounty, could have gone hungry during many years to the end that the residuary legatees should eventually receive an augmented principal. I think we should not, in construing the will, attribute that intent to the testator unless it unmistakably appears. Under the circumstances of this case we are not bound by the construction given the will by the trial court. (See In re Estate of Platt (1942), 21 Cal.2d 343, 352, 131 P.2d 825.)

It appears to me, further, that the statement in the trust clause of the will that "all of the above [trust] bequests are payable as soon after my death as funds are available" indicates an awareness by the testator that the details of administering so large an estate as he expected to leave would in all probability be complex and consume an extended period of time, and an intention on his part that the trust beneficiaries should be entitled to the cumulative payment in full during continuance of the trust, of the respective amounts specified, "as soon * * * as funds are available" with which to pay. Moreover, the remaindermen—strangers in blood to the testator—are, by his specific direction, to take only "upon the completion of all the trusts." The trusts, I think, cannot properly be regarded as "completed" until payment has been made in full, from the net income of the estate, of the cumulated monthly income benefits. Consequently if, for any reason, it is impossible to keep the monthly payments up to date at all times, such deficiencies as occur should be met out of subsequently available net income. The further direction that "Upon the death of my wife and Trustee, * * * Harlan G. Palmer, Sr., shall succeed her as Trustee and * * * shall hold of my estate such part as may be approved by court as *ample* to provide income for the payments directed in * * * this * * * [trust] clause, and shall distribute, free from this trust, the balance of the estate, together with any *undistributed net income,* to the [Palmer] children" (italics added) also demonstrates that the testator's prime concern was to provide for the trust beneficiaries and that the Palmer children were to take only after *ample* provision had been made to meet the trust annuities.

That the above stated view as to the relative place of the Palmer children in the testamentary plan was entertained by the District Court of Appeal in passing on related litigation is evidenced by the fol-

lowing passage: "In regard to the matter of the testator's intention to execute a will, we find that on January 25, 1930, Palmer received a letter written by Blanche C. Markham, at her husband's dictation. This letter stated, in effect, that for some three or four months past he and his wife had been considering the disposition of their property, and suggested that Palmer call upon them at his convenience and discuss with them the preparation of a will. Thereafter, one evening Mr. and Mrs. Palmer went to the Markham home in Glendale, where Mr. and Mrs. Markham, in the presence of Mr. and Mrs. Palmer discussed their will, and where Mr. Markham then told Mr. and Mrs. Palmer that *the Markhams* had decided to dispose of *their* property *so as to take care of their friends and relations, with the remainder to the four Palmer children.*" (Italics added.) (O'Brien v. Markham (1940), supra, 37 Cal.App.2d 381, 385, 99 P.2d 583, 584.) If the will is to accomplish the object which Mr. Markham, in the presence of Mrs. Markham, declared to Mr. and Mrs. Palmer—"to dispose of their property so as to take care of their friends and relations, with the remainder to the four Palmer children"—it should not be so construed as to "take care of" the Palmer children *in any event* but of "their friends and relations" *in properous years only.* I cannot escape the belief that the majority opinion strains both recognized rules of construction and the whole testamentary plan of the will in so holding.

Of course, it is possible that the testator may have altered his object; he executed the will as drafted for him (from his notes prepared subsequent to the conversation with Mr. and Mrs. Palmer) and made its language his own. If that language explicitly requires the conclusion reached by the majority then such conclusion must be held to be the revised and final intent of Mr. Markham and should be given effect. But if the language used does not explicitly require such conclusion then it should be interpreted in the light of Mr. Markham's prior declaration of objective. I am convinced that the language of the will and its general plan, taken as a whole, admit more reasonably of a construction consistent, than of one inconsistent, with the purpose and intent which he evidenced when declaring his objective (and that of Mrs. Markham) to Mr. and Mrs. Palmer.

The holding in the In re Estate of Platt (1942), supra, 21 Cal.2d 343, 351, 131 P.2d 830, that "each accounting period must be regarded separately and the net amount earned by the trust property in each year paid to the beneficiaries as provided by the will" is relied upon as controlling the construction and operation of the annuity provisions in the will now before us. But the language of the will construed in the Platt case, as well as the testamentary plan there set up, differs substantially from that now before us and that case seems to me to be not controlling here on this issue. If there be a repugnancy in the provisions we are to construe, it is code law that "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." (Civ.Code, § 1652.) The rule is equally applicable in the construction of wills. Giving effect both to the direction that the annuity shall be paid out of net income and to the direction that it shall be in amount "($100.00) a month during her natural life," appears to require the conclusion that deficiencies in annuity payments because of inadequacy in net income during any accounting periods should be made up out of net income during periods of greater earnings or smaller expenditures.

In the Platt case one of the two trust beneficiaries was the testator's widow and the other was his son, whereas the remaindermen here are complete strangers in blood to the testator. Further, the issue presented in the Platt case arose upon a provision for the *immediate* division of income between the two beneficiaries, while in the present case the issue arises between the claimant to an immediately payable annuity and remainderman who seek the cumulation of net income in prosperous years to be added to corpus, even

though the immediate trust beneficiaries have not been paid in full during abnormally low net income periods.

In the Platt case the provision of the will which was construed is as follows: "If the income from said trust exceeds the * * * $250.00 * * * per month payable to my wife * * * then my trustee shall pay said surplus income up to the sum of * * * $250.00 * * * per month to my * * * son * * *; If there is any income in addition to the sums mentioned in the foregoing subdivisions * * * the said surplus income over and above the sum of * * * $500.00 * * * per month shall be divided in equal shares between my * * * wife * * *, until she remarries, and my * * * son. * * *" Page 350 of 21 Cal.2d, page 829 of 131 P.2d. The important point to note is that the quoted provision *made immediate division and distribution of all the income* no matter how large it might be. There was no authorization for accumulation of any amount of net income for a remainderman. There never could be a surplus out of which deficiencies could be paid. Concerning this provision we said (page 351 of 21 Cal.2d, page 829 of 131 P.2d): "The plan of the testator undoubtedly contemplated an accounting period, at which time the income of the estate, less the cost of administering the trust, would be computed and distributed. * * * *And as he disposed of all income* with no provision to meet any deficiency in the stated monthly payments to the wife, each accounting period must be regarded separately and the net amount earned by the trust property in each year paid to the beneficiaries as provided by the will." (Italics added.) But in the case at bar the testator obviously contemplated that the aggregate of all the payments to the immediate beneficiaries would be less than the net income and that there would be surpluses of such net income which should be accumulated. Since he did not make disposition of all income as it accrued the controlling reason for the Platt case holding that the income distribution plan there set up necessarily presupposed the use of accounting periods and the final determination of the income distribution for each period as it occurred is nonexistent here. In the Platt case, as previously indicated, there never could be a surplus of net income in any accounting period because the total net income for each period was disposed of in that period. But in the case at bar it appears that there will normally be a surplus of net income in each period. No language in the will now before us has been pointed to which forbids the use of such surpluses for making up deficiencies which may occur in the payments of annuities during periods of inadequate net income. On the contrary, every provision of the will, when read and construed as a whole and in the light of the circumstances shown, is consistent with the view that the annuities shall be paid in full from net income "as soon * * * as funds are available" regardless of the accounting period in which earned, and the will as a whole, in the light of the undisputed circumstances, is inconsistent with the view that the annuities for any accounting period need never be paid unless the net income for that particular period is adequate. The testator, it will be remembered, explicitly directed that the remaindermen shall take only "upon completion of all the trusts" and that the succeeding trustee "shall hold of my estate such part as may be approved by court as ample to provide income for the payments directed." That direction surely was not intended by the testator to be interpreted as meaning merely sufficient to provide for such payments during prosperous years.

As a special defense to the petition for an order directing the trustee to pay accrued annuities, the trustee alleged "That the * * * Court has heretofore ruled and made its order that this Trustee does not owe the successors in interest of said M. Louise Markham, Deceased, for said alleged unpaid annuities * * * reference being hereby made to the Objections to First Account Current of Trustee and Request for Payment of Annuities, filed herein by * * * [the] Executor of the Will of Louise Markham, deceased, and the Answer to same filed by this Trustee, and the ruling and order made thereon by

this Court on the 28th day of May 1942, overruling said objections, and said matter and the issues involved in the within petition * * * are Res Adjudicata, pursuant to Sections 738 and 1908 of the Code of Civil Procedure * * *, said order above referred to having become final and no appeal having been taken therefrom." The court decided in favor of the trustee on the issues raised by this defense. In my view of the case such decision cannot be sustained. That it cannot be sustained the majority opinion, by silence on the subject apparently concedes but does not expressly so declare. I therefore point out the inadequacy of the evidence to support such defense.

The first account current of the trustee, referred to above, was filed April 21, 1942. The objections filed by the Louise Markham executor set forth the bequest to Louise Markham of $100 per month during her life, quoted the provision of the will that "all of the above bequests are payable as soon after my death as funds are available," and alleged a deficiency of $1,420 in payments which became due in 1933–1936 and that funds were on hand to pay the deficiency. The trustee's answer admitted the deficiency, alleged that the net income had been insufficient to pay more than had been paid, set out the first paragraph of the trust provisions of the will (as quoted in the main opinion herein), and alleged that *the principal had been depleted in a net amount of over $125,000 by payments that should have been made from income.* The account and the objections were heard before Florence M. Bischoff, court commissioner in probate, sitting as a judge pro tempore, who made an order which reads in part as follows: "[Objections having been presented, the Court, after hearing the evidence, overrules said objections, and findings being hereby waived, settles and approves said account in the manner following: [Order made settling the account and allowing trustee's fee.]" The trustee asserts that this order effected an interpretation of the will against payment from either corpus or subsequently earned net income, of the $1,420 deficiency. I hereby express no opinion concerning the issue as to the corpus; it may be assumed for the purposes of this discussion that the deficiencies are not payable from corpus and that the order made by the court commissioner as judge pro tempore so adjudicates. However, I am convinced that the described order did not adjudicate the question of right to payment of the deficiency from subsequently earned net income. Upon the record it is irrefragable that, as appellant contends, the trustee on that occasion claimed only that the principal had been depleted, *that annuities had been paid out of principal* and had thereby been overpaid, that there had been no net income in the current year, and that therefore no funds were then on hand from which the deficiency could properly be paid. It is to be noted in this connection that no evidence was taken except to prove the account and that the hearing was terminated when it became clear *that the trustee had no net income on hand.* These facts are established by the extrinsic evidence which was received (and properly so received in view of the fact that the record of the hearing preceding the described order did not disclose whether there had been a trial and decision of the same issues as here discussed) in the present proceeding.

Lieutenant Hahn, the attorney who represented the Louise Markham executor in the 1942 hearing, testified that prior to such hearing two applications had been made for payment of the same claim, and that they had been denied without prejudice. He stated further: "To the best of my recollection, the matter took place in Miss Bischoff's office, and I believe Miss Bischoff, Judge Palmer and Mr. Thompson and myself were present. I had filed my petition some time before, as is shown in the file and as Judge Palmer related, and I alleged that there was sufficient income available to pay these deficient annuities.

"Upon the examination of the account at that time by Miss Bischoff and by Judge Palmer and myself, it was determined that there was not any net income available, there was no net income—I shouldn't say available. There apparently was no net in-

come, and I had no reason, no facts, no evidence of any kind to believe that that wasn't a very proper accounting.

"It is my recollection that Miss Bischoff therefore took the position that since under the terms of the will annuities were to be paid from net income, that there wasn't money available to pay these and therefore the question wasn't properly raised at that time. That is, in essence, my recollection of her ruling at that time.

"Q. Was that, as you recollect, the sole basis of the decision, Lieutenant? A. My recollection is that Judge Palmer mentioned other facts that were in his petition, which I do not recall if they were at this time, but that that was the basis, that was the way I understood the basis of the court's ruling.

"Q. Then, will you state whether or not you understood that this denial of your petition was a denial with or without prejudice? A. I took it certainly to be a denial without prejudice, because the merits of the matter, the legal issue of whether our clients were entitled to these delinquent annuities, had never been fully presented to the court, never been presented at all, to my knowledge.

"Q. Will you state whether or not that was the basis and reason for a waiver by you, if there was such a waiver, of written findings? The order recites findings were waived. A. I think that must have been why I waived findings at that time.

"Q. May I ask you, if it had been in your understanding a final and conclusive determination on the merits, would you have waived findings? A. No, I would not have."

Miss Bischoff testified: "* * * It wasn't a very long hearing, as I remember it.

"When Lieut. Hahn spoke to me, asked me if I remembered it, and I looked at my notes before I knew that there had been an order, I had an idea there had been a stipulation and the order was made by stipulation; that was my first recollection, but of course my notes didn't show that. I looked it up, and I had written down just 'Objections overruled and account settled'; and I have no further recollection than that, except that I know it was a short hearing and there were no briefs presented to me, as far as I know, and I didn't look up any law, because I made the decision right there.

"Q. By the Court: What was the nature of the hearing, Miss Bischoff? A. It was on the hearing of the account; and the objections to the account at the time, as I remember it, were mostly due to the fact that there were no funds available, which there were not, and I think it was practically conceded at the time, and that is the reason I thought it was a stipulated judgment, a stipulated order; but I don't remember, there may have been testimony or law quoted with regard to the matter of the statute of limitations, but I have no recollection of that at all, not at all, and I didn't have any on my little notes. I had destroyed my large notes and only had my little notebook, and it said nothing whatever about that or about any of the testimony that was taken; and, as I said, there have been so many things since then, I am very sorry that I can't recollect anything more than that, except it was a short hearing in the little room.

"Q. By Mr. Bartlett [attorney for appellant]: May I ask, Miss Bischoff, if there was any practice or custom on your part, when sitting as judge in those matters where there was a decision on the merits, to make a notation of that fact in the order? A. I usually did, I usually did on my own.

"Q. By The Court: Notes? A. Notes.

"Q. By Mr. Bartlett: From the absence of that notation in this order, would that suggest anything to you with reference to the merits? A. Of course, we all slip. I couldn't say, because while it is my custom—was always my custom to make notes, probably fuller notes than some of the others did, that may have been a day when I did not. I can't say definitely, because I don't recollect it.

"Mr. Bartlett: Cross examine.

"Examination By The Court: (Q.) In other words, when the matter came before

you, Miss Bischoff, it was on a hearing on whether or not you should approve the account? A. Yes.

"Q. And certain objections had been filed to that account? A. Yes; precisely.

"Q. You approved the account and overruled the objections? A. That is all I did. My notes show that.

"Q. Other than that—A. I don't remember anything. The only thing I can say is that if there had been any legal points involved, I wouldn't have made my decision, I know that, I wouldn't have made my decision right then and there, because I always read the law, I always took it under submission and read the cases and looked into it. I would never have made a decision without looking up and reading the cases; that has always been my custom, I am quite certain I would have done that. But I can't say that there was nothing said about it, because I don't know, I don't remember it."

In addition it was stipulated in the present proceeding that at the 1942 hearing described above the trustee gave an oral history of the administration of the estate by the executrix and the trustee, and stated that Louise Markham had not been paid in full because there had been insufficient net income during the periods the deficiency had accrued and that the trustee contended that during part of the time when the annuities were paid in full they were so paid in violation of the provision of the will that they should be paid from net income.

Thus the extrinsic evidence establishes clearly that at the 1942 hearing the court was not required to, and did not, decide whether or not the deficiency should be paid out of future net income, but determined only that the account correctly reported the receipts and disbursements of the estate and the property remaining in the trustee's hands and that the trustee had properly performed his reported acts. The claim of the Louise Markham executor was overruled because it was represented that the estate had on hand no net income from which to pay the claim. Consequently, since the issue now presented was not decided upon the merits at the 1942 hearing the order made at that time does not render such issue res judicata in the present proceeding. As observed by Mr. Justice Carter, speaking for the court in Stark v. Coker (1942), 20 Cal.2d 839, 843, 129 P.2d 390, 393, "when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue. A judgment is not an adjudication as to matters which the court expressly refrains from determining." (See, also, Goddard v. Security Title Ins. & Guar. Co. (1939), 14 Cal.2d 47, 52, 92 P.2d 804; Security Trust & Savings Bank v. Southern Pacific R. R. Co. (1931), 214 Cal. 81, 87, 3 P.2d 1015; Campanella v. Campanella (1928), 204 Cal. 515, 520, 521, 269 P. 433.)

The court in this proceeding determined also that the orders settling the accounts made by the executrix in the years when the deficiencies accrued constituted judgments which fully adjudicated the issue as to future payment of such deficiencies. Such determination is contrary to the evidence. The accounts usually stated that the net income had permitted that only a part of the annuities be paid during the current year and asked credit for such payments as had been made. In no case was it alleged that such part payments constituted payment in full under the terms of the will for the respective years. Some of the orders approving the accounts did not refer specifically to the annuities paid; orders that did refer to such annuities simply approved the reported payments. In no instance was the court requested to decide, nor did it decide, nor could it upon the issues before it properly have decided, the issue now under discussion, i.e., whether the deficiencies were payable from future net income. Moreover, the answer to the petition for an order directing the trustee to pay accrued annuities states in part as follows: "admits that during the administration of said estate and before final distribution had been made, a deficiency of $1,420.00 in the payments of the an-

nuities had occurred, but alleges that said deficiency was caused by insufficiency of net income to make the full amount of said payments as they became due." Furthermore, the trustee did not object to payment in full of the annuities in periods during which, he now asserts, it was necessary to resort to corpus in order to make such payments, and no issue as to interpretation of the will was presented or decided. If we should apply to the orders (now final) approving accounts showing payments of the annuities in part out of corpus the res judicata effect as to construction of the will which the trustee now asks us to apply to the 1942 order we should have to hold that such orders rendered res judicata a construction of the will that the annuities were properly payable from corpus when the net income was insufficient.

It seems to me, from the entire record, to be established that the court did not adjudicate on the settlement of the first, or any other, account current, that the executrix or the trustee should be discharged from liability in futuro for the payment out of future net income of any arrearages due on the Louise Markham annuity. The settlement of the accounts was obviously an approval of the trustee's bookkeeping and reported transactions, not a construction of the will. The approval of expenses paid and mathematical determination that net income for the accounting period was inadequate to pay accruing annuities in full should not be enlarged intc a determination that net income of the future should not be applied to payment of past due annuities. In my opinion the orders settling the accounts in question are not a bar to the present proceeding.

For adequate discussion of other issues raised reference is made to the opinion of Mr. Justice Shinn, speaking for the District Court of Appeal, reported in 158 P.2d 62.

The judgment should be reversed.

SPENCE, J., concurred.

28 Cal.2d 185

PEOPLE v. WILSON.

Cr. 4691.

Supreme Court of California.

May 7, 1946.

As Modified May 23, 1946.

1. Homicide ⇨253(1)

Evidence sustained court's fixation of degree of murders as first degree.

2. Homicide ⇨237

In murder prosecution, evidence sustained jury's finding that defendant was sane at time of commission of the offenses.

3. Homicide ⇨27

Where, defendant, charged with murder, knew the difference between right and wrong and knew the nature and consequences of acts committed by him, defendant was responsible in the eyes of the law for such acts, regardless of any perversion of his moral senses and regardless of his sadistic tendencies.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Otto Stephen Wilson was convicted of first-degree murder and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged by indictment with the murder of two women, Virgie Lee Griffin and Lillian Johnson, whose bodies were found in the Barclay and Joyce Hotels respectively, in Los Angeles on November 15, 1944. He entered pleas of guilty and of not guilty by reason of insanity to both counts of the indictment. After a jury trial he was found sane at the time he committed both offenses. His

motion for a new trial was denied. Each offense was fixed as murder of the first degree and defendant was sentenced to the death penalty on each count of the indictment. This is an automatic appeal under section 1239 of the Penal Code.

The facts and circumstances surrounding the killings as disclosed by the record are as follows:

About November 12, 1944, defendant, who was thirty-four years of age, left employment at a shipyard near Wilmington, California, and shortly before noon on November 14, 1944, purchased from a hardware store in Los Angeles a knife with about a seven-inch blade. He represented himself as a cook to the salesman who sold him the knife. At 1 p. m. on the same day he secured a room at the Barclay Hotel and signed the register, "Mr. and Mrs. O. S. Wilson, Shelbyville, Indiana." Shortly thereafter, at an unidentified bar, defendant met a partially intoxicated young woman, later identified as Virgie Lee Griffin, with whom he had been theretofore unacquainted. In consideration of $5 she accompanied him to his hotel room. Soon after the couple reached the room, defendant went out and got a fifth of whiskey. After returning to the room he choked the woman and then indulged in an orgy of stabbing, cutting, and severing parts of the woman's body, using the knife he had just purchased. He claimed to have had no sexual experience with her and none was proved. He also claimed that the choking took place during an argument following a demand by the woman for $20 after reaching the room. Defendant stated his original plan was to cut up the body of his victim so as to carry it out of the hotel in package form. To this end one leg was severed, but the plan was then abandoned because of the difficulty of its accomplishment. Instead the several parts of the body were placed in a closet of the room. As defendant was leaving the hotel at about 11 a. m. on November 15, he met the hotel maid in the hall, handed her $1 and told her not to go into the room as his wife was tired and he wanted her to rest. At the hotel office he tried to rent the room for another night but was unable to do so. Before leaving the room defendant had attempted to strap the knife to his body with adhesive tape but without success. The knife, empty whiskey bottle, and some wrapping paper were later found in the room

Shortly thereafter on November 15, defendant picked up a second girl at a bar and went with her to the Joyce Hotel, arriving at about 1:25 p. m. Defendant also gave this woman $5. She was later identified as Lillian Johnson. Defendant stated to the hotel operator that his wife was drunk and he wanted a room for two or three hours in order to sober her up. A room was given them and defendant signed the register, "Mr. and Mrs. O. S. Wilson." He proceeded with this second victim in much the same manner as the first except that he used a razor blade instead of a knife. Because of the difference in the implement used, the body of his second victim was not so badly mutiliated as the first. About an hour after defendant had entered the hotel, he came to the desk and asked for the room overnight. Upon refusal of his request he stated that he was going down to get his wife some sandwiches. He then left the hotel, went to a picture show, and was later arrested in a bar. As the arresting officer searched defendant, the latter unsuccessfully tried to have the officer throw away a match cover bearing the name "Barclay Hotel." Later at the police station, defendant threw the match cover under a chair.

The police obtained a statement from the defendant which was reduced to writing and then signed by defendant. An addition to this statement made at the time of signing reads as follows: "I would like to add that I have always been emotionally unstaple (sic) and that with my sexual complex I went completely insane and I could not possibly control myself." Defendant denied that he acted under delusions or hallucinations and stated that at no time was he so drunk that he did not know what he was doing.

The background of the defendant, as related by him to the psychiatrists who examined him, is as follows:

Defendant was born in Shelbyville, Indiana, in 1910. He has three or four sisters and two brothers living and he believes them to be responsible people. His father died when he was five years of age and defendant was then placed in an orphanage. He saw his mother, who had remarried, on only a couple of occasions thereafter, and she died when he was about 12 or 13 years of age. Defendant attended grammar and high school at the orphanage and was graduated at the age of 19. He enlisted in the United States Navy in August, 1930, and advanced to the rank of pharmacist's mate, second class, and was discharged on January 9, 1941. At about 24 or 25 years of age, he began to drink alcoholic beverages but claimed that he did not often drink to excess up to a year or so prior to the time here involved. Defendant did not mix well with people and as a child and as an adult was alone much of the time. As a youth he did a great deal of daydreaming which later changed to fantasies of more adult character. Both in childhood and later his daydreaming was about girls, women, and anatomical characteristics of the body. In recent years certain fantasies of cruelty entered into his daydreams, such as choking a woman, cutting her up, eating parts of her body, and drinking her blood. He claimed that such fantasies were so strong that there was a considerable force to them toward putting them into effect, and he thought seriously of doing so, but always refrained because of a certain control of himself by reason of the consequences. Defendant had no contacts with girls while in the orphanage but his outside contacts and those in later life left him with the impression that girls did not consider and treat him the same as other men and, because of this feeling, he developed a certain bitterness toward them which accentuated his sadistic tendencies.

In 1937, he married a Navy nurse and they separated about three years later when she turned him in to the naval hospital for mental observation. The circumstance which led to her action was his hitting her on the chin and pulling a butcher knife out of his robe, causing her to make her escape through a bathroom window. She charged: "(1) that her husband is a homosexual; (2) that he was 'sexcrazed, insane on the subject, and has suggested that she assist in the sadistic mutilation of a girl by cutting off her breasts and clitoris'; (3) that he has been drinking constantly and to excess; (4) that his actions had been threatening toward her; (5) that he has threatened suicide; (6) that he has been mentally confused on at least two occasions, often moody, depressed, restless, irritable, with definite personality change in the past year."

The statement of the examining neuropsychiatrist at the naval hospital was that there was no obvious psychosis but that the question of sexual psychopathy, homosexuality, and perversion with express sadistic tendencies of a criminal nature was so serious in its implication that prolonged observation and study were necessary. He was discharged on January 9, 1941, as a "C.P.S. Sexual Psychopath. Not recommended for reenlistment." His wife secured a divorce in 1942. After discharge from the Navy, defendant worked in restaurants and as a laborer. He worked at no one place for more than two months. His previous criminal record consists of a conviction of battery (charge changed from attempted rape) and a conviction of second-degree burglary, for which he served short jail terms. He has also been arrested two or three times for intoxication. He was on parole at the time he committed the offenses herein considered. Defendant indulged in homosexual practices and had sexual relations with a number of different women over a period of years. He is afflicted with syphilis which was first detected in 1942, but it is not of such an advanced stage as to affect him mentally.

At the trial seven psychiatrists testified upon the issue of defendant's sanity. They based their conclusions upon the facts and circumstances surrounding the killings, the historical background of defendant (both of which were related to the respective doctors by defendant and counsel on both sides substantially as set out

above), certain physical and neurological tests and their conversation with and observation of defendant. Three psychiatrists produced by the defense testified that in their opinion defendant was legally insane when he committed the offenses. On the other hand, the remaining four psychiatrists, two of whom testified that they were appointed by the court, gave as their conclusion that he was a sexual psychopath but was at all times legally sane in the sense that he knew the difference between right and wrong and the nature and consequences of the acts committed by him.

It thus appears that but two questions were presented for determination in the trial court with respect to each count: (1) the question of the degree of the alleged murder to which defendant had entered his plea of guilty and (2) the question of defendant's sanity under his plea of not guilty by reason of insanity.

[1-3] With respect to the question of the degree of the crimes, the evidence concerning the activities of defendant during the two-day period, including the making of the hotel arrangements, the purchase of the knife, the commission of both offenses in much the same manner, and the making of obvious efforts to delay discovery of the crimes, shows a purposeful, calculating mind, acting with deliberation and premeditation and with a consciousness of guilt, and is sufficient to support the court's fixation of the degree of the murders as first degree. With respect to the question of the sanity of the defendant, the evidence was conflicting but there was abundant evidence given by four of the psychiatrists to support the jury's finding that defendant was sane at the time of the commission of the offenses. The jury impliedly found, upon sufficient evidence and under full and fair instructions, that defendant knew the difference between right and wrong and knew the nature and consequences of the acts committed by him. Under these circumstances, defendant is responsible in the eyes of the law for such acts, regardless of any perversion of his moral senses and regardless of his sadistic tendencies. People v. French, 12 Cal.2d 720, 87 P.2d 1014; People v. Walter, 7 Cal.2d 438, 60 P.2d 990; People v. Troche, 206 Cal. 35, 273 P. 767.

The judgments and order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



28 Cal.2d 33

EMPIRE STAR MINES CO., Limited, v. CALIFORNIA EMPLOYMENT COMMISSION.

Sac. 5680.

Supreme Court of California.

April 23, 1946.

Rehearing Denied May 20, 1946.

1. Master and servant ⇐78

The objects and purposes of Unemployment Insurance Act are not limited to the raising of revenue, but the act is a remedial statute, and the provisions as to benefits must be liberally construed for the purpose of accomplishing the objects of the act. Gen.Laws, Act 8780d.

2. Master and servant ⇐78
Taxation ⇐59

The taxing sections of Unemployment Insurance Act and the sections conferring benefits are entirely separate, notwithstanding that benefits are paid from the amount collected as taxes imposed by the Act. Gen. Laws, Act 8780d.

3. Taxation ⇐59

The employee-employer relationship is the basis of the requirement for contributions under Unemployment Insurance Act, and a principal for whom services are rendered by an independent contractor does not come within the Act. Gen.Laws, Act 8780d.

4. Master and servant ⇐5

In determining whether one who performs services for another is an employee

or an independent contractor, the important factor is the right to control the manner and means of accomplishing the result desired, and if the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an "employer-employee relationship" exists.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee".

5. Master and servant ⇐1

Strong evidence in support of an employment relationship is the right to discharge at will without cause.

6. Master and servant ⇐1

Factors to be considered in determining whether employer-employee relationship exists are whether employee has a distinct occupation or business, whether the work is usually done under direction or without supervision, the skill required, who supplies the tools and place of work, length of time required, method of payment, whether the work is a part of principal's regular business, and whether the parties believe they are creating such relationship.

7. Taxation ⇐59

Persons to whom mining company leased particular areas and who were independent from any supervision by company of method, manner or details of mining operations, and who carried on mining activities at their own risk in their own way for their own profit, were "independent contractors" and were not "employees" for whom company must make unemployment compensation contributions. Gen. Laws, Act 8780d.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractors".

8. Master and servant ⇐78

The determination of California Employment Commission that individual miners to whom mining company leased certain mine areas were entitled to unemployment benefits was not determinative in company's action to recover unemployment insurance taxes paid under protest, of issue whether mining company must make unemployment compensation contributions for such miners, inasmuch as taxing sections and benefit sections of Unemployment Compensation Act were entirely separate. Gen.Laws, Act 8780d, §§ 41.1, 45.10, 67.

9. Mandamus ⇐73(1)

The final ruling of California Employment Commission whether claimant is an unemployed worker entitled to unemployment compensation benefits is reviewable by mandamus. Gen.Laws, Act 8780d, § 67.

10. Master and servant ⇐78

A determination of California Employment Commission that applicant is entitled to unemployment compensation benefits is not res judicata in action brought by employer for recovery of contributions paid under protest on ground that employer is not an employer within Unemployment Compensation Act. Gen.Laws, Act 8780d, §§ 45.10, 67.

11. Judgment ⇐547

Generally, res judicata doctrine cannot be availed of in connection with the exercise of administrative powers.

12. Judgment ⇐542

For the defense of res judicata to operate as an estoppel, there must be a judgment rendered by a court of competent jurisdiction.

13. Master and servant ⇐78

In action to recover unemployment insurance taxes paid under protest, record of proceedings in which California Employment Commission allowed unemployment compensation benefits to claimants as employees of plaintiff was properly rejected, since the action was a statutory action having no connection with commission's ruling upon the benefit claims. Gen.Laws, Act 8780d, §§ 45.10, 67.

14. Master and servant ⇐78

The failure of mining company to attack by mandamus proceeding the determination of California Employment Commission allowing unemployment compensation benefits to claimants as employees of mining company did not estop mining company from asserting, in action to recover unemployment contributions paid under protest, that claimants were not employees for

whom company must make contributions, since Unemployment Insurance Act requires payment of benefits even before any decision upon any administrative appeal which might have been prosecuted by the mining company. Gen.Laws, Act 8780d, § 67.

In Bank.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Empire Star Mines Company, Limited, a corporation, against California Employment Commission, to recover unemployment insurance taxes paid under protest. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 158 P.2d 606.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Robert M. Searls, of San Francisco, and Lynne Kelly, of Grass Valley, for respondent.

H. Ward Sheldon, of Nevada City, amicus curiae on behalf of respondent.

EDMONDS, Justice.

The Empire Star Mines Company contracted with certain persons, on a royalty basis, to produce ore from various portions of its properties. Upon a ruling of the California Employment Commission that these persons were employees within the meaning of the Unemployment Insurance Act, Stats. 1935, p. 1226, as amended; Deering's Gen. Laws, 1939 Supp., Act 8780d, the mining company, under protest, paid the taxes imposed by that statute. The trial court held adversely to the state's construction of the contracts, and the commission has appealed from the judgment entered in conformity with that determination.

For many years, the respondent has operated the Empire-North Star group of mines in the Grass Valley Mining District of California. One of them, known as the North Star Mine, contains approximately 150 miles of underground workings. In 1929, when the company commenced to operate that property, it determined that the production of ore in some of the extensive tunnels far from the only available shaft would be commercially impracticable. The company also concluded that independent and experienced operators, with the incentive to make more than wages by skillful mining of the veins, and exercising much more care in the selection of ore than is customary in usual mining operations, could profitably work the remote ore bodies.

Accordingly, early in 1930, the company offered to lease certain of these areas in the mine. Such contracts were an old practice in the Grass Valley Mining District, the custom having been brought over from Cornwall many years ago. Prospective leasers investigated and sampled the areas for which contracts were offered and, following these examinations, many miners, usually on behalf of and in association with a group of workers, executed leases of those parts of the mine which had been selected by them.

Except as to the descriptions of the areas leased, the terms of these contracts are substantially uniform. By the provisions of the agreements the lessees, who are referred to as leasers or tributers, for a period of six months were given the exclusive right to mine and carry on development work in a described area. The mining company agreed to furnish sufficient water and compressed air for operating machine drills and to supply the necessary track, tools, and drill steel; also, to hoist the ore and waste rock delivered by the leaser at the vertical shaft of the mine. A further agreement of the lessor was to place at the leaser's disposal the necessary facilities for the milling of the ores mined by him and upon retorting the amalgam and melting the bullion, to market the product.

In consideration of the lease of the mining rights and the facilities furnished by the lessor, the parties agreed that the company should retain, as a royalty, 50 per cent of the gross recovery from all ores mined by the leaser. But there was the condition that in the event the assay value of the concentrates was less than $60 per ton, the royalty might be increased by the

lessor to a reasonable amount commensurate with the extraction costs, but, under such circumstances, the leaser was given the right to dispose of his portion of the concentrates.

The leaser agreed "to perform all work in good and miner-like manner, installing timber where necessary, and maintaining all workings in a safe condition; to furnish all explosives and fuse necessary for mining operations * * *, such explosives and fuse to be purchased from the Lessor at Lessor's cost, delivered at the mine." The leaser was given the right to carry on mining operations with workmen employed upon either a wage or profit-sharing basis but, without the consent of the company, he was limited to a working force of eleven persons. The lease expressly declared that there should be "no privity of contract between said Lessor and the employees of said Lessee, but that all business transacted under the terms of this lease shall be transacted by and in the name of said Lessee." The leaser assumed full and sole responsibility for the operation and direction of the work done under the lease; also, the contract specified that all persons employed "by the Lessee, whether it be on a wage or tribute basis, shall be deemed the employees of the Lessee, and not under any circumstances the employees of the Lessor." The leaser was required to obtain with an insurance carrier and in an amount satisfactory to the mining company, adequate compensation insurance for himself and all workmen employed in any capacity in his operations under the lease.

Other provisions as to workmen were that although the mining company should have no part in the selection, employment or direction of the leaser's employees, upon written request, he agreed to discharge any employee whom the lessor's superintendent designated as objectionable. The leaser also agreed "to use suitable precautions to prevent any theft of ore, amalgam or concentrates by anyone, whether connected with Lessee's operations or not. * * *"

The tramming, hoisting, storage and milling operations of the ore produced by the leaser were to be carried on in accordance with schedules set by the company. It reserved the right to enter the leased area "to inspect work done in both underground and milling operations, for the purpose of determining the grade of ore being mined, the size and location of veins and the efficiency of milling operations."

The leaser had the right, upon ten days' notice, to terminate the contract. After thirty days' notice, the lessor might do so for the failure of the leaser to perform the covenants of the lease on his part to be performed; if the operations were not financially profitable to the lessor; if the lessor should suspend all of its operations at the mine; in the event that the mine should be wholly or partially destroyed or rendered useless by fire, flood, or act of God; or upon the discovery of evidence by the lessor, through search or other means, that substantial amounts of ore, amalgam or concentrates were being stolen or not accounted for. The agreement was not assignable without the written consent of the lessor.

The leases executed in 1930 were extended, sometimes orally, for successive periods of six months. Other leases, substantially in the same form, were signed in 1935 and again in 1939. Under protest, the company paid to the federal government amounts demanded from it for taxes claimed to be due under titles VIII and IX of the Social Security Act, 42 U.S.C.A. § 1004 et seq. 1101 et seq. Suit was then commenced to recover the federal taxes. Meantime, early in 1940, the California Employment Commission made a demand upon the mining company for the payment of the tax which the Unemployment Insurance Act, supra, lays upon employers subject to its provisions. The basis of this demand was that the company's leasers were employees and not independent contractors. Under protest the company then paid 3.7 per cent of the total amount received by the leasers.

In the federal litigation, the court held in favor of the mining company, and following the affirmance of the judgment (Anglim v. Empire Star Mines Co., 9 Cir., 129 F.2d 914), the present action was com-

menced. In addition to a general denial of the allegations of the complaint regarding the status of the leasers, as a separate defense, the commission pleaded that claims for unemployment benefits had been filed with it by certain persons, each of whom asserted that he had rendered services for the company under a contract for hire and that such services constituted employment within the meaning of the Unemployment Insurance Act. The company was a party to the proceedings in connection with these claims, joined issue by denying that the services rendered constituted employment and introduced evidence in support of its position. Upon a finding that the claimants were employees and not independent contractors, the commission paid unemployment benefits. That decision was not judicially attacked, the answer asserted, and is final. Although the pleading does not identify these persons, the briefs disclose that the claimants were partners of leasers who had worked out and abandoned the portions of the mine contracted for by them. Before the trial, several actions to recover taxes paid under protest upon the amounts received by leasers of parts of other mines of the respondent under contracts in the same form as that which has been summarized, were consolidated with the present suit.

The evidence presented by the mining company in support of its claim for refund consists of a transcript of the record in the federal suit, introduced by stipulation of the parties, three additional leases and a statement of the taxes paid under protest. The mining company's manager of certain of its properties upon which leases were made and also its general manager appeared and testified. The amount of the leasers' earnings during the period for which taxes were paid was shown by tabulations of its accountant, verified by his testimony. No witness was called by the state, but in support of its separate defense, it offered the record of the proceedings before the California Employment Commission upon the claims of the persons who had worked for leasers. The court sustained the mining company's objection to the introduction of this evidence and later granted its motion to strike out the separate defense.

Upon the issues of fact, the trial court found that as a "matter of practice, the leasers at all times have been entirely independent from any supervision, direction or control by the plaintiff [mining company] of the method, manner or details of the leaser's operations in the leased areas." The provisions authorizing the lessor to enter the leased areas and "to inspect work done in both underground and milling operations * * * did not give the plaintiff [lessor] the right to direct or control the means or methods by which the leasers conduct their mining operations." These conditions, the court found, were imposed to prevent ore stealing or "highgrading," to insure the leasers' compliance with safety orders of the California Industrial Accident Commission, to obtain information as to whether the leasers kept within the leasing boundaries, and to ascertain the possible direction of ore bodies in order to determine whether these veins might be found in areas of the mine other than those leased. The requirement that the work should be done "in a minerlike manner" for the due preservation of the mine and safety of all persons underground, said the court, is one customarily found in mining leases.

The mining company "had no right to control, nor has it exercised any control, of the means, details or methods by which the various lease groups conduct sorting and milling operations." Although the lessor's regular mill employees have, at the request of the leasers, assisted the lease groups in milling their ore, as to such operations, those employees were subject to the direction and control of the leasers who were charged for such services.

The provisions concerning tramming and storage operations of the ore and waste, as mutually interpreted by the mining company and the various leasers in practice were not construed as giving to the corporation the control of, or the right to control, the details, manner or methods by which the leasers conducted these operations, but only the right to establish schedules by which such work might be carried

out most conveniently. Such schedules were necessary to insure, for the various lease groups, an orderly and separate handling, treatment and storage of their ores, as well as to insure compliance with mine safety orders of the California Industrial Accident Commission. By the terms of the leases the mining company "did not have the right to control * * *, nor did it in practice control or direct, or assert any control or direction over, the hours or number of shifts worked by the leasers, or the amount of ore extracted by the lease groups, or the selection or employment of the individual leaser associates or employees."

The provisions by which the leaser agreed to discharge any employee whom the company's superintendent designated as objectionable and the requirement for suitable precautions to prevent the theft of ore, amalgam, or concentrates were imposed "not only for the purpose of preventing * * * 'highgrading' but also to insure compliance by the leasers with the safety orders of the Industrial Accident Commission." As mutually construed in practice, this provision was not intended to give, nor did it give, to the lessor "the right to control the means, details, or methods of leasers' operations." Furthermore, said the court, "the company has never discharged, or asserted the right to request discharge of, any member or employee of any lease group." No contract was ever terminated by the lessor and the provisions allowing it to do so did not give the mining company control over the leasers' operations.

The provision that the leaser should purchase all explosives and fuse necessary for mining operations from the company and at its cost was to the advantage of the leasers because it effected a saving to them of approximately 20 per cent. Purchasing from the company also relieved the leasers from inconvenience and hazard in handling outside purchases of explosives and bringing them underground for storage purposes. In practice, this provision was not construed as obligating the leasers to purchase all materials and supplies from the company.

Concerning the division of the proceeds from the ore, the court found that the company "stored and shipped the bullion bars for each lease group separately and accounted separately to a designated representative of each lease group. * * *" It did not control or participate in, directly or indirectly, the apportionment of the payment for bullion bars among the members of any lease group. The members of each group shared in the profits of the mining operations. They participated in the selection of new associates or employees, in the determination as to the methods to be followed in the mining operations, in deciding upon the basis for accounting between themselves, and in the selection or designation of a lease group representative. Except as to a few men who "were hired by the lease partners themselves," the company and the leasers considered the members in each lease group to be partners who were carrying on mining operations.

As conclusions of law, the trial court declared that the leasers were independent contractors and not employees of the mining company and that neither of them was liable for the payment of unemployment insurance taxes upon the earnings of the leasers from their operations. Judgment was accordingly ordered for the amount of taxes which had been paid.

As grounds for a reversal of the judgment the commission contends that the Unemployment Insurance Act, supra, is social legislation, as distinguished from a taxing statute, and must be liberally construed. The mining company had the right to completely control the leasers, hence under the common law rule, the contract established the relation of master and servant. But the courts, in construing the statute, are not bound by the rule of the common law; "they must search for and apply a distinction" which will accomplish the purpose of the legislation, and the decision in Anglim v. Empire Star Mines Co., supra, is not determinative of the present controversy. Furthermore, the argument continues, the ruling of the commission that the persons who claimed unemployment benefits were employees of the mining company is res

judicata in the present action. In conclusion, the attorney general says, the trial court committed prejudicial error in refusing to accord the decision of the administrative board the weight to which it is entitled, and because the administrative ruling allowing benefits was not challenged by a proceeding in mandamus, the mining company is estopped from asserting in the present action that the leasers were not employees.

In response to these contentions, it is argued that neither under the lease agreements nor under common law rules were the leasers in employment within the meaning of the Unemployment Insurance Act; that the defense of res judicata is not applicable because the commission has no judicial power; that the present action is statutory, not in the nature of a review, and thus the cases in mandamus cited by the attorney general are not in point; and that the plea of estoppel may not be availed of because the law requires the payment of benefits upon a referee's decision favorable to the claimant.

[1, 2] The objects and purposes of the Unemployment Insurance Act are not limited to the raising of revenue. It is a remedial statute and the provisions as to benefits must be liberally construed for the purpose of accomplishing its objects. California Emp. Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 150 P.2d 186. But there is no basis for the attorney general's contention that because the legislation confers benefits and also imposes taxes, the two parts of the law are inextricably connected. The taxing sections of the legislation are entirely separate from those concerning benefits, and although the benefits are paid from the amount collected as taxes imposed by the act, the provisions fixing liability for payments to the fund are to be considered accordingly.

[3-6] The relationship contemplated by the legislation as the basis of the requirement for contributions is that of employer and employee; a principal for whom services are rendered by an independent contractor does not come within the scope of its provisions. Garrison v. State of California, 64 Cal.App.2d 820, 824, 149 P.2d 711; see California Emp. Comm. v. Bates, 24 Cal.2d 432, 150 P.2d 192; California Emp. Comm. v. Los Angeles, etc., News Corp., supra. In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. California Emp. Comm. v. Bates, supra; California Emp. Comm. v. Los Angeles, etc., News Corp., supra.

Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest., Agency, § 220; Cal.Ann. § 220.

[7] The trial court found that under the lease contract the leaser and not the lessor had the right to direct the work in the leased areas, and, as a matter of practice, at all times he was entirely independent from any supervision, direction or control by the mining company of the method, manner or details of the mining operations. The commission has not questioned the sufficiency of the evidence to sustain that or any other finding. The testimony shows that the men who were hired by the mining company worked in regular shifts. They were assigned to their working places

by a shift boss and were told what to do, where to drill, just how to drill and frequently were told how much powder to load. The mucker was told what to pick out for waste, what to send to the chute for ore, what chute to use, where to pile the waste, and where to put rock walls.

The leasers carried on their operations quite differently. They determined for themselves, within the group, what work they would do, and how it should be done. They fixed their own working time. No leaser was ever requested to discharge anyone. Once, in the whole six-year period, the superintendent told a head leaser that one of his associates had persistently violated mine safety rules and suggested a two weeks' punitive lay-off of the offender which was carried out by the lease group to which the man belonged.

The foremen and shift bosses never visited the leasers' work. About once a month the company's safety engineer would go through the leased areas to see if the regulations of the Industrial Accident Commission were being carried out. He occasionally gave the leasers helpful suggestions but no orders. Occasionally a leaser would apply to one of the company's engineers for geological advice with respect to the vein he was following. Such help was always given as an accommodation. If a leaser had cross-cutting to do or other dead work in following a vein, he would sometimes hire men and pay their wages. The leasers directed the milling operations and, if they so requested, the size of the screens or the arrangement of the jigs was changed. All of these practices are entirely inconsistent with an employer-employee relationship.

The provisions of the agreement giving the company the right of access to those portions of its mine which had been leased and to inspect work done in both underground and milling operations, as well as the requirement that the work should be well performed with suitable precautions to prevent the theft of ore, do not prove that the leasers were employees. On the contrary, as the court impliedly, if not directly, found, those demands tend to prove the relationship of principal and independent contractor. Unquestionably the mining company had a considerable interest in the suppression of highgrading, and was bound to see that there was complete compliance with safety orders of the Industrial Accident Commission. Other reasons which would prompt any lessor of mining property to insist upon the right of access are to afford a means of ascertaining whether the lessees kept within the boundaries specified in the agreement and to follow the direction of the ore bodies to other parts of the mine.

Also, in the operations of a large enterprise such as the Empire Star Mines, necessarily the tramming and storage of the ore produced by an independent contractor would have to be handled in accordance with schedules worked out for mutual convenience.

All of this evidence tends to prove that the leasers were carrying on mining activities at their own risk, in their own way, for their own profit, and places the trial court's findings to this effect beyond the reach of an appellate court. Although the language of the contract is not conclusive, it includes all of the essential elements of a mining lease. Of particular significance is the provision that the mining company could terminate the agreement only upon thirty days' notice and for specifically enumerated causes. As a matter of law, there is no condition or requirement which compels a determination that either the person designated as the leaser, or anyone working for him, was an employee of the corporation. The testimony concerning the conduct of the parties directly negatives an employment relationship, and taken as a whole, the evidence substantially, if not conclusively, supports the determination of the trial court that the leasers were independent contractors. As the Circuit Court of Appeals succinctly summarized its conclusions upon the same facts:

"The typical leaser is the resourceful miner who prefers the speculative rewards, along with the risks, of operating on his own account. There was in the practice here no element of calculated tax avoid-

ance. The taxpayer's leasing program was inaugurated years before the Social Security Act was placed on the books. We entertain no doubt that these leasers should be classed as independent contractors. We are not unmindful of the beneficent purposes of the Act, but the extension of its benefits to wider fields is not the business of the courts." Anglim v. Empire Star Mines Co., supra, 129 F.2d at page 917.

[8] The allowance by the commission of the claims of certain leasers to unemployment benefits upon a finding that the applicants were employees of the mining company is not determinative of the issue in the present action, as the attorney general contends. Perhaps, for the reasons stated in Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 109 P.2d 935, the mining company might have sued in mandamus to test the ruling upon the sole question of employment. However, the position of the Bodinson Company was quite different from that of the respondent now before the court. In the Bodinson case, the claims of certain applicants for unemployment benefits were resisted upon the ground that, although these persons had been employed by the company for some time, they were ineligible for benefits under the statute because they left their work as the result of a trade dispute. The mining company insists that the leasers were not employed by it but operated as independent contractors.

[9] But regardless of this difference, the Unemployment Insurance Act, supra, makes a clear distinction between procedures available to a person against whom a levy for contributions is made and the means specified for an applicant to secure a determination of his claim to benefits. The provisions concerning claims for benefits are found in article 6 of the statute. Under section 67 of this article, an applicant for benefits who asserts that he is unemployed but available for and able to work may have an initial determination "with respect to whether or not benefits are payable, the weekly benefit amount payable, and the maximum amount of benefits payable." Any employer whose reserve account may be affected by the payment of benefits to the applicant, is given the right to appear in the proceeding. Either the applicant or the employer may appeal from the initial determination and the final ruling is reviewable by mandamus. Matson Terminals, Inc., v. California Emp. Comm., 24 Cal.2d 695, 151 P.2d 202.

Article 4 of the statute concerns "contributions," a euphemistic expression meaning tax exactions. Section 45.10 of this article gives to any person from whom a tax has been illegally collected upon the ground that he is an employer, the right to sue the commission for its recovery. The distinction between this cause of action and the right of an employer to contest, in an administrative proceeding and by judicial review, a claim for benefits has been clearly stated in W. R. Grace & Co. v. California Emp. Comm., 24 Cal.2d 720, 727, 151 P.2d 215, 219, where it was held: "The superior court actions, which in the view of the commission and claimants abate the present proceedings, are suits to recover unemployment insurance contributions paid by the employers under protest, brought under anthority of section 45.10 of the Unemployment Insurance Act * * *. The present petition for a writ of mandamus is to test the validity of the commission's decision that claimants are entitled to the benefits of the Unemployment Act in the form of payments or credit for the weeks of waiting period, and is in effect an appeal to the courts from a determination under section 67 of the act. An action under section 45.10 is entirely different, simple determining the propriety of the employer's contributions to the fund."

[10] The article which specifies the procedure for the levy and collection of contributions includes section 41.1 which provides a remedy for an employer whose account is charged with benefit payments which he contends were illegally made. Under such circumstances, the statute reads, he may protest the charge but, pending a determination of the controversy, he is required to pay the tax. In the event of an adverse administrative ruling, he may then sue the commission to recover the asserted

overpayment. But a determination that an applicant is entitled to benefits is not, as the attorney general insists, res judicata in an action brought under the provisions of section 45.10 for the recovery of contributions paid under protest upon the ground that the plaintiff is not an employer within the meaning of the statute. What was said in Matson Terminals, Inc., v. California Emp. Comm., supra, 24 Cal.2d at page 702, 151 P.2d at page 206, concerning the bar of an administrative decision upon the question of eligibility for benefits is applicable only to a later proceeding under section 41.1 for a determination of the rate chargeable against the employer for a succeeding taxable period.

[11, 12] This conclusion is in accordance with the general rule that the doctrine of res judicata may not be availed of in connection with the exercise of administrative powers. Olive Proration, etc., Committee v. Agricultural, etc., Comm., 17 Cal.2d 204, 208, 109 P.2d 918; see 30 Am. Jur., Judgments, § 164, and cases cited under note no. 16, p. 910. For the defense of res judicata to operate as an estoppel there must be a judgment rendered by a court of competent jurisdiction. Panos v. Great Western Packing Co., 21 Cal.2d 636, 637, 134 P.2d 242; Edmonds v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 439, 19 P.2d 502; In re Estate of Bell, 153 Cal. 331, 339, 95 P. 372; Waterbury Sav. Bank v. Danaher, 1941, 128 Conn. 78, 20 A.2d 455, 461; see Freeman, Judgments, 5th Ed., vol. 2, § 633. The Employment Commission has no judicial power (Bodinson Mfg. Co. v. California Emp. Comm., supra, 17 Cal.2d at page 326, 109 P.2d 935; see Waterbury Sav. Bank v. Danaher, supra, 20 A.2d at page 461), and a decision of that body is of the same character as the one which was considered in Waterbury Sav. Bank v. Danaher, supra. In refusing to apply the doctrine of res judicata to a determination of Danaher as administrator of the Unemployment Act of Connecticut, the court held that the rule "is not applicable to the defendant's action as an administrative official in this case, but relates only to decisions rendered by a court of competent jurisdiction."

[13] As a further ground for the reversal of the judgment, the commission argues that, under the rule stated and applied in Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425; Madruga v. Borden Co., 63 Cal.App.2d 116, 146 P.2d 273; Vaughn v. Board of Police Commissioners, 59 Cal.App.2d 771, 140 P. 2d 130; and National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170, although it is the duty of a court in a trial following the finding of an administrative body to exercise an independent judgment upon the facts and the law, the challenged determination will not be disturbed if it is supported by substantial evidence. But the cases upon which the commission relies are not here in point. Those decisions concerned the procedure to be followed in mandamus or certiorari; the suit of the mining company is not a review of the administrative order but, for the reasons heretofore stated, a statutory action having no connection with and independent of the commission's ruling upon the benefit claims. Accordingly the trial court correctly ruled in striking from the commission's answer the defense of res judicata and in sustaining the mining company's objection to the introduction in evidence of the record of the proceedings in which benefits were allowed.

[14] The attorney general states that because the mining company did not attack by a proceeding in mandamus the administrative ruling allowing benefits the commission paid the claims. For that reason, he says, the mining company is estopped from asserting in the present action that the leasers were not employees. However, under the Unemployment Insurance Act, supra, upon the affirmance by a referee of an initial determination allowing benefits, "such benefits shall be paid regardless of any appeal which may thereafter be taken." Section 67. Accordingly, the law required the payment of benefits even before the decision upon the administrative appeal prosecuted by the mining company. This provision is "the very essence of the act." Abelleira v. District Court of Ap-

peal, 17 Cal.2d 280, 298, 109 P.2d 942, 132 A.L.R. 715.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



28 Cal.2d 50

BRIGGS v. CALIFORNIA EMPLOYMENT COMMISSION.

L. A. 19030.

Supreme Court of California.

April 23, 1946.

Rehearing Denied May 20, 1946.

1. Master and servant ⇐78

The relationship contemplated by the Unemployment Insurance Act is that of employer and employee, and it was not the intent or the purpose of the Legislature to include an independent contractor. Gen. Laws, Act 8780d.

2. Taxation ⇐59

Bottled water distributors who had routes for water company were "independent contractors" and not "employees" for whom company must make unemployment compensation contributions, where company had no right to control manner or means by which distributors sold water, and distributors worked few or many hours with no requirement that minimum quantity of water must be sold, and distributors sold routes without asking permission of and without knowledge of water company. Gen.Laws, Act 8780d.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractors".

3. Taxation ⇐543(1)

An action to recover unemployment insurance taxes paid under protest is a statutory action for the purpose of obtaining a judicial determination upon the question of tax liability. Gen.Laws, Act 8780d, § 45.10.

4. Master and servant ⇐78

In action to recover unemployment insurance taxes paid under protest, plaintiff was not bound by findings or decision of California Employment Commission that unemployment compensation benefit claimants were employees of plaintiff. Gen. Laws, Act 8780d, § 45.10.

In Bank.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by L. D. Briggs against California Employment Commission to recover unemployment insurance taxes paid under protest. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondent.

EDMONDS, Justice.

L. D. Briggs, doing business as Knoxage Water Company, sued to recover taxes levied under the Unemployment Insurance Act, Stats. 1935, p. 1226, as amended; Deering's Gen.Laws, 1939 Supp. Act 8780d, and paid by him under protest. As grounds for the reversal of the judgment in his favor, the California Employment Commission contends that the persons who performed services for him in the sale and delivery of bottled water were his employees and not independent contractors.

The facts are not in dispute In the years 1938 to 1940, inclusive, the Knoxage Water Company sold its product through distributors who contracted in writing with Briggs and were assigned specific routes. The commission assessed Briggs for contributions assertedly due under the terms of the statute, the amount of the tax being based upon the income of these distributors from their sales. Upon the protest of Briggs, filed pursuant to section 45.10 of the act, a hearing was held and evidence taken by the examiner of the commission. The examiner concluded that the distributors were

independent contractors and that the assessment levied upon their earnings should be cancelled. Upon exceptions to the examiner's report presented by its rules and regulations section, the commission reviewed the record and determined "that the distributors were subject to the direction and control of the petitioner [Briggs] to a great extent, and were in fact employees of petitioner."

Following this decision, Briggs paid, under protest, the amount of the contributions, with interest, assessed against him, and, in his complaint to recover the tax, alleged that the levy was invalid. The commission, by answer, admitted that payment was made as stated in the complaint but denied that it was illegally exacted. As a separate defense, the commission pleaded that, upon the evidence taken by its examiner, it had decided "that the water distributors were employees of * * * L. D. Briggs, doing business as 'Knoxage Water Company.'"

When the cause was called for trial, counsel for Briggs offered in evidence the record of the proceeding before the commission for the purpose of presenting the facts to the court as the basis for an independent determination upon them. The attorney general consented to the admission of the record into evidence but objected to its consideration "for any purpose other than to show the action taken by the Commission and the foundation upon which the Commission based its findings." He stipulated that if the witnesses who testified before the commission were produced in court, they would testify as disclosed by the record, but he objected to their testimony upon the ground that the law does not allow a trial de novo "in the true sense of the word" and in an action to recover taxes paid under protest following an administrative determination of liability, the court is bound by the findings of the commission. The objection was overruled and the cause submitted upon the record and the commission's certificate of assessment.

The evidence concerning the business methods of Briggs is uncontradicted. In the name of Knoxage Water Company, he entered into contracts for specified territories with various persons who were designated as distributors. The term of each agreement was three years and it was subject to renewal by mutual consent.

By the terms of these contracts, the company agreed to sell bottled water to the distributor at a stated price per bottle; to take back at invoice price any spoiled, deteriorated or unsaleable water; to protect the distributor against any decline in the resale price by rebates upon all stock in his possession at the time of the decline; and to cooperate with the distributor in furthering the sale of the product.

The contract required the distributor to purchase from the company all of the Knoxage water required by and supplied to customers in the territory assigned to him; to pay for the water in accordance with the prices and conditions fixed in the schedule of prices by the company; to sell the company's products at fixed prices; to keep his trucks painted and to cooperate with the company. Equipment furnished by the company, such as bottles, coolers, tilt racks and crates, were at all times to remain its property, and the distributor agreed to pay the market price for all equipment not returned or accounted for. The distributor undertook to use his best efforts in the furtherance of the sale of Knoxage water, and bound himself not to sell any other brand of water during the continuance of the contract or for one year thereafter. He also promised that, for one year after the termination of the contract, he would not solicit, divert or take away business of the company in the designated territory. By the terms of the agreement, the distributor was not to be deemed the agent of the company for any purpose other than that specifically stated.

In practice each distributor treated his contract as property. Several of them sold their routes and assigned their contracts for amounts ranging from $1,000 to $1,700. The company was not a party, directly or indirectly, to these sales. Each distributor owned his own truck, which was painted to conform to a general plan of color and advertising signs. Several distributors employed helpers. Neither the salary of these helpers or any other expense of the distrib-

utors was paid by the company. However, the company furnished advertising material and loaned dispensing equipment designed to facilitate the use of its water.

The distributors serviced their routes whenever and as often as they chose and were not required to report at the company's plant at any particular time. They received no instruction whatever and were not required to make any reports or handle any minimum quota of water. They extended credit to customers upon their own initiative and bore all losses by reason of bad debts. Generally accounts with the company were settled every two weeks.

The company had two routes which were operated with its own trucks. The driver of each of them, as compensation for the use of the vehicle, was charged an additional five cents per bottle. These persons did not pay for territorial rights and certain amounts fixed by the usual distributor's contract were not charged to them upon the termination of their services.

Licenses required by law were taken out in the name of the company but were paid for by the distributors. The company did not carry workmen's compensation covering the distributors, but the policies of public liability insurance obtained by each distributor upon his truck included the name of the company as one of the insured.

The name of a new customer obtained as the result of the company's advertising was given to the distributor serving the area in which he lived. Complaints from customers were handled in the same way.

Upon this evidence, the trial court found that Briggs, doing business as the Knoxage Water Company, was engaged in the business of selling spring, distilled and mineral water at wholesale to independent contractors who distributed and sold it at retail; that Briggs was not an employer as defined in the Unemployment Insurance Act and the assessments levied against him were not authorized by its provisions.

As grounds for a reversal of the judgment, the commission contends that the distributors were in the "employment" of Briggs within the meaning of the Unemployment Insurance Act, supra, as that term is defined by the statute. Also, it is asserted, the court committed prejudicial error in allowing a trial de novo and refusing to accord the decision of the administrative board the weight to which it is entitled.

[1] The relationship contemplated by the Unemployment Insurance Act is that of employer and employee, and it was not the intent or the purpose of the Legislature to include an independent contractor. Garrison v. State of California, 64 Cal.App.2d 820, 824, 149 P.2d 711; see: California Emp. Comm. v. Bates, 24 Cal.2d 432, 150 P.2d 192; California Emp. Comm. v. Los Angeles etc. News Corporation, 24 Cal.2d 421, 150 P.2d 186. And as stated in the Empire Star Mines case (Empire Star Mines Co. v. California Employment Comm., Cal.Sup., 168 P.2d 686): "In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause."

[2] The uncontradicted evidence concerning the contract of the distributors and the operations carried on pursuant to those agreements clearly show that the water company had no right to control, nor did it, in practice, control the manner or means by which the route men sold water. Each of them was free to do as he pleased. He worked few or many hours with no requirement that he must sell any minimum quantity of water in a given period. He serviced his route whenever and as often as he chose and was not required to report at the company's plant at any particular time. He received no instructions and was not required to make reports. He extended credit or required cash at his discretion and bore all losses on debts. He did all of the work himself or hired helpers whom he paid. Although the record discloses that some of the equipment was furnished by the company, the distributor had to pay

the company the market price of all equipment not returned or accounted for and all but two of the distributors owned their own trucks. As the agreement was for a three-year period, the water company did not have the right to discharge the distributors at will without cause. Routes were sold without asking the permission of the company and often without its knowledge. Under these circumstances, in every respect, the distributor was an independent contractor.

The administrative proceeding resulting in the determination which, the attorney general asserts, the trial court should have sustained because it is based upon substantial evidence, was brought under a different provision of the statute from the one invoked by the claimants in Empire Star Mines Co. v. California Employment Commission, Cal.Sup., 168 P.2d 686. However, the principles which were stated and applied in that case are governing here. By the record now before the court, it appears that following the protest of Briggs to an assessment levied against him by the Employment Commission in accordance with the provisions of section 45.5 of the statute, an administrative hearing was held. The examiner of the commission determined that the distributors were not employees of Briggs but independent contractors. Upon an appeal from that decision, the commission held to the contrary.

[3, 4] Thereafter, Briggs paid the amount assessed against him for contributions and commenced the present suit pursuant to the provisions of section 45.10 of the statute. As has been held in the Empire Star case, this is a statutory action for the purpose of obtaining a judicial determination upon the question of tax liability. Accordingly, the trial court was not bound by the findings or decision of the commission, and the testimony of the witnesses presented by stipulation fully supports the conclusion that the distributors were independent contractors.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

28 Cal.2d 56

TWENTIETH CENTURY LITES, Inc., v. CALIFORNIA DEPARTMENT OF EMPLOYMENT et al.

L. A. 19401.

Supreme Court of California.
April 23, 1946.

Taxation ⊂59

Salesmen working for neon advertising sign company were not "independent contractors" but were "employees" for whom company must make unemployment compensation contributions, where salesmen were subject to control of company and company had right to terminate their services at will without cause, and salesmen's work was to some extent restricted to certain prospective customers, and all orders procured by salesmen were subject to company's approval, and salesmen were required to conform with rules pertaining to the business. Gen.Laws, Act 8780d.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractors".

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in mandamus by Twentieth Century Lites, Inc., against California Department of Employment and others, to compel the Employment Commission to set aside a decision and make a refund of unemployment taxes paid under protest. From a judgment discharging the alternative writ and dismissing the petition, Twentieth Century Lites, Inc., appeals.

Affirmed.

Prior opinion, 158 P.2d 600.

Musgrove & Cannan and Robert M. Miller, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent.

EDMONDS, Justice.

The California Employment Commission, acting under the same statute which was construed and applied in Empire Star Mines v. California Employment Commission, Cal. Sup., 168 P.2d 686, and Briggs v. California

Employment Commission, Cal.Sup., 168 P.2d 696, Unemployment Insurance Act, Stats. 1935, p. 1226, as amended; Deering's Gen. Laws, 1939 Supp., Act 8780d, determined that certain persons who solicited orders for Twentieth Century Lites, Inc., were employees. Upon that finding it levied an assessment upon the corporation for taxes at the rate imposed by the statute. The amount was paid under protest and the corporation sued in mandamus to compel the commission to set aside its decision and make refund accordingly. The appeal is from a judgment discharging an alternative writ of mandamus and dismissing the corporation's petition.

The facts are undisputed. The business of the corporation is the manufacture and sale of neon advertising signs. The salesmen solicited orders for these signs and, after ascertaining the desires of a prospective customer, submitted a rough sketch of the proposed display to the company's art department which prepared drawings and estimated the cost of the installation. Occasionally, when only a small sign was desired, the salesmen did not consult the art department.

If the company's design and price was accepted by the prospect, the salesman obtained from the customer a signed order on a form furnished by the appellant. The salesmen signed these forms as representatives of the company, but it reserved the right finally to accept or reject an order. Also, the company passed upon each customer's credit rating, carried all credit accounts, and paid the salesmen commissions only upon accepted contracts. Requested changes in the installation or adjustments as to price could not be made by the salesmen without the company's approval. In practice, it was the custom of the salesmen to ascertain if the customer's order had been satisfactorily completed and to refer any complaints to the service department for adjustment.

The salesmen were furnished desk space and telephone service in the company's office. Each of them used cards indicating that he was its representative, corresponded with customers on company stationery, and signed letters as a member of the sales department. A "lead" service was maintained which was available to all salesmen, except in certain instances when the name of a prospective customer was given to only one of them. One salesman testified that they were required to call upon the "leads" given them by the company. At one time, he said, a salesman was prevented from consummating a deal because the prospective customer was assigned to another person. Salesmen were not required to report regularly to the company's office, but they generally did so either by telephone or personally. When requested by the company they followed up a complaint and usually made a report concerning it.

The salesmen had the right to take their orders to other companies engaged in the same business, but in general practice Twentieth Century was offered the first opportunity to make the sale or lease. They were free to work for others or to devote as much time as they desired to other business activities, whether in competition with the appellant or not. They received no advances or loans from the company and were not given a drawing account.

There is evidence that on two occasions sales meetings were conducted, but no advertising material was furnished to the salesmen. They were not required to furnish a bond, to produce a minimum amount of business, nor to work fixed or regular hours. Their services were terminable without liability at the will of either party.

Not all of the salesmen had written contracts. However, one such agreement received in evidence provided that the salesman was to work diligently to sell or lease Twentieth Century's products, to solicit prospects and otherwise promote the business. He was also required to conduct his business and regulate his habits so as to increase the good will and reputation of the company. A further agreement of the parties was to conform to all laws, rules and regulations applicable to the business.

Other provisions of the contract were that the salesman was not to be restricted as to territory, time or method of sale, time devoted to the business, or the volume of business, nor required to submit reports of activities except as to completed deals. The salesman was given no authority to bind

the company unless specifically authorized in writing to do so in a particular transaction. Subsequent to the termination of the contract, the salesman was not to use to his own advantage, or to the advantage of any other person, information gained from the files and business of the company relating either to sales, leases or contracts covering the products of the company. Concerning the relationship of the parties, the contract provided that in any action at law, the salesman should be construed to be a subagent only with respect to customers for whom services were performed and otherwise deemed to be an independent contractor and not a servant, employee, joint adventurer or partner of the company.

The trial court's findings include substantially all of the facts which have been stated except some of the terms of the written contract. It is not true, the findings also declare, that Twentieth Century exercised no control over the salesmen; it is not true that the salesmen were independent contractors; and it is not true that the decision of the commission was improper, erroneous or unlawful or contrary to the provisions of the California Unemployment Insurance Act. Upon these findings, the court concluded that the payment of contributions by the corporation was not contrary to the provisions of the California Unemployment Insurance Act; that it was an "employer" within the meaning of the act; that the salesmen were in "employment" as such term is defined in the act and received "wages" from Twentieth Century; and that the decision of the commission was reasonable and proper.

The corporation, relying upon Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; and Sipper v. Urban, 22 Cal. 2d 138, 137 P.2d 425, declares that it was the duty of the court to make an independent review of the facts presented. There is a presumption that the findings of fact of the board are correct, it qualifiedly admits, the presumption being applicable only when there is a conflict in the evidence or when different inferences may be deducted from the evidence. The appellant asserts that there is little conflict in the evidence and that most of the findings of fact of the commission and of the trial court are correct. But it urges that, upon the facts found by the commission, the administrative determination was unlawful, arbitrary and capricious because the salesmen were independent contractors not subject to the provisions of the Unemployment Insurance Act.

The decision of the commission determining that the salesmen were employees, the attorney general contends, "should be vulnerable to attack only if it is shown that the board has acted arbitrarily or capriciously or that the determination was not supported by substantial evidence." He takes the position that rarely, if ever, will the determination of an administrative board be disturbed unless the person challenging it is able to show affirmatively a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts. The function of a trial court, he insists, is to determine "whether the Commission has properly performed its official duty and where the evidence is susceptible of two constructions, to take the view most favorable to the implied findings of the taxing authority." Accordingly, it is argued, as the trial court found that the conclusion of the commission is fully supported by the evidence, the decision should be affirmed. On the merits of the issue of employment, the attorney general follows the same line of reasoning advanced by him in the Empire Star and Briggs cases, asserting that under either a liberal or narrow interpretation of the provisions of the Unemployment Insurance Act, the salesmen were employees.

The factors to be taken into consideration in determining whether one who performs services for another is an employee or independent contractor are stated in Empire Star Mines Co., Ltd., v. California Employment Commission, Cal.Sup., 168 P.2d 686. Those principles are determinative of the present controversy. It reasonably may be inferred from the evidence presented to the trial court that the salesmen were subject to the control of the company. The company had the right to terminate their services at will without cause. To some extent it restricted the salesmen's work to certain prospective customers. Every order for the sale or lease of a sign was subject to the company's approval. Changes in the design or plan of installation or adjustments as to

price could not be made by a salesman without the company's approval. The written contract provided that the salesman was to work diligently for the advancement of the company's business and to regulate his habits so as to increase the good will and reputation of the company. Conformity with all rules and regulations pertaining to the business was required. Another factor tending to prove an employee status is that the salesmen were not engaged in a distinct occupation but carried on the regular business of the company which supplied them with some of the tools necessary to do this and with a place to work. And although different inferences may be drawn from the uncontradicted evidence, both the commission and the trial court found in favor of the employer-employee relationship.

No question has been raised upon appeal concerning the propriety of a proceeding in mandamus under the circumstances here shown and the decision of the trial court does not make certain whether the case was tried upon that theory or as one brought under section 45.10 of the Unemployment Insurance Act. The findings of fact, consistent with a proceeding in mandamus, are to the effect that upon an independent review of the record of the commission, the salesmen were employees within the meaning of the statute. The same determination is expressed in another form, consistent with the scope of the findings in a statutory action. But either upon the theory that in a proceeding in mandamus following the administrative decision, the trial court independently reviewed the record and rendered judgment in accordance with its own findings upon the evidence before the commission (Dare v. Board of Medical Examiners, supra, 21 Cal.2d 799, 801, 136 P.2d 304), or that the administrative record was used as presenting, by stipulation of the parties, the testimony of witnesses upon the issues in an action authorized by the statute, the evidence fully supports the conclusion that the salesmen were employees of the corporation and not independent contractors.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

74 Cal.App.2d 398

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. MATCOVICH.

Civ. 7216.

District Court of Appeal, Third District, California.

May 4, 1946.

1. Evidence ⇐417(10)

Where printed card signed by taxi dance hall operator and dancing girls as a preliminary act in establishment of relationship between them stated that the consideration to be paid the girl was a part of the money earned by her as mutually agreed upon, and the terms agreed upon were arrived at orally, the contract was an oral contract, and consequently parol evidence of the terms of contract was admissible in action against operator to recover unemployment compensation contributions. Gen.Laws, Act 8780d.

2. Appeal and error ⇐931(1)

On defendant's appeal from judgment for plaintiff, evidence was viewed in the light most favorable to the plaintiff.

3. Taxation ⇐59

Dancing girls working in taxi dance hall were not "independent contractors" but were "employees" for whom dance hall operator must make unemployment compensation contributions, where operator completely controlled activities and conduct of the girls while they were on the premises, and girls were free to terminate their services at will without being legally obligated to operator.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

4. Appeal and error ⇐1061(3)

Any error in denying a motion for nonsuit is harmless where the asserted sufficiency in the plaintiff's evidence is supplied by other evidence thereafter adduced.

5. Judgment ⇐585(5)

The estoppel of a judgment extends only to the facts in issue as they existed

at the time the judgment was rendered, and does not prevent a re-examination of same questions between same parties where in the interval facts have changed or new facts have occurred which may alter legal rights or relations of litigants, and this is true whether judgment is pleaded in bar only or by way of estoppel on certain issues.

6. Judgment ⇐585(5)

The doctrine of res judicata is not applicable where a cause of action arises out of the same subject matter but upon a new set of facts not obtaining at the time of the former judgment.

7. Judgment ⇐585(5)

A decision of superior court in a prior action involving a different period of time, that taxi dancing girls were not employees of dance hall operator, who consequently was not required to make unemployment compensation contributions, was not res judicata as to status of dancers in instant proceeding to recover contributions, where operator relied on written contract in instant proceeding but not in prior action, and manner of paying the girls was different in instant proceeding. Gen.Laws, Act 8780d, § 6.5.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the California Employment Stabilization Commission, successor to the California Employment Commission, formerly the Unemployment Reserves Commission, against N. S. Matcovich, individually and doing business as Rio Bar and Cafe, to recover contributions allegedly due under the California Unemployment Insurance Act, Gen.Laws, Act 8780d. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Robert H. Schwab, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen. and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent.

PEEK, Justice.

This is an action by the plaintiff commission to recover from defendant contributions alleged to be due plaintiff under the provisions of the California Unemployment Insurance Act, Deering's General Laws, Act 8780d. The findings and judgment of the trial court were in favor of plaintiff, and defendant has appealed.

A summary of the evidence in support of the judgment discloses the following facts:

Appellant was engaged in the business of operating a so-called "taxi dance hall", known as the "Rio Bar and Cafe", in the City of Sacramento, where soft drinks and beer were sold. In the operation thereof he engaged the services of various girls to dance with men patrons and aid in the sale of appellant's beer and soft drinks. Either before a girl went to work, or in some cases after she had danced a few times, appellant had her sign a printed card prepared by him which purported to make her a "licensee" and not an "employee" and read as follows:

"This is to certify that ——— is hereby granted the privilege of engaging in dancing with patrons of the undersigned at 416-18 K Street, Sacramento, California, in consideration of the payment to the undersigned of a portion of the money earned by her as mutually agreed upon.

"In granting this privilege, it is the intent hereof that licensee shall not become an employee of the undersigned and that she shall not become subject to the control of the undersigned.

"Licensee agrees to abide by all regulations established by the undersigned in the operation of his business.

"Dated ———, 193—.

"Rio Ball Room

"416 K Street, Sacramento, California

"By ————.

"Accepted:

"By ————."

A man was employed by appellant to sell dance tickets at ten cents each to the men patrons of the dance hall who in turn gave the tickets to the girls, one for each

dance. Of this money the girls received five cents for each ticket turned in and five cents was retained by appellant. For their assistance in the sale of beer and soft drinks, the girls received tokens representing one-half of the amount paid by the respective patrons. Six per cent of the girl's share of the amount taken by her for dances and the sale of drinks was retained by appellant, on the ground that this amount was to cover the cost of free dances. In the case of free dances the patron did not have to buy a ticket or coupon for the dance, but could dance with a girl without charge. Apparently these dances were given to entice the patron on the dance floor and were for the benefit of appellant as much as for the benefit of the girls. The girl not only had to dance the free dance, but had to pay a percentage of her entire remuneration for the evening on account of these dances.

There was testimony that the appellant could and did on occasion discharge a girl at will and without incurring liability, and that the girls likewise were free to terminate the relationship at any time. However, while they were engaged in their occupation, they were expected to work every night; and if a girl stayed away for more than a week she was required to obtain appellant's signed approval before she could resume work. If she desired to leave before the closing hour, it was necessary for her to secure the permission of appellant or of the special police officer who was an employee of and paid by appellant. She was forbidden to wear slacks at any time, although no such restriction was placed on couples who came from the outside to use the dance floor. She was instructed not to occupy a table with a patron or stand at the bar with him for more than fifteen minutes at one time, and at all other times when with a partner she was required to stay within the dancing enclosure. If unattached for a time, she could be directed to seek out a partner for dancing or drinking, and sometimes particular individuals would be designated to her for such purpose. Her behavior on the dance floor was the subject of the special officer's supervision, and she could be removed at his instance. The license for maintaining the dance hall was appellant's, as was also the license to sell alcoholic beverages.

The trial court found that these taxi dancers were in the employment of appellant, were not independent contractors, and were subject to the appellant's direction and control in the performance of their services.

The issues presented on appeal are:

(1) Whether or not the taxi dancers, whose status is in question, were in the employment of appellant within the meaning of section 6.5 of the California Unemployment Insurance Act during the period in question; and

(2) Whether or not the trial court erred in holding that a decision of the superior court in a prior action, involving a different period of time, to the effect that the taxi dancers were not in the employment of the appellant, is not res judicata as to the status of the taxi dancers involved in the present controversy.

[1] Manifestly, the printed card which appellant and the dancer signed, as a preliminary act in the establishment of the relationship between them, did not purport to evidence the complete agreement of the parties thereto. The card expressly stated that the consideration to be paid the undersigned was a portion of the money earned by the dancer "as mutually agreed upon." The terms agreed upon were apparently arrived at orally; and therefore the contract was in legal effect an oral contract. 6 Cal.Jur. p. 227, § 150; Fabian v. Lammers, 3 Cal.App. 109, 84 P. 432. Consequently, parol evidence was admissible to show the terms and conditions of the contract. Eng-Skell Co. v. Ind.Acc.Com., 44 Cal.App. 210, 212, 213, 186 P. 163.

[2, 3] Viewed by us in the light most favorable to respondent, the evidence noted above sufficiently discloses a situation wherein a complete power of control over the activities of the taxi dancers resided in the appellant, and whereby, through the instrumentality of the special police officer employed by him, he could and did exercise a direct control over the conduct of the girls as long as they were on the premises.

These powers which he was potentially able to exercise without incurring liability, and which in some instances he did exercise, characterize the relationship in question as one of employer and employee within the meaning of the act. Empire Star Mines Co., Ltd., v. California Emp. Comm., Cal.Sup., 168 P.2d 686; Twentieth Century Lites, Inc., v. California Dept. of Employment, Cal.Sup., 168 P.2d 699; California Emp. Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 425, 150 P.2d 186; Matcovich v. Anglim, 9 Cir., 134 F.2d 834, certiorari denied 320 U.S. 744, 64 S.Ct. 46, 88 L.Ed. 441. In addition, the circumstance that the dancers were free to terminate their services at will, without becoming legally obligated to appellant, is further evidence of the nonexistence of their alleged status as independent contractors. See Baugh v. Rogers, 24 Cal.2d 200, 206, 207, 148 P.2d 633, 152 A.L.R. 1043.

[4] Appellant complains of the action of the trial court in refusing to grant a nonsuit at the close of respondent's case, contending that the certificate on which respondent relied to establish a prima facie case, under section 45.1 of the Act, was insufficient to raise a presumption of the existence of the relationship of employer and employee, and that the rule of People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029, which said court deemed applicable, did not cover the situation presented in the instant case. Even though we assume, without deciding, that appellant's contention is sound, this would not affect the ultimate decision herein, since the principle is well established that any error in denying a motion for nonsuit is rendered harmless where the asserted deficiency in the plaintiff's evidence is supplied by other evidence thereafter adduced. 2 Cal.Jur., p. 1025, § 610; 1 Cal.Jur.Supp. p. 639. "The denial of a motion for a nonsuit is not prejudicial error where facts sufficient to support the judgment are in evidence either before or after the denial of the motion. Cosby v. Cline, 186 Cal. 698, 200 P. 801. Whether or not denial of this motion was prejudicial error must depend upon our conclusions as to whether there was sufficient evidence to sustain the judgment." Parra v. Cleaver, 110 Cal.App. 168, 170, 294 P. 6, 7.

[5-7] The remaining issue presented involves the question of the effect of the judgment of the Superior Court of Sacramento County in a certain proceeding entitled "California Employment Commission v. Matcovich," Sacramento Superior Court No. 59018, brought by respondent's predecessor, the Unemployment Reserves Commission, against the appellant herein, to collect contributions under the Unemployment Reserves Act, Stats.1935, p. 1226, ch. 352, on account of the employment of the services of taxi dancers from January 1, 1936, to April 1, 1938. In that proceeding it was adjudged by the trial court that the taxi dancers there involved were independent contractors, and that the commission recover nothing by reason of its action. The judgment was entered February 6, 1940, and an appeal therefrom which was duly filed by the commission was dismissed pursuant to stipulation of counsel, November 16, 1940. Therefore such judgment has long since become final.

An examination of the record of said prior proceeding discloses that the issues therein, as presented by the pleadings, and as reflected by the findings and opinion of the trial court, are not identical with those in the present proceeding. In the earlier case there was no allegation or proof of a written contract of any kind, whereas in the present case the appellant has pleaded and relies largely on the existence of a written contract based on the printed card which we have discussed heretofore.

There is another difference between the factual situations in the two cases which is even more material. It appears from the memorandum of opinion of the trial court in the former case that the manner in which taxi dancers were paid was entirely different from that adopted subsequent to the times therein involved. Thus, in the earlier case, the court, in its opinion, observed that "the women paid themselves from their own earnings after deducting therefrom the sum which they paid the owner of the hall as a place to work."

In the present case, the evidence clearly shows that the women did not pay themselves, but to the contrary were paid by appellant a share of the house earnings to which their services had contributed. The collections were made by the management and not by the taxi dancers. The dance tickets were purchased from appellant or his employee, and not from the girls. The drinks were purchased from appellant or his employee, and not from the girls. Each night, the girl turned in the tickets which her partners had purchased and exhibited the tokens she had received as evidence that her escorts had paid for the drinks, and she was paid by appellant or his employees her net percentage thereon.

The importance of this distinction in the facts, as herein found by the trial court and as revealed by the evidence, from the facts on which the former judgment appears to have been predicated, is readily apparent from a consideration of the settled principle that "The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." 34 C.J. p. 905, § 1313. The same rule applies whether the judgment be pleaded in bar or only by way of estoppel on certain issues. 15 Cal.Jur. p. 154, § 201; 34 C.J. p. 808, § 1228. In Silva v. Reclamation District No. 1001, 41 Cal.App. 326, 329, 182 P. 786, this rule was applied to successive proceedings brought to determine the validity of assessments levied on the same lands in the hands of the same persons, and it was held that the judgment decreeing the first assessment invalid was not conclusive in the second proceeding where it appeared that the insufficiency of the plans and specifications on which said judgment was predicated had been cured prior to the levy of the second assessment. This decision has been cited by the Supreme Court as illustrating the principle that the doctrine of res judicata is not applicable in a case where "a cause of action arises out of the same subject-matter, but upon a new set of facts not obtaining at the time of the former judgment." Price v. Sixth Agricultural Assn., 201 Cal. 502, 511, 258 P. 387, 390. To the same effect is Timm v. McCartney, 30 Cal.App.2d 241, 85 P.2d 920; on the former appeal, 9 Cal.App.2d 230, 235, 49 P.2d 315. See also, Blair v. Commissioner of Internal Revenue, 300 U.S. 5, 8, 9, 57 S.Ct. 330, 81 L.Ed. 465.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



28 Cal.2d 91

In re PORTERFIELD.

Cr. 4555.

Supreme Court of California, in Bank.

April 30, 1946.

1. Licenses ⚿5½

City of Redding, a municipal corporation of the sixth class, subject to constitutional limitations and public policy and general laws of state, had power, generally speaking, to license, for purposes of regulation and of revenue, every kind of business transacted or carried on in city, and to fix rates of license taxes, and provide for their collection. Gen.Laws, Act 5233, § 862.12.

2. Habeas corpus ⚿32

Habeas corpus was the proper vehicle for invoking decision of court on constitutionality of city ordinance under which petitioner was convicted, and on the validity of petitioner's restraint under the conviction.

3. Habeas corpus ⚿30(1)

A habeas corpus proceeding may not be used as a device for the correction of mere errors or irregularities committed within the exercise of an admitted jurisdiction.

4. Municipal corporations ⇐594(2)

An ordinance requiring license to solicit, for compensation, membership in organizations requiring payment of dues, was not void on ground of uncertainty as to who is required to obtain a license, since the language clearly applies to one who solicits members in an organization whether he is compensated with a stipulated sum for each member secured or is paid a salary for services which include the duty to solicit memberships. Gen.Laws, Act 5233, § 862.12.

5. Licenses ⇐11(3)

The fact that the only license issued under city ordinance requiring a license to solicit, for compensation, membership in organizations requiring payment of dues, was to one whose compensation for soliciting members was based on the number of memberships sold, did not require that ordinance be construed to apply only to such solicitors and not to one who is paid a salary for services including his duty to solicit memberships. Gen.Laws, Act 5233, § 862.12.

6. Licenses ⇐7(1)

Generally, where a profession or occupation is one requiring particular qualifications, Legislature or other law-making body has the power, and ordinarily the duty, to exact reasonable assurances of those pursuing the profession or occupation that they possess such qualifications.

7. Licenses ⇐11(3)

The mere fact that labor unions are treated in Labor Code and professions in general by the Business and Professions Code does not mean that act of employee of a labor union in soliciting workers to become members of a particular union does not constitute engaging in an occupation or business within meaning of city ordinance requiring license to solicit, for compensation, membership in organizations requiring payment of dues. Gen.Laws, Act 5233, § 862.12.

8. Statutes ⇐231

For purposes of statutory construction, the codes are to be regarded as blending into each other and constituting but a single statute.

9. Constitutional law ⇐90

City ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues, is not invalid on ground that it violates the constitutional right of free speech. Gen. Laws, Act 5233, § 862.12.

10. Municipal corporations ⇐611

A municipality may impose reasonable conditions on the conduct of a business.

11. Constitutional law ⇐90

The right of free speech protected by the federal and state constitutional guarantees, is not an absolute right which carries with it into businesses and professions total immunity from regulation in the performance of acts to which speech is a mere incident or means of accomplishment. Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A. Const. Amend. 1.

12. Constitutional law ⇐90

Under the right of free speech protected by the federal and state constitutional guarantees, the right to speak for purpose of profit cannot operate to the derogation of the police power of the state or city. Gen.Laws, Act 5233, § 862.12; Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A. Const. Amend. 1.

13. Constitutional law ⇐90

The main purpose of the constitutional provisions guaranteeing free speech is to prevent previous restraint on, or the stifling of efforts pointing toward, enlightenment of individuals on or concerning their rights and beliefs and duties of their rulers. Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A.Const. Amend. 1.

14. Constitutional law ⇐90, 274

The freedom of speech and of the press protected by the constitutional guarantees includes in the main freedom of expressions on political, sociological, religious, and economic subjects, not commercial activities to which speech is only an incident or means. Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A.Const. Amends. 1, 14.

15. Constitutional law ⇐90, 274

The right of free speech has not been confined to any field of human interest and is not wholly inapplicable to business or

economic activity. Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A.Const. Amends. 1, 14.

16. Licenses ⇐7(1)

The extent of permissible regulation of business or economic activities depends on the balancing of social interests and the facts of any given case.

17. Constitutional law ⇐70(3)

A very wide discretion as to what is needful or proper for the regulation of business or economic activities is necessarily committed to the legislative body.

18. Constitutional law ⇐70(1)

In view of the fact that the rights of citizens both to free speech and to engage in a business or follow a profession are constitutionally protected, it is a judicial question whether any particular regulation of business or economic activity is a valid exercise of legislative powers. Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A.Const. Amend. 14.

19. Constitutional law ⇐48

Constitutionality of purpose and application of a statute are generally to be presumed.

20. Constitutional law ⇐48
Municipal corporations ⇐122(2)

Only where it clearly appears that an ordinance or statute passes definitely beyond limits which bound the police power and infringes on rights secured by the fundamental law, should the ordinance or statute be declared void.

21. Constitutional law ⇐90

The preferred place given in the constitutional system to the freedoms secured by the First Amendment gives such liberties a sanctity and a sanction not permitting dubious intrusions, and it is the character of the right not of the limitations which determines what standards govern the choice. U.S.C.A.Const. Amend. 1.

22. Constitutional law ⇐90

Any attempt to restrict free speech or free assembly must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. U.S.C.A.Const. Amend. 1.

23. Evidence ⇐20(1)

It is common knowledge that among labor organizations there exists a sedulous interest and high zeal in matter of obtaining new members not only in general, but as against other and competing unions with conflicting interests.

24. Constitutional law ⇐274

The right to discuss and to inform the public concerning the asserted virtues and faults of employers, of working conditions, and of union objects, and the advantages and disadvantages of membership in any particular union, is protected as an incident of free speech and free assembly. U.S.C.A.Const. Amends. 1, 14.

25. Constitutional law ⇐62
Municipal corporations ⇐591

A statute or ordinance which vests arbitrary discretion with respect to an ordinary lawful business in public officials without prescribing a uniform rule of action, or which authorizes issuing or withholding of licenses according as designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional.

26. Constitutional law ⇐274
Licenses ⇐7(1)

City ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues and providing that if city council is satisfied that applicant for license is of good moral character and will not resort to force, threats, coercion, or corrupt means in his proposed work of solicitation, it shall direct issuance of license, denies constitutional rights, not only on basis of guarantees applicable to free speech but also on basis of those protecting right to engage in lawful fashion in a lawful activity, because of the indefinite standards required of an applicant. Gen.Laws, Act 5233, § 862.12; Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A. Const. Amends. 1, 14.

27. Evidence ⇐83(1)

Where free speech or any other fundamental right is involved, the presumption of proper action by licensing authority in acting on an application for a license cannot be relied on.

28. Torts ⇐10
Trade unions ⇐8

Physically peaceable compulsion, coercion, intimidation and threats by labor unions, may go to make up lawful moral and social pressure as against both employers and non-member employees.

29. Constitutional law ⇐90

Various means of economic suasion by a labor union, such as picketing, the primary and secondary boycotts, and refusal to work, may be performed in the exercise of civil liberties, guaranteed by both federal and State Constitutions. Const.Cal. art. 1, §§ 1, 3, 9, 13; U.S.C.A. Const. Amend. 1.

30. Trade unions ⇐8

Members of a union or group of affiliated unions are privileged to refuse to work on the same job with other workmen, whether the latter have united or organized themselves into a separate trade union or have not done so.

31. Trade unions ⇐8

A labor union may resort to concerted activities to win over employees with the object of gaining a closed shop agreement. National Labor Relations Act § 8(3), 29 U.S.C.A. § 158(3).

32. Courts ⇐262(4)

Peaceful picketing and boycotting for a closed shop by an outside union are not enjoinable in a federal court under the Norris-LaGuardia Act. Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq.

33. Licenses ⇐7(1)

The fact that granting of a license to one who should use force, violence and fraud was prohibited by city ordinance requiring license to solicit, for compensation memberships in organizations requiring payment of dues, did not warrant sustaining the ordinance, where ordinance also prohibited that which could not lawfully be prohibited. Gen.Laws, Act 5233, § 862.12.

34. Municipal corporations ⇐592(1)

Tax provisions of city ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues, and requiring solicitors to pay a license tax as a condition precedent to pursue their activities, are invalid because inconsistent with the public policy of the state as declared in the state Labor Code. Labor Code, § 923.

35. Municipal corporations ⇐592(1)

Where a matter is of statewide concern, local regulation on the subject may be enforced only if it is not in conflict with the statutes of the state. Const. art. 11, § 11.

36. Trade unions ⇐1

A part of the right of self-organization of employees is the right of reasonable solicitation of others to join their union.

37. Evidence ⇐20(1)

It is common knowledge that many of the larger industrial plants in California are so situated that they draw workers from as many as five or six or more cities.

38. Master and servant ⇐15(9)

The public policy evinced by that section of the Labor Code declaring the public policy of California concerning labor, is to protect collective bargaining as is done by the National Labor Relations Act. Labor Code, § 923.

39. Municipal corporations ⇐111(4)

Potential severability of invalid portions of city ordinance prohibiting soliciting for compensation, without a license, of memberships in organizations requiring the payment of dues, could not save conviction of business representative of union based on entire ordinance notwithstanding the presence of a saving clause.

Proceeding in the matter of the application of James Porterfield for a writ of habeas corpus to secure his release from custody after conviction of violating a city ordinance.

Petitioner discharged.

Prior opinion, 63 Cal.App.2d 518, 147 P.2d 15.

Clarence E. Todd, of San Francisco, Cal., for petitioner.

Tobriner & Lazarus, Mathew O. Tobriner, P. H. McCarthy, Jr., F. Nason O'Hara, George G. Olshausen and Wayne M. Collins, all of San Francisco, amici curiae, on behalf of petitioner.

Glenn D. Newton, City Atty., of Redding, for respondent.

SCHAUER, Justice.

Petitioner James Porterfield, a labor organizer, stands convicted of violating Ordinance No. 251 of the city of Redding (now incorporated in the Redding Municipal Code). Such ordinance prohibits soliciting for compensation, without a license, of memberships in organizations requiring the payment of dues. This petition for habeas corpus is urged upon the grounds that the ordinance contravenes the state and federal Constitutions in numerous respects, and that it conflicts with the National Labor Relations Act, 29 U. S.C.A. § 151 et seq., and with statutes of the State of California and is therefore null and void. We conclude that portions of the ordinance, purporting to establish the standards upon which the licensing board shall act, are, as enacted, arbitrarily prohibitive of certain of petitioner's constitutionally guaranteed rights and that the requirement of payment of a license fee in order to engage in solicitation of memberships, as applied in this case, contravenes the declared public policy of this state that workmen shall have full freedom of association and self-organization (see Labor Code, § 923.) Petitioner, therefore, is entitled to his release.

Material Facts

[1] The material facts are not in dispute. The city of Redding is a municipal corporation of the sixth class. Generally speaking, and subject to constitutional limitations and the public policy and general laws of the state, it has power to license, for the purposes of regulation and of revenue, all and every kind of business transacted or carried on in such city, and to fix rates of license taxes upon the same, and provide for their collection. (Municipal Corporation Act, § 862.12, Stats. 1935, p. 2071, 2 Deering's Gen.Laws 1937, p. 2537, Act 5233.)

Ordinance No. 251 was passed as an initiative measure in the year 1938 by the people of Redding. It provides in material part as follows:

"Section 1. It shall be unlawful for any person, firm or corporation, whether as principal, clerk, servant, agent, or employee, inside of the city limits of the City of Redding, by force, violence, menaces, threat, intimidation, coercion or corrupt means, either directly or indirectly, to seek, solicit, induce, or attempt to seek, solicit or induce, any person to join or take membership in any organization, or by force, violence, threat, intimidation, coercion or corrupt, means, either directly or indirectly, to seek, solicit or induce, or attempt to seek, solicit or induce, any employer or other person to compel or induce any employee or any other person to join or take membership in any organization.

"Section 2. It shall be unlawful for any person, inside of the city limits of the City of Redding, to solicit or obtain membership for compensation in any organization which requires the payment of dues by such members without first having procured a license to do so, as in this ordinance provided.

"Section 3. The city council of the City of Redding is hereby designated as a licensing board for the issuance of license under this ordinance.

"Section 4. Any person desiring a license to engage in or carry on the work of soliciting membership as herein provided shall make application in writing to said city council upon such forms as may be provided by said city council, a copy of which shall at all times be attached to said license.

"Section 5. Said application shall be filed with the clerk of the said City of Redding at least one week prior to the meeting of the city council at which said application shall be heard.

"Section 6. Upon said hearing the said city council shall receive evidence and determine whether said applicant is of good moral character, and is likely to use force, violence, threats, menace, coercion, intimidation or corrupt means in his proposed work of solicitation. If the city council is satisfied that said applicant is of good moral character and will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation, it shall direct the issuance of a license to said applicant for said purpose of solicitation upon payment of the license fee herein provided for.

"Section 7. Each person to whom a license is issued hereunder shall pay to the City of Redding for each period of three months a license fee in the sum of $5.00. * * *

"Section 11. This ordinance is hereby declared to be enacted in the exercise of the police power of the City of Redding and if any section, sentence, clause, or phrase of this ordinance shall be declared invalid, such declaration shall not affect the validity of the remaining portions of this ordinance. The city council [although, as above noted, this is an initiative measure] hereby declares that it would have passed this ordinance and each section, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, sentences, clauses or phrases is declared unconstitutional or otherwise invalid."

Porterfield, sometimes referred to herein as petitioner, is the business representative of the Construction and General Laborers Union, Local No. 961. A part of his duties is to solicit memberships. He receives a salary for performing his duties. On March 10, 1942, he solicited, in Redding, a man by the name of Shaw to join Local 961. He told Shaw that he had a job for him if he became a member of Local 961; that the initiation fee for joining would be $25, and dues thereafter would be $1.50 per month. Shaw did not join.

On March 16, 1942, a conversation took place between petitioner and Harold F. Riley, License Collector in the City of Redding. Clarence E. Todd, petitioner's attorney, and Glenn D. Newton, City Attorney of Redding, were also present. Riley asked petitioner to make application for a license for soliciting memberships in organizations and demanded that he pay the sum of $5.00 for the license fee, but petitioner, on the advice of counsel, refused to do either. On that same day, a complaint was filed in the City Court of Redding charging petitioner with violations of sections 2, 4 and 7 of Ordinance No. 251, namely, with soliciting for compensation, without first having a license so to do, memberships in an organization requiring the payment of dues by its members; with failure to apply for a license although engaging in the described work, and with failure to pay the license fee of $5.00 per quarter. Petitioner was tried and convicted on all three counts. Upon appeal to the Superior Court in Shasta County, the judgment was affirmed. Petitioner thereafter applied to the District Court of Appeal (Third Appellate District) for a writ of habeas corpus on the ground that the ordinance was unconstitutional. That court denied the writ, Mr. Justice Peek dissenting (Ex parte Porterfield (1944), 63 Cal.App.2d 518, 147 P.2d 15). Petitioner now seeks a writ of habeas corpus from this court. The conclusions we have reached make it necessary to disapprove the holding of the District Court of Appeal insofar as it is inconsistent herewith.

Petitioner and the several amici curiæ who have filed briefs in his support attack the Redding ordinance with many shafts. Foremost among the contentions are the following: (1) That petitioner does not fall within the terms of the ordinance; (2) that the right to solicit members in a lawful organization is an exercise of the constitutional right of free speech and not subject to regulation through the police power; (3) that the ordinance is invalid for the reason that it reposes uncontrolled discretion in the city council to grant or deny constitutional rights; (4) that the ordinance is vague and uncertain in its application in that it provides a standard pursuant to which a license may be denied an

applicant because of prior or anticipated conduct on his part that may be clearly lawful; (5) that the ordinance is in conflict with the National Labor Relations Act, 29 U.S.C.A. § 151 et seq.; (6) that the ordinance conflicts with general laws of the State of California.

The Remedy.

[2, 3] Habeas corpus is a proper vehicle for invoking the decision of this court upon the constitutionality of the ordinance and the validity of petitioner's restraint. (Ex parte Bell (1942), 19 Cal.2d 488, 492-495, 122 P.2d 22; In re Mark (1936), 6 Cal.2d 516, 58 P.2d 913; Ex parte Keeney (1890), 84 Cal. 304, 24 P. 34; 13 Cal.Jur. 225-227, § 8.) It is not, however, the equivalent of an appeal (Ex parte Connor (1940), 16 Cal.2d 701, 705, 108 P.2d 10; see Bowen v. Johnston (1939), 306 U.S. 19, 26, 27, 59 S.Ct. 442, 83 L.Ed. 455; In re Drew (1922), 188 Cal. 717, 720, 207 P. 249; Ex parte Sternes (1888), 77 Cal. 156, 161, 19 P. 275, 11 Am.St.Rep. 251) and the proceeding may not be used as a device for the correction of mere errors or irregularities committed within the exercise of an admitted jurisdiction (see In re Wood (1924), 194 Cal. 49, 62, 227 P. 908).

Scope of Application of the Ordinance.

[4, 5] We are satisfied that the ordinance, at least in this proceeding, is not vulnerable to attack on the ground of uncertainty as to who is required to obtain a license. We are in accord with the construction attributed to section 2 of the ordinance by the trial court. We think that the plain meaning of the language of that section is that every person who for pay solicits members in an organization as therein designated is purportedly required to apply for a license, whether he is compensated with a stipulated sum for each member secured, or is paid a salary for services including his duty to solicit memberships. In either event he is receiving "compensation" for his services. The fact, pointed to by petitioner, that the only license issued under the ordinance, during the first four years following its enactment, was to an individual whose compensation was based upon the number of memberships sold, is not of such controlling importance as to establish a contrary construction by the enforcement officer or to justify one by us.

Police Power of Municipality to Regulate and Tax Business

[6-8] It is a general and well-established rule that where a profession or occupation is one of which it can be fairly said that those pursuing it should have particular qualifications, it is within the power, and ordinarily is the duty, of the Legislature or other law-enacting body to exact reasonable assurances of those pursuing the profession or occupation that they do possess such qualifications. (Riley v. Chambers (1919), 181 Cal. 589, 593, 185 P. 855, 8 A.L.R. 418; Binford v. Boyd (1918), 178 Cal. 458, 461-463, 174 P. 56; People v. Ratledge (1916), 172 Cal. 401, 405, 156 P. 455; In re Stork (1914), 167 Cal. 294, 295, 139 P. 684; Ex parte Whitley (1904), 144 Cal. 167, 172, 77 P. 879, 1 Ann.Cas. 13; In re Carlson (1927), 87 Cal.App. 584, 587, 588, 262 P. 792.) There can scarcely be doubt that one who for compensation and as a part of his regular duties solicits or obtains memberships in an organization requiring dues of its members is engaging in a professional or business pursuit. He normally does so for business reasons, exclusively or materially. One who joins such an organization at the instance of the solicitation thereby assumes a financial liability to the organization and ordinarily expects to receive some value or benefit from his membership. The mere fact that labor unions are treated in the Labor Code and professions in general by the Business and Professions Code does not mean that the act of an employe of a labor union in soliciting workers to become members of a particular union does not constitute engaging in an occupation or business subject to license for purposes of regulation or revenue. Labor unions exist for very practical business as well as social reasons. The code separation is for convenience only. It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute. (Proctor v. Justice's Court (1940), 209 Cal. 39, 43, 285 P. 312; Coun-

ty of Butte v. Merrill (1903), 141 Cal. 396, 399, 74 P. 1036; Clarke v. Mead (1894), 102 Cal. 516, 520, 36 P. 862.)

[9] Petitioner undoubtedly has a constitutional right to speak with or to others privately or in public, of the merits of labor organization. He contends that the constitutional guaranty secures to him the right to engage, wholly unregulated, in the business of membership solicitation for his principal because, he asserts, his solicitation amounts only to an exercise of speech, i.e., the imparting of information, the conveyance of ideas and persuasion. The same may be said of the speech of a stock or real estate salesman, of an itinerant peddler, or of a country club promoter. It is not contended that such last mentioned pursuits cannot be regulated. Hence petitioner cannot stop on the abstract right of speech; he must go further and depend on the object sought to be accomplished by the speech. That is, he must show the real character of the activity. If his speech, by way of examples, relates only to social or economic theories or to governmental issues he may not be placed under prior restraint unless clear, present, and grave danger to the public requires this. A person without a license may speak privately or in public on the social and economic advantages of home owning in a particular area. The dissemination of his ideas may persuade persons to make purchase offers. But he cannot without being subject to the sanction of the law (Business and Professions Code, §§ 10130, 10134, Real Estate Law) engage in such activities for compensation. Porterfield was exercising the faculty of speech not merely to convey ideas but for compensation to sell a membership in his organization; a membership which, it was contemplated, would have a utilitarian value to the person solicited as well as to the labor movement.

[10-16] A municipality may impose reasonable conditions upon the conduct of a business. The right of free speech protected by the federal and state constitutional guaranties is not an absolute right which carries with it into businesses and professions total immunity from regulation in the performance of acts as to which speech is a mere incident or means of accomplishment. It was not intended that a right to speak for the purpose of profit may be created to the derogation of the police power of state or city. The main purpose of such constitutional provisions was to prevent previous restraint upon (as had been imposed by other governments and in early times in this country), or the stifling of efforts pointing toward, enlightenment of individuals upon or concerning their rights and beliefs and the duties of their rulers. (See Patterson Colorado (1907), 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689; Commonwealth v. Blanding (1825), 3 Pick., Mass., 304, 313, 314, 15 Am.Dec. 214.) The freedom of speech and of the press protected by the constitutional guaranties includes in the main, it has been said, freedom of expressions on political, sociological, religious, and economic subjects, not commercial activities to which speech is only an incident or means. (Valentine v. Chrestensen (1942), 316 U.S. 52, 54, 55, 62 S.Ct. 920, 86 L.Ed. 1262; see Packer Corp. v. Utah (1932), 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643, 79 A.L.R. 546; Fifth Avenue Coach Co. v. New York City (1911), 221 U.S. 467, 31 S.Ct. 709, 55 L.Ed. 815; San Francisco Shopping News Co. v. City of South San Francisco (9 Cir., 1934), 69 F.2d 879; Sieroty v. City of Huntington Park (1931), 111 Cal.App. 377, 295 P. 564; Pittsford v. City of Los Angeles (1942), 50 Cal.App.2d 25, 31, 33, 122 P.2d 535; People v. St. John (1930), 108 Cal.App. Supp. 779, 238 P. 53.) However, as pointed out in the recent case of Thomas v. Collins (1945), 323 U.S. 516, 65 S.Ct. 315, 323, 89 L.Ed. 430, the right of free speech has not been confined to any field of human interest and it cannot be said that the safeguards of the First Amendment (or the Fourteenth as it incorporates the First) are wholly inapplicable to business or economic activity. (Cf. Schneider v. State of New Jersey (1939), 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155.) In the last analysis the extent of permissible regulation of business or economic activity depends upon the balancing of social interests and the facts of any given case. (Cf. Jackson,

J., concurring in Thomas v. Collins (1945), supra.)

[17, 18] The need for such legislation is primarily to be decided by those who enact it. A very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body. (Ex parte Tuttle (1891), 91 Cal. 589, 591, 27 P. 933; In re McNeal (1939), 32 Cal.App. 2d 391, 395, 396, 89 P.2d 1096.) But because the rights of citizens both to free speech and to engage in a business or follow a profession are constitutionally protected (see U.S.Const., 14th Amend.; Cal. Const. art. I, §§ 1, 3, 9, 13; Gitlow v. New York (1925), 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138; Stromberg v. California (1931), 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; De Jonge v. Oregon (1937), 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278, 283; Suckow v. Alderson (1920), 182 Cal. 247, 249, 250, 187 P. 965; Pasadena Ice Co. v. Reeder (1929), 206 Cal. 697, 703, 704, 275 P. 944, 276 P. 995; Continental Car-Na-Var Corp. v. Moseley (1944), 24 Cal.2d 104, 110, 148 P.2d 9), it is always a judicial question whether any particular regulation of such rights is a valid exercise of legislative powers. (See Ex parte Whitwell (1893), 98 Cal. 73, 78-80, 32 P. 870, 19 L.R.A. 727, 35 Am.St.Rep. 152; Ex parte Drexel (1905), 147 Cal. 763, 766, 82 P. 429, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878; In re Miller (1912), 162 Cal. 687, 694, 124 P. 427; Ex parte Dickey (1904), 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am.St.Rep. 82, 1 Ann.Cas. 428; Frost v. City of Los Angeles (1919), 181 Cal. 22, 183 P. 342, 6 A.L.R. 468.)

[19, 20] We unequivocally recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties. Those freedoms are vastly more consequential than any object to be attained by business or professional regulations and the integrity of the former is not to be compromised to save the latter. It is a general rule, also, that the power of the courts, from its very nature, must be exercised with the utmost caution. Laws are enacted by and for the people. The people have a right of experimentation, of evolution through trial and error. Constitutionality of purpose and application is generally to be presumed. It has often been said that it is only when it clearly appears that an ordinance or statute passes definitely beyond the limits which bound the police power and infringes upon rights secured by the fundamental law, that it should be declared void. (Ex parte Whitwell (1893), supra, 98 Cal. 73, 79, 32 P. 870, 19 L. R.A. 727, 35 Am.St.Rep. 152; Laurel Hill Cemetery v. City & County of San Francisco (1907), 152 Cal. 464, 471, 93 P. 70, 27 L.R.A.,N.S., 260, 14 Ann.Cas. 1080; Ex parte Quong Wo (1911), 161 Cal. 220, 230, 118 P. 714; Ex parte Hadacheck (1913), 165 Cal. 416, 419, 132 P. 584, L.R.A.1916B, 1248.)

[21, 22] The choice, then, which the courts must make—"to say where the individual's freedom ends and the State's power begins"—is a delicate one. "Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * * For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (Thomas v. Collins (1945), supra, 323 U.S. 516, 65 S.Ct. 315, 322, 323, 89 L.Ed. 430.) Here, however, it seems to us that the character of the right which is immediately regulated is, as previously indicated, that of engaging in a business or profession rather than of speech or assembly. Were it not for the direct application by the Supreme Court of the constitutional speech and assembly guaranties to the facts of the Thomas case (hereinafter discussed in more detail) there would seem to be little basis for arguing that the solicitation by Porterfield

for compensation was not a business act subject to police regulation.

[23] The matter dealt with, solicitation, may be a vehicle for deception or fraudulent imposition. Also, it is a matter of common knowledge that among labor organizations there exist a sedulous interest and a high zeal in the matter of obtaining new members not only in general but as against other and competing unions with conflicting interests. Such organizations have had a rapid growth in recent years and have developed to the stage where it has become virtually necessary for most employes in the larger industries, not already members, to affiliate with one group or another in order to secure or preserve employment. Union members are required to contribute in the aggregate large sums of money in the form of dues to the unions, which depend thereon for support. In addition, new members are generally charged substantial initiation fees. The question of whether or not a given individual should join a particular union or local thereof is a matter that vitally affects his livelihood and is usually not lightly considered. It is of importance to the individual and to the community as well as to the interests of the union itself, that the representatives entrusted with soliciting memberships be reputable persons who will not misrepresent the facts, whose promises can be depended upon, and who will carry on their work in an orderly manner having due respect to other representatives canvassing the same field. Since such representatives in acting for others occupy a capacity more or less fiduciary in character, there is particularly required of them for the proper discharge of their duties certain attributes, such as honesty and truthfulness, which go to make up good moral character. (Cf. Riley v. Chambers (1919), supra, 181 Cal. 589, 594, 185 P. 855, 8 A.L.R. 418.)

Laws Governing Freedom of Speech or of Business as Controlling the Limits of Regulation.

[24] The foregoing considerations, plus the fact that in the instant case the only restriction upon speech (other than that involved in the standards prescribed for issuance of the license, hereinafter discussed) is that which is incidental as a part of the regulation of paid solicitation, suggest the conclusion that the constitutional principle of free speech does not render wholly immune from reasonable regulation the profession or business of solicitation in which petitioner is engaged. To a varying extent solicitation of memberships in a labor organization may incidentally involve some discussion of questions of a social or economic nature not ordinarily involved in the conduct of most other professions. The right to inform the public concerning and to discuss the asserted virtues and faults of employers, of working conditions, and of union objects, and the advantages and disadvantages of membership in any particular union, is protected as an incident of free speech and free assembly. (See Hague v. C. I. O. (1939), 307 U.S. 496, 512, 513, 59 S.Ct. 954, 83 L.Ed. 1423.) However, the ordinance under discussion, insofar as it has been applied to petitioner, is directly regulative only of the acts of soliciting and of obtaining of dues-paying memberships for compensation. Only through that regulation, and as an incident thereof, has it affected the expression of views, dissemination of information, laudation, or any other kind of speech activity by petitioner. (Its tax feature, and the validity of the licensing standards it ordains, entirely different questions, are discussed later herein. Also, it must be noted in this connection, that we are not now concerned with any direct application of section 1 as prohibiting strikes, picketing, or other concerted activity.)

Petitioner, however, strongly relies upon Thomas v. Collins (1945), supra, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, as establishing the proposition that the solicitation by a labor organizer, whether with or without compensation as such, of memberships in a labor union is but an exercise of the freedom of speech and is not subject to any prior regulation or restraint except under the clear and present danger rule. That case, it must be recognized, presents a factual basis of such similarity as to make it difficult upon reason to distinguish. There a Texas statute required

each labor union organizer to secure an organizer's identification card from the Secretary of State before soliciting members for his organization. The Texas statute is not a licensing or revenue act. It is a mere registration statute purportedly applicable to all labor organizers. It provides that "'labor organizer' shall mean any person who for a pecuniary or financial consideration solicits memberships in a labor union or members for a labor union." (§ 2(c) of House Bill No. 100, ch. 104, Gen. and Sp.Laws of Texas, Reg.Sess., 48th Legis.1943, Vernon's Ann.Tex.Civ.St. art. 5154a.) Section 5 of the same statute ordains that "All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full; (b) his labor union affiliations, if any; (c) describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such application being filed, the Secretary of State shall issue to the applicant a card on which shall appear the following: (1) the applicant's name; (2) his union affiliation; (3) a space for his personal signature; (4) a designation, 'labor organizer'; and, (5) the signature of the Secretary of State, dated and attested by his seal of office. Such organizer shall at all times, when soliciting members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership."

It will be noted that the card issuing official is given no discretion in the matter. He is bound to issue the card as of course upon application. No fee is charged. Showing the similarity of the arguments made in support of the Texas law to those advanced in favor of the far more rigorous Redding ordinance is the following language of the Supreme Court of Texas (Ex parte Thomas (1943), 141 Tex. 591, 596, 174 S.W.2d 958, 961): "A careful reading of the section of the law here under consideration will disclose that it does not interfere with the right of the individual lay members of unions to solicit others to join their organization. It does not affect them at all. It applies only to those organizers who for a pecuniary or financial consideration solicit such membership. It affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union. Furthermore, it will be noted that the Act does not require a paid organizer to secure a license, but merely requires him to register and identify himself and the union for which he proposes to operate before being permitted to solicit members for such union. The Act confers no unbridled discretion on the Secretary of State to grant or withhold a registration card at his will, but makes it his mandatory duty to accept the registration and issue the card to all who come within the provisions of the Act upon their good-faith compliance therewith.

Differing in one particular (not material to the decision, apparently) from the Redding ordinance the Texas statute expressly provided that an injunction might issue to restrain acts in violation of the statute. It also made violation a misdemeanor. No point was made of the injunctive feature. It was contended that "the constitutional vice lay in the prohibition of the statute and that vice would preclude arrest and conviction for violation, no less than injunction against the denounced activity." (Thomas v. Collins, supra, 65 S.Ct. at page 332.)

Thomas advertised that he intended making a speech soliciting memberships in a local union affiliated with the international union by which he was employed. He did not register or apply for an identification card. An injunction was issued and served. By its terms it forbade "soliciting membership in Local Union No. 1002 * * * [or] memberships in any other labor union" without first obtaining a card. It did not forbid holding a meeting or making a speech, as such. Thomas still did not register or apply for a card. The advertised meeting was held and Thomas particularly solicited one Pat O'Sullivan and, in general, an audience of some three hundred persons to join the local union. Both contempt and criminal proceedings were instituted against Thomas. He was

adjudged guilty of contempt and sentenced. On his application for a writ of habeas corpus the Supreme Court of Texas, as previously indicated, upheld the statute and the sentence. (Ex parte Thomas (1943), supra, 141 Tex. 591, 174 S.W.2d 958.) On appeal the Supreme Court of the United States declared (page 323 of 65 S.Ct.), "The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

"The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so. Nor, on the other hand, is the answer given, whether what is done is an exercise of those rights and the restriction a forbidden impairment, by ignoring the organization's economic function, because those interests of workingmen are involved or because they have the general liberties of the citizen, as appellant would do.

"These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. Schneider v. State of New Jersey, 308 U. S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this. * * * [Page 324 of 65 S.Ct.] Thomas went to Texas for one purpose and one only—to make the speech in question. *Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting.* The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. *Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization.* It included, in this case, the right to designate Local No. 1002 or any other union or agency as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, *privately or in public assembly. Necessarily correlative was the right of the union, its members and officials* [this would seem obviously to include paid organizers], *whether residents or nonresidents of Texas and, if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employes concerning matters involved in their choice. These rights of assembly and discussion are protected by the First Amendment.* Whatever would restrict them, without sufficient occasion, would infringe its safeguards. The occasion [obviously, solicitation of memberships] was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done. * * * [Page 326 of 65 S.Ct.] The First Amendment is a charter for government, not for an institution of learning. *'Free trade in ideas' means free trade in the opportunity to persuade to action,* not merely to describe facts. [Citations.] Indeed, the whole history of the problem shows it is to the end of prevent-

ing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

"Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. * * * [Page 327 of 65 S.Ct.] If what Thomas did, in soliciting Pat O'Sullivan, was subject to such a restriction, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty which was imposed for violating the restraining order. Since the penalty must be taken to have rested as much on the speech and the general invitation as on the specific one, and the former clearly were immune, the judgment cannot stand." (Italics added.)

Thus it appears that the majority of the Supreme Court avowedly left open the question as to whether a personal solicitation of one person would be unlawful (subject to regulation) while holding that the same solicitation addressed to three hundred persons was lawful (not subject to regulation or any prior restraint, even registration for identification). Of course, Thomas was at least equally carrying on his business of soliciting members for compensation when he addressed three hundred persons as when he addressed one. It would seem that he was more efficiently carrying on his business when addressing three hundred than he would have been by addressing one and that the need for whatever protection the statute afforded the public was correspondingly greater in respect to the larger number. There scarcely seems to be magic in the number three hundred. If the number had been one hundred or fifty or ten, would not the result have been the same? And if ten persons could lawfully assemble to hear a speech or solicitation could not two do the same thing? If the speaker may lawfully solicit two persons to join a union may he not solicit one?

The Redding ordinance by its express terms would apply to the facts of the Thomas case. Section 2 makes it "unlawful for any person, inside of the city limits of the City of Redding, to solicit * * * membership for compensation in any organization which requires the payment of dues by such members without first having procured a license to do so, as in this ordinance provided." Thomas received compensation for soliciting memberships in his own and affiliated unions. The "whole object" of his speech was to solicit memberships. If it had been made in Redding he clearly would have been subject to prosecution under the ordinance if he had not first paid the tax and secured the license. Regardless, however, of whether a distinction of constitutional substance can be made between the occasion of the Thomas public solicitation of three hundred persons and the Porterfield private solicitation of one person, there are elements of the Redding ordinance not present in the Texas statute, which compel us to hold such ordinance invalid.

Arbitrary Prohibition of Lawful Acts.

[25] Petitioner contends that section 6 of the ordinance is invalid because it provides for a vague and uncertain subjective test whereby the city council may exercise substantially unrestricted authority to arbitrarily grant or deny licenses. In American Law Reports, Annotated (vol. 12, p. 1436), the general rule on this subject is well stated. "[A] statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business * * * in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses * * * according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform,—is unconstitutional and void." (See, also, State ex rel. Altop v. Billings, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1104; American Baseball Club of Philadelphia v. City of Philadelphia, 312 Pa. 311, 167 A. 891, 92 A.L.R. 400.) It is recognized that there is a considerable diversity of conclusion and some inconsist-

ency in the applications of the tests. The annotator (p. 1435 of 12 A.L.R.) says "In the main, it may be said that the validity of the grant of discretion depends largely upon the nature of the business * * * with respect to which it is to be exercised, and as to whether or not the proper regulation and control thereof require that a discretion be vested in one or more public officials in order properly to control the conduct of the business. * * *" (As previously indicated, we assume for the purposes of this discussion, without deciding, that the solicitation of memberships in a labor union is a business which may properly be subjected to some police regulation.)

In the first place in this connection it is to be noted that section 4 of the ordinance requires that application for a license be made in writing "upon such forms as may be provided by said city council, a copy of which shall at all times be attached to said license." The ordinance is utterly silent as to what the content of the forms shall be. Section 6 provides that at the hearing to be held by the council on each application for a license, evidence shall be received of the good moral character of the applicant and whether or not he is likely to resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation. "If the city council is satisfied that said applicant is of good moral character and will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation, it shall direct the issuance of a license to said applicant for said purpose of solicitation upon payment of the license fee herein provided for."

[26] We are of the opinion that on the face of the ordinance the indefinite standards which it enunciates provide a mechanism for the deprival of constitutional rights, not only on the basis of the guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity. It is pointed out by petitioner that the council members in the exercise of their power might very conceivably conclude that because of an applicant's labor union affiliations or because of his attitude upon controversial labor issues he did not have the prescribed qualities. It is entirely possible that on occasion a majority of the council might be members of a rival labor union or they might be employers engaged in a controversy with the union represented by the applicant. Certainly the standard provided by section 6 of the Redding ordinance is entirely subjective. Each council member is left to determine in his own mind what is "likely" to be the future conduct of the applicant. The character or extent of showing necessary to satisfy the council that the applicant is of good moral character and will not resort to the activities mentioned is not set forth. Satisfaction may be circumscribed by individual whim, caprice, or personal prejudice.

[27] Respondent maintains that the ordinance may be sustained if we indulge in a presumption that the council will perform its duty in a fair and impartial manner. (See People v. Globe Grain & Milling Co. (1930), 211 Cal. 121, 126–128, 294 P. 3; In re Flaherty (1895), 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529; 19 Cal.L. Rev. 449.) This contention rests upon the assumption that no question of, or akin to that of, free speech is presented, for where free speech or any other fundamental right is involved the presumption of proper action by the licensing authority cannot be relied upon. Numerous recent decisions from the United States Supreme Court have struck down ordinances which attempted to vest city officials with virtually unlimited discretionary power to grant or refuse permits and to thereby effectively impose a censorship or previous restraint upon constitutional rights or liberties. (See Lovell v. Griffin (1938), 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. C. I. O. (1939), supra, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State (1939), supra, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. Connecticut (1940), 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Largent v. Texas (1943), 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873.) As shown in some detail later in this opinion, in at least one aspect of the instant case, the

element of free speech cannot be ignored. (See discussion in immediately following paragraphs of requirement of the ordinance that organizers and unions forego the right to resort to concerted activities amounting to or producing "menace, threat, intimidation, coercion" and see previously quoted language of the main opinion in Thomas v. Collins (1945), supra, 323 U.S. 516, 65 S.Ct. 315, 323, 89 L.Ed. 430.) Furthermore this case presents the question as to whether a special act (the Redding ordinance) has validity in view of the general state law (Labor Code, § 923). In discussing the presumptions of validity which ordinarily support legislation this court has said that "these presumptions * * * are proper in a case where the right to legislate both generally and specially upon a subject exists but are inapplicable to a case like the present where we are testing the question as to whether or not there is room for the operation of a special act, in view of the existing general law." (Ventura County Harbor Dist. v. Board of Supervisors (1930), 211 Cal. 271, 280, 295 P. 6, 9.)

But even if we induge to its fullest extent the presumption urged by respondent the ordinance remains void on its face because by necessary implication it directs the city council to deny a license unless the council "is satisfied that said applicant * * * will not resort to * * * threat, menace, coercion, intimidation * * * in his proposed work of solicitation," means to which, as expressed or applied through strikes, picketing, or other lawful concerted action of union members, an applicant has a constitutionally protected right to resort.

That portion of section 6 which requires a determination by the council, before a license may be directed to issue, that the applicant will not resort to such means in his proposed work, appears to be complementary in purpose to section 1 of the ordinance, which provides that "It shall be unlawful for any person, firm or corporation, whether as principal, clerk, servant, agent, or employee, inside of the city limits of the City of Redding, by force, violence, menaces, threat, intimidation, coercion or corrupt means, either directly or indirectly, to seek, solicit, induce, or attempt to seek, solicit or induce, any person to join or take membership in any organization, or by force, violence, threat, intimidation, coercion or corrupt means, either directly or indirectly, to seek, solicit or induce, or attempt to seek, solicit or induce, any employer or other person to compel or induce any employee or any other person to join or take membership in any organization." This section seems to be directly aimed at prohibiting strikes, picketing and concerted action generally, and proscribes lawful as well as unlawful manifestations and applications of such activities. It is reasonably supposed that the "proposed work of solicitation," referred to in section 6 of the ordinance, includes the direct or indirect employe and employer solicitation referred to in section 1. It is too firmly established to merit much more that the mere enunciation of the fact that not all conduct embracing or effecting compulsion, coercion, intimidation, threats, and menace is unlawful. The means employed and the object to be attained may be entirely lawful, moral and just, even though the conduct has effected such incidental results and has attained its objective through them.

[28-32] Perhaps the largest number of organizations of any particular type which appear to fall within the terms of the Redding ordinance are labor organizations. It is with the rights of such an organization and its employe that we are here directly concerned. Particularly in the fields of labor union controversies with employers and in competition among the unions themselves has it been recognized that physically peaceable compulsion, coercion, intimidation, and threats may go to make up lawful moral and social pressure as against both employers and nonmember employes. (See Parkinson Co. v. Building Trades Council (1908), 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; McKay v. Retail Automobile Salesmen's Local Union No. 1067 (1940), 16 Cal.2d 311, 320, 321, 106 P.2d 373; Ex parte Bell (1942), 19 Cal.2d 488, 497, 122 P.2d 22.) Various means of economic suasion such as picketing, the primary and secondary boycotts, and refusal to work

together, often go to make up concerted efforts to induce nonmember employes to join a particular union. Such conduct may be performed in the exercise of civil liberties, guaranteed by both our federal and state Constitutions. Furthermore, solicitation of memberships in a labor union, unlike most other organizations, does not end when a worker chooses one union in preference to another. Members of a union or group of affiliated unions are privileged to refuse to work on the same job with other workmen whether the latter have united or organized themselves into a separate trade union or have not done so. (Parkinson v. Building Trades Council (1908), supra; McKay v. Retail Automobile Salesmen's Local Union No. 1067 (1940), supra.) It is now well established that a labor union may resort to concerted activities to win over employes with the object of gaining a closed shop agreement. (Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc. (1941), 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; McKay v. Retail Automobile Salesmen's Local Union No. 1067 (1940), supra; C. S. Smith Metropolitan Market Co. v. Lyons (1940), 16 Cal.2d 389, 396, 106 P.2d 414; Fortenbury v. Superior Court (1940), 16 Cal.2d 405, 106 P.2d 411; Sontag Chain Stores Co. v. Superior Court (1941), 18 Cal.2d 92, 113 P.2d 689; Park & T. I. Corp. v. International, etc., of Teamsters (1946), 27 Cal.2d 599, 165 P.2d 891.) The National Labor Relations Act designates the closed shop as one of the objectives of collective bargaining. It constitutes an unfair labor practice for an employer, governed by such act, to enter into a collective bargaining agreement with a unit not the representative of the majority of the employes. (National Labor Relations Act, § 8(3), 29 U.S.C.A. § 158(3).) And peaceful picketing and boycotting for a closed shop by an outside union are not enjoinable in a federal court under the Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq. (See Lauf v. E. G. Shinner & Co. (1938), 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872.)

[33] If a paid organizer or solicitor has in the past been connected in any way with concerted activities carried on by his union against an employer or an employe group or, in the opinion of the board, is "likely" to participate in such activity in the future, he could (and apparently *should)* under the terms of the ordinance be denied a license. Indeed, to meet the standard required for a license, he would be bound to prove that he and his union (at his request or with his connivance) would not (i.e., would forego the right to) engage in strikes, picketing, or boycotts as means of procuring members. Inasmuch as such conduct is inherently entirely lawful the consequent deprivation of a license would be arbitrary and in derogation of the applicant's constitutional right to carry on a lawful business or professional activity. The fact that the use of force, violence, and fraud may be prohibited does not warrant sustaining the ordinance which also prohibits that which may not be prohibited. "Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced. [Citation.] A conviction based upon such a statute cannot stand even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation." (Ex parte Bell (1942), supra, 19 Cal.2d 488, 496, 122 P.2d 22, 27.)

Impropriety of Control by Municipality, through Taxation, of Right Declared by General State Law.

[34] There is still another element of the Redding ordinance which in and by itself necessitates the conclusion that petitioner is entitled to his discharge. The tax provisions of such ordinance require paid organizers or solicitors to pay a license tax as a condition precedent to the pursuit of their activities. Such provisions are not consistent with the public policy of California as declared in section 923 of the California Labor Code. That section provides that "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such em-

ployers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment * * *." (See, also, Shafer v. Registered Pharmacists Union (1940), 16 Cal.2d 379, 382, 106 P.2d 403.)

[35] Where a matter is of state-wide concern, local regulation upon the subject may be enforced only if it is not in conflict with the statutes of the state. (Cal. Const., art. XI, § 11; Pipoly v. Benson (1942), 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515; In re Means (1939), 14 Cal. 2d 254, 260, 93 P.2d 105, 123 A.L.R. 1378; In re Simmons (1925), 71 Cal.App. 522, 528, 235 P. 1029.) Respondent concedes that the ordinance in question is both a regulatory and revenue measure. We think that because it is the latter as well as the former it is incompatible with the state legislation.

[36] The imposing of a license tax upon the exercise of the privilege of membership solicitation places an impediment in the way of realization of the state's declared policy of "full freedom" for association and self-organization of workers. A part of the right of self-organization of employes is the right of reasonable solicitation of others to join their union. (Republic Aviation Corp. v. National L. R. Board (1945), 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372, 157 A.L.R. 1081.) The solicitation of members is one of the most important activities of a union. Such solicitation is to a union akin to what breathing is to a human being. It is axiomatic to say that without members a union cannot function. In the development and apposition of a trade union the paid organizer usually has the duty to widely and systematically solicit workers for membership. A tax on solicitation of memberships thus tends to smother the workers' united existence. A revenue tax could be made so onerous as to proximately affect collective bargaining and the successful carrying on of concerted activities for other mutual aid or protection. The legitimate objective of the closed shop and consequent employer recognition can generally be obtained only by increase of membership and expansion of organization.

[37] If the city of Redding may tax the privilege (or right) for revenue it may fix the rate of tax and thus control at will an activity in a field where the Legislature has declared that full freedom shall exist. "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." (Murdock v. Pennsylvania (1943), 319 U.S. 105, 112, 63 S.Ct. 870, 874, 891, 87 L.Ed. 1292, 146 A.L.R. 81.) Further, if the city of Redding may impose such a tax every other municipality in the state may impose a similar tax upon the same individual if he crosses its borders. It is common knowledge that many of the larger industrial plants in this state are so situated that they draw workers from as many as five or six or more cities. In order to carry on the work of solicitation successfully, so as to attain a united employe front in any such plant and at the same time observe the right of the employer to the full-time attention of his employes to his work (see Midland Steel Products Co. v. National L. R. Board (6 Cir., 1940), 113 F.2d 800), it may be necessary that an organizer representing or soliciting workers employed in such plants spend part of his time in each city from which workers are drawn. Even though the tax imposed by one city might not be burdensome additional levies by others could readily become so.

We confine our decision for present purposes on this phase of the case to the narrow question we have before us, i. e., the validity of a flat license tax attempted to be imposed by a municipality upon the exercise of the right of membership solicitation by a labor organizer for his union. It is not a tax imposed by the same authority which has declared the state's policy of full freedom of association and self-organization for workers. It is not an income or other indirect tax related to the scope of the activities of the solicitor or the amount of his compensation. It is not imposed to defray expenses of regulation.

It is, we think, in its relationship to the public policy of the state as declared in section 923 of the Labor Code, if not in its relationship to freedom of speech, the type of tax recently condemned by the Supreme Court of the United States in Murdock v. Pennsylvania (1943), supra, 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81. The court there held it to be immaterial that the tax in the particular case did not actually suppress or control the activity concerned or that it was nondiscriminatory. It was pointed out that the very nature of the tax, conditioned upon the activities of distributing literature and soliciting people to purchase religious books and pamphlets, operated to restrain in advance constitutional liberties and inevitably tended to suppress their exercise. (See, also, Jones v. Opelika, (1943), 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290.) Here, the license tax obviously operates to make conditional and to restrict the "full-freedom" of self-organization which the state law declares and protects.

By section 10 of the ordinance violation of any of its provisions is made a misdemeanor and subjects an offender to a maximum penalty of imprisonment in the county jail for a period of three months and a fine of $300. It thus effectually prohibits a paid organizer who is unable to pay the prescribed license fee from functioning as such paid organizer.

Since the State of California has seen fit to declare a state policy of complete freedom in regard to the formation of labor organizations to the end that there may be collective action by workmen (Labor Code, § 923; C. S. Smith Metropolitan Market Co. v. Lyons (1940), supra, 16 Cal.2d 389, 400, 106 P.2d 414) and because inevitably the licensing provision of the Redding ordinance restrains the freedom taxed, such ordinance must give way to the dominant state legislation. It is of no consequence in this respect that only those who solicit for compensation are required to pay a tax. Lay members of a labor union have a right to carry on their work of self-organization both through their personal efforts and through those of their paid organizers. The latter are, or at least should be, but the representatives of the former.

Effect of National Labor Relations Act and of Section 923 of the Labor Code as Absolutely Precluding any Municipal Regulation of Labor Organizers Not Determined.

It is further contended that the Redding ordinance is wholly invalid (in its regulatory as well as taxing aspects) for the asserted reason that it creates a constitutionally prohibited conflict with the public policy and laws of the United States as exemplified by the National Labor Relations Act (see Hill v. Florida (1945), 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782); also that it conflicts with the public policy of the State of California as exemplified by section 923 of the California Labor Code and is therefore rendered wholly nugatory under the principle that where a matter is of state-wide concern, local regulation upon the subject may not be imposed if it is in conflict with the statutes of the state. (See Cal.Const. art. XI, § 11; Pipoly v. Benson (1942), supra, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515; In re Means (1939), supra, 14 Cal.2d 254, 260, 93 P.2d 105, 123 A.L.R. 1378; In re Simmons (1925), supra, 71 Cal.App. 522, 528, 235 P. 1029.)

[38] The National Labor Relations Act applies only to activities which affect interstate commerce. (National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937), 301 U.S. 1, 29-32, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.) The act secures to workers, who fall within it, the rights of self-organization and "full freedom" in the selection of representatives of their own choosing for purposes of collective bargaining with employes. (National Labor Relations Act, 29 U.S.C.A. § 151; Hill v. Florida (1945), supra; cf. National L. R. Board v. Fansteel Metallurgical Corp. (1939), 306 U.S. 240, 255, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599; National L. R. Board v. Sands Manufacturing Co. (1939), 306 U.S. 332, 59 S.Ct. 508, 83 L.Ed. 682.) The public policy evinced by section 923 of the Labor Code is likewise that of protecting collective bargain-

ing. (Shafer v. Registered Pharmacists Union (1940), supra, 16 Cal.2d 379, 385, 106 P.2d 403.)

For the reason that the records in the City Court of Redding (and on appeal in the Superior Court of Shasta County) do not show that Porterfield acted as the bargaining representative of employes in industries which are subject to the National Labor Relations Act, we find it unnecessary to determine whether or not the Redding ordinance conflicts with such act. (See Alabama State Federation of Labor v. McAdory (1945), 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed 1725.) Also, inasmuch as it appears that, for reasons already stated, petitioner is entitled to his discharge, we find it unnecessary to determine whether the regulatory features of the ordinance in question, standing alone, are or are not, in their application to labor organizers, so inconsistent with the declared state policy as to be, if otherwise valid, entirely beyond the sphere of permissible municipal legislation.

Severability Clause Cannot Save Conviction Based on Entire Ordinance.

[39] Respondent city contends that the portions of the ordinance relating to payment of the license fee and to soliciting by force, violence, menace, threats, intimidation, coercion, or corrupt means, if objectionable, may be eliminated by virtue of the savings clause (§ 11). The provisions of the ordinance left after severance would then require a showing merely as to the good moral character of the applicant.

The potential severability of the ordinance, however, can have no effect upon the instant matter. As far as petitioner is concerned the existence of the statute as a whole was an operative fact. The consequences of its existence as such cannot be ignored. In order for petitioner to have secured a license he would have had to have complied with the terms of the ordinance as written. In Smith v. Cahoon (1931), 283 U.S. 553, 563–565, 51 S.Ct. 582, 75 L.Ed. 1264, a private carrier for hire was convicted of the charge of operating vehicles upon the highways without having obtained the certificate of public convenience and necessity and without having paid the tax required by a statute of the State of Florida. Upon habeas corpus defendant successfully contested the constitutionality of certain provisions of the statute as applied to private carriers. It was contended in support of the conviction, however, that a savings clause removed the infirmity of the statute. In denying the efficacy of the contention and holding that defendant was entitled to assert his constitutional right by virtue of the invalidity of the statute upon its face, the United States Supreme Court stated (page 563 of 283 U.S., page 586 of 51 S.Ct., 75 L.Ed. 1264): "The effect of this savings clause is merely that, if one provision is struck down as invalid, others may stand. But, until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left."

It is ordered that petitioner be discharged.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

SPENCE, Justice.

I concur in the judgment discharging petitioner. I am entirely in accord with the conclusion stated by Mr. Justice Schauer that the "portions of the ordinance, purporting to establish the standards upon which the licensing board shall act, are, as enacted, arbitrarily prohibitive of certain of petitioner's constitutionally guaranteed rights"; and I am further in agreement with much that is said in the opinion in support of the conclusion. If it may be implied, however, from the extended discussion of the several points considered in the opinion, that there are obstacles, constitutional or otherwise, to any and every form of reasonable regulation by municipal authorities of the occupation in which petitioner is engaged, I am not prepared to join in any portions of the opinion which may carry such implication.

EDMONDS and SHENK, JJ., concurred.

74 Cal.App.2d 418

FILLMORE v. FILLMORE.

Civ. 3196.

District Court of Appeal, Fourth District, California.

May 9, 1946.

1. Appeal and error ⇐518(4)

Where cross-complaint was dismissed and abandoned and not introduced as evidence of an admission, the dismissed and abandoned pleading was not properly a part of record on appeal.

2. Divorce ⇐239

In divorce action, finding that plaintiff was in poor health and required medical attention at reasonable cost of $60 per month and that defendant was able to pay that amount was adequate.

3. Divorce ⇐243, 245(1)

In divorce action, where court caused a memorandum to be entered in minutes showing plaintiff to be entitled to an interlocutory divorce decree with $60 per month for support until further order of court, deliberations of court, as mentioned in minute entry, were conclusively merged in judgment providing that allowance should automatically stop at expiration of six months and trial judge had right to modify or change his memorandum opinion as to the length of time payments were to continue

4. Divorce ⇐239

In divorce action, trial court has very broad powers in passing on questions of fact, including amount and duration of alimony.

5. Appeal and error ⇐1008(1)

The finding of trial court will not be disturbed on appeal unless a clear abuse of discretion appears from the record.

6. Divorce ⇐243

Interlocutory divorce decree providing that plaintiff was entitled to $60 per month for six months, but that allowance should automatically stop at expiration of that period unless plaintiff filed appropriate proceeding before expiration of the six months' period establishing necessity for continuance of monthly allowance, was not an abuse of discretion.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action for divorce by Irene Velma Fillmore against Millard Ivan Fillmore, wherein the defendant filed a cross-complaint. From an interlocutory decree of divorce, the plaintiff appeals.

Affirmed.

N. E. Youngblood, of Los Angeles, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and defendant were married in 1937. They separated in 1944. Plaintiff and cross-defendant commenced this action for divorce against defendant and cross-complainant on three separate grounds, extreme cruelty, wilful neglect, and wilful desertion. It was alleged in plaintiff's complaint, in addition to certain acts of extreme cruelty, that for a considerable time immediately preceding the commencement of the action, plaintiff was in poor health and is still requiring constant medical care necessitating the expenditure of approximately $55 per month and that she is unable to pay said amount.

Defendant denied generally the allegations of the complaint and by way of cross-complaint he sought a divorce on the grounds of extreme cruelty and desertion and also sought an annulment of the marriage on the ground that plaintiff, at the time of her marriage, was physically incapable of entering into the marriage state by reason of the fact that she was suffering from cancer and concealed said known fact from defendant; that said physical incapacity still exists and is incurable.

Plaintiff answered the cross-complaint, denied generally the allegations pertaining to the divorce and denied that at the time of her marriage she was physically unable to enter into the marriage state by reason of personal defects as alleged, and denied

that she concealed the fact from defendant that she was suffering from cancer, but alleged that she did not know of such fact at the time of the marriage.

A minute entry of May 18, 1945, discloses that the cause came on for hearing and counsel for defendant dismissed the cross-complaint upon motion duly granted. The case was submitted on May 22, 1945. The court caused a memorandum to be entered in the minutes showing plaintiff to be entitled to an interlocutory decree of divorce, and "It is further decreed that the defendant pay to the plaintiff the sum of Sixty Dollars ($60.00) per month for support, maintenance and medical care, until further order of the court * * * that the defendant take nothing by his cross-complaint.

The proposed findings filed by defendant, to which plaintiff objected, contained a finding that plaintiff is in poor health and still requires medical attention at a reasonable cost of $60 per month and that defendant is able to pay said amount. It then sets forth a provision in reference to the term for which said amount shall be paid, which is the cause for plaintiff's appeal from the judgment. It provides that plaintiff is entitled to $60 per month for six months but that said allowance shall automatically stop and end at the expiration of that period unless plaintiff files appropriate proceedings before the expiration of said six months period, establishing the necessity for a continuance of said monthly allowance, and if no proceedings are filed within said time said allowance shall terminate. Plaintiff proposed findings allowing her $60 per month "until further order of the court." The court signed defendant's proposed findings.

On October 1, 1945, plaintiff moved to modify the findings as signed, on the ground that they did not conform to and were inconsistent with the minute order dated May 22, 1945, wherein the court granted plaintiff $60 per month "until further order of the court," and asked the trial court specifically to find "That the plaintiff is and has been for a considerable period of time immediately preceding the commencement of this action in poor health, and has required and is still requiring constant and continued medical care for cancer," because that fact was pleaded in defendant's cross-complaint and admitted by plaintiff's answer thereto. This motion was denied. Plaintiff, on the same day, filed a notice of appeal reciting that she appealed from the interlocutory decree of divorce dated October 1, 1945.

As we gather from plaintiff's argument, it is now contended that the order terminating the $60 per month support for plaintiff at the end of six months is without evidentiary support because the court found that plaintiff was and still is requiring constant and continued medical care for cancer, and that the burden should not be placed on plaintiff to show that the continuance of support at the end of six months is essential. Plaintiff asks that this court order the findings to be amended to conform to those proposed by her.

[1, 2] Our investigation of the record reveals the fact that the cross-complaint was dismissed and abandoned and not introduced as evidence of an admission of either party. The dismissed and abandoned pleading is not properly a part of the record on appeal. Williams v. Seiglitz, 186 Cal. 767, 200 P. 635. The court did make a finding which adequately covered the subject. Kepfler v. Kepfler, 134 Cal. 205, 66 P. 208.

[3-5] The memorandum minute entry of the court's decision contemplated the preparation and filing of findings and a judgment based thereon. The deliberations of the court, as mentioned in the minute entry, were conclusively merged in the judgment and the trial judge had the right to modify or change his memorandum opinion as to the length of time said payments were to continue. Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 669, 242 P. 725. The trial court has very broad powers in passing upon questions of fact, including the amount and duration of alimony. Lamborn v. Lamborn, 80 Cal.App. 494, 251 P. 943. The findings of the trial court will not be disturbed on appeal unless a clear abuse of discretion appears from the record. Duffey v. Duffey, 79 Cal.App. 734, 251 P. 218.

[6] The evidence produced by plaintiff as to her state of health was not conclusive. The fact that she worked steadily for four years and up to the time of trial may have had a bearing on the question of the duration of the payments. The door is still open to her to seek continuance of such payments, upon proper showing, if application is made within the period prescribed. We perceive no error or abuse of discretion.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



74 Cal.App.2d 354

WHEELER v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

Civ. 15212.

District Court of Appeal, Second District, Division 2, California.

May 2, 1946.

1. Appeal and error ⇐931(1), 989

On appeal by plaintiff from judgment in favor of defendant after trial before the court without a jury, the evidence would be viewed in the light most favorable to defendant, and conflicting evidence of plaintiff would be disregarded.

2. Payment ⇐89(5)

A party alleging mistake in payment of money must sustain his charge by clear and convincing evidence.

3. Payment ⇐89(5)

In action by trustor to recover from trustees an amount alleged to have been paid to the trustees under a mistake, evidence that check by which payment was made bore a notation that it was for the trust, that letter accompanying check recited that amount was to be placed in principal account of the trust, and that quarterly statements furnished trustor showed the amount as an addition to principal, sustained finding that trustor intended at the time to exercise the right reserved to her in declaration of trust to add further cash to corpus of the trust, and did not act under any mistake.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Helen E. Wheeler against the Citizens National Trust & Savings Bank of Los Angeles and others to recover an amount alleged to have been paid to trustees under a mistake. Judgment for defendant, and plaintiff appeals.

Affirmed.

Sprague & Sparks, Todd W. Johnson, Alva C. Baird, and William S. Sprague, all of Los Angeles, for appellant.

Harry J. McClean, of Los Angeles, for respondents.

Cosgrove & O'Neil, of Los Angeles, Leonard A. Diether, of Pasadena, and John N. Cramer, of Los Angeles, for respondent Bank.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover the sum of $65,000 from the trustees of a trust alleged to have been paid to said trustees under a mistake, plaintiff appeals.

[1] The evidence being viewed in the light most favorable to defendants (respondents) and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

On April 11, 1941, plaintiff as trustor executed a written declaration of trust in which defendants Citizens National Trust & Savings Bank of Los Angeles and John E. Wheeler were named as trustees. This declaration of trust provides, among other things, that (1) the trustor has the right to add real estate, securities, cash or other property to the corpus of the trust to be held by the trustees under the terms of the trust; (2) the trustor can not revoke or alter the provisions of the trust, except

that she reserved the right to withdraw at any time any property or money comprising part of the corpus of the trust estate, provided the aggregate of such withdrawals should not exceed the total market value of $50,000; (3) during the lifetime of the trustor the trustees are to pay to her an annuity of 12,000 a year out of the income or incomes and corpus of the trust estate; however, if the net income exceeds $12,000 in any one year, the trustees are to pay such excess to the trustor; and (4) upon the death of the trustor the trust is to terminate and the entire trust estate together with any income accrued or undistributed to the trustor on the date of her death is to be transferred, conveyed and distributed according to the trustor's last will or, in the event she fails to exercise this power of appointment, in equal shares to her issue per stirpes, and if there are no issue to her heirs at laws, in accordance with the statutes of succession of the state of California.

Approximately four months after the execution of the declaration of trust a check in the sum of $65,000 representing the proceeds of sale of certain property located in the state of Washington was prepared by Mr. Wheeler for plaintiff's signature, naming the corporate trustee as payee. The check bore this notation: "For Helen Evans Wheeler Trust No. 8005." (This was the number of the trust created by plaintiff on April 11, 1941.) This check was accompanied by a letter addressed to the corporate trustee reading in part thus:

"I hand you herewith the sum of $65,000.00, to be placed in the principal account of the Helen E. Wheeler trust, No. 8005."

These were delivered to the Citizens National Trust and Savings Bank of Los Angeles, which added the $65,000 to the corpus of the trust estate.

In April or May of 1944, plaintiff demanded that the corporate trustee return to her the sum of $65,000. She was informed that it was part of the trust estate, and that since the trust was irrevocable she was not entitled to withdraw any part of the sum.

On September 4, 1944, plaintiff commenced the present action against defendant seeking a judgment for $65,000, alleging that she had paid the money above mentioned under a mistake of fact, believing it was merely a loan and could be withdrawn at any time. The trial court found against plaintiff's contention.

Plaintiff urges reversal of the judgment upon the proposition that *there was not any substantial evidence to support the trial court's finding that plaintiff intended to exercise the right reserved to her in the declaration of trust to add further cash to the corpus of the trust, and that the $65,000 delivered to the corporate defendant accompanied by the letter of August 22, 1941, was not loaned to the trust for the purpose of improving certain property of the trust estate.*

[2] This proposition is untenable. Bearing in mind the settled law in California that a party alleging mistake is bound to sustain his charge by clear and convincing evidence showing the mistake to the entire satisfaction of the court, and not leaving the mistake open to doubt [1], the evidence sustains the questioned findings of the trial court. For example, the check plaintiff delivered to the trustees bore the notation, "For Helen Evans Wheeler, Trust No. 8005." The letter accompanying the check contained this statement:

"I hand you herewith the sum of $65,000, to be placed in the *principal account* of the Helen E. Wheeler trust, No. 8005." (Italics added.)

[3] In addition to the foregoing evidence indicating that the money was to be deposited in the principal account of the trust estate the trustees furnished plaintiff on August 25, 1941, a quarterly statement which read thus:

"Principal Cash

"8-25 Check from Trustor—addition to principal $65,000.00."

Plaintiff testified relative to this statement as follows: "Well, I always read those things over from one end to the other, so I judge I probably noticed it at the time."

1 6 Cal.Jur. (1922) p. 92, § 56; Moore v. Copp, 119 Cal. 429, 436, 51 P. 630; Lepper v. Ratterree, 98 Cal.App. 245, 255, 276 P. 1037.

No objection was made by plaintiff that the money was deposited as part of the corpus of the estate until April or May of 1944.

From the foregoing evidence the trial court was justified in drawing the inference that plaintiff delivered the $65,000 check to the corporate trustee with the intent that it should become part of the corpus of the trust estate and that she did not give it to the trustee with the understanding that it was to be loaned for the specific purpose of making repairs upon property of the trust estate; that as a result plaintiff did not act under any mistake when she delivered the sum to the Citizens National Trust & Savings Bank of Los Angeles.

It needs no citation of authority to support the proposition that this court must disregard conflicting evidence of plaintiff to the effect that she understood and intended that the sum should be merely a loan subject to be returned to her upon her demand.

For the foregoing reasons the judgment is affirmed.

MOORE, P, J., and WILSON, J., concur.



74 Cal.App.2d 269

PEOPLE v. DOBKIN.

Cr. 2383.

District Court of Appeal, First District, Division 2, California.

April 30, 1946.

Hearing Denied May 27, 1946.

1. Criminal law ⇐824(1)

The trial court in a criminal case must instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts and the court is not relieved of such duty to give instructions whose necessity is developed through the evidence introduced at the trial, an instruction being "necessary" if it is vital to a proper consideration of the evidence by the jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Instruction".

2. Criminal law ⇐780(1)

If the evidence requires it, trial court should charge the law as to accomplices, leaving the question of whether a witness is an accomplice for the jury.

3. Criminal law ⇐742(2)

Where fact of whether a witness did certain things which would make him an accomplice is in dispute, the matter is for the jury, but, where facts are not disputed, it becomes a question of law as to whether such acts make the witness an accomplice.

4. Criminal law ⇐934

A contention that a conviction was had upon the uncorroborated evidence of an accomplice presents a legal question under statute authorizing the granting of a new trial on ground that the verdict is contrary to the law and evidence. Pen. Code, § 1181, subd. 6.

5. Criminal law ⇐780(2)

Where complaining witness in prosecution for crime against nature was 16 years of age and the circumstances, shown by his own testimony, established unquestionably that he was an accomplice, trial court should have so instructed jury as a matter of law. Pen.Code, § 286.

6. Criminal law ⇐781(5)

Where evidence of defendant's confession is admitted, and the court submits to jury the question whether the confession was voluntarily made, court should instruct jury to disregard the evidence if they find confession to have been involuntary.

7. Criminal law ⇐1186(4)

Failure of trial court of its own motion to give instructions directly telling jury that 16 year old complaining witness in prosecution for crime against nature was an accomplice constituted prejudicial error under circumstances. Pen.Code, §§ 286, 1111; Code Civ.Proc. §§ 1839, 2061, subd. 4; Const. art. 6, § 4½.

8. Infants ⇐20

Evidence supported conviction of contributing to the delinquency of a minor. Welfare and Institutions Code § 702.

9. Criminal law ⇐1174(7)

Alleged misconduct in that one of arresting officers mingled with jurors during a court recess did not require reversal of conviction, where alleged misconduct was taken care of by an instruction to jury given immediately after the incident occurred, after which trial judge asked defendant's counsel if instruction satisfied him and he replied that it did.

Appeal from Superior Court, San Francisco County; Theresa Meikle, Judge.

George J. Dobkin was convicted of a violation of section 286 of the Penal Code and section 702 of the Welfare and Institutions Code, and he appeals.

Judgment of conviction on charge of a violation of section 286 of the Penal Code reversed and cause remanded, and judgment of conviction for violation of section 702 of the Welfare and Institutions Code affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., City and County of San Francisco, and Andrew Bodisco, Asst. Dist. Atty., City and County of San Francisco, both of San Francisco, for respondent.

GOODELL, Justice.

The appellant was convicted by a jury of a violation of sec. 286, Pen.Code, and of sec. 702 of the Welfare and Institutions Code and sentenced to the penitentiary in the 286 case and to the county jail for one year in the 702 case, the sentences running concurrently. His motion for a new trial was denied.

The appellant contends: 1st, that the corpus delicti was not proved; 2d, that he was convicted solely on the uncorroborated testimony of an accomplice; 3d, that the signed statement of the appellant, relied on as corroboration, was not freely and voluntarily given; 4th, that a material witness for the defense was prevented by intimidation from testifying; 5th, that the assistant district attorney was guilty of misconduct; 6th, that there were procedural errors; 7th, that one of the arresting officers mingled with the jurors during recess; 8th, that the court erred in rulings; 9th, that the court erred in instructions; and 10th, that the court of its own motion should have instructed the jury that the complaining witness was an accomplice.

The tenth point will be discussed first.

The only instruction given in this case which can be said to define or deal with accomplices and their corroboration reads as follows: "I instruct you that a conviction of this defendant on charges of violation of Section 286 of the Penal Code cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

The appellant contends that his rights were not adequately protected by this instruction, and that the court sua sponte should have told the jury (in dealing with the charge under sec. 286) directly and in so many words *that the complaining witness was an accomplice.*

[1] Three recent cases discuss the duty resting on trial courts to give instructions even though they are not requested, i. e., People v. Warren, 16 Cal.2d 103, 104 P.2d 1024; People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; and People v. Bender, 27 Cal.2d 164, 163 P.2d 8. In the Putnam case, supra, 20 Cal.2d at page 890, 129 P. 2d at page 369, the court says: "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case [citations]. The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial' [citations]. An instruction is necessary if it is vital to a proper consideration of the evidence by the jury [citations]." In enumerating the subjects on

which such instructions must be given the opinion specifies accomplice instructions when it says: "Accordingly, it has been held that the court must of its own motion instruct the jury in criminal cases with respect to accomplices and their testimony (People v. Warren, supra; People v. Heddens, [infra]), * * *."

In People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024, 1031, the court said: "While it is true that appellant Warren did not propose instructions on the subject, we believe it was prejudicial error here for the trial court to fail to give such instructions of its own motion. People v. Heddens, 12 Cal.App.2d 245, 55 P.2d 230; see, also, People v. Curran, 24 Cal.App.2d 673, 75 P.2d 1090."

[2-4] The leading case of People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 902, 39 L.R.A.,N.S., 704, lays down the following rules with respect to accomplice instructions, differentiating between those cases where there is a question of fact whether a witness is an accomplice and those where there is not: "When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am.St.Rep. 65. Whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. * * * Therefore whenever upon appeal it is argued that the conviction was had upon the uncorroborated testimony of an accomplice, it is equivalent to a declaration that the verdict is contrary to the law and the evidence, and this is always a legal question. Pen.Code, § 1181, subd. 6. Therefore, in every proper case, a Court of Appeals is called upon to consider whether or not the witness is an accomplice, and, if so, whether his evidence has received the corroboration demanded by the law before a defendant may be convicted upon it."

[5] The age of the complaining witness (16 years) and all the circumstances shown by his own testimony bring the case squarely within the rule of People v. Robbins, 171 Cal. 466, 154 P. 317. He was unquestionably an accomplice and it was therefore the duty of the court to so instruct the jury as matter of law. People v. Coffey, supra; People v. Southwell, 28 Cal.App. 430, 152 P. 939; People v. Swoape, 75 Cal.App. 404, 242 P. 1067; People v. Brown, 25 Cal.App.2d 513, 515, 77 P.2d 880. The respondent in its brief does not question that the complaining witness was an accomplice but assumes that he was.

In People v. Southwell, supra, the failure of the court to instruct the jury directly, and as matter of law, that two women witnesses who put up bribe money were accomplices, was held to be prejudicial error. The court's reasons were thus stated, 28 Cal.App. at page 433, 152 P. at page 940: "Under this state of the case, and assuming that the corroborative evidence, admittedly slight, was sufficient to support the conviction, it was very material to the defendant to have the law as to the testimony of accomplices explicitly stated to the jury. It was not for the jury to decide whether each or any of the witnesses were accomplices, but under the testimony it was the duty of the court to give the requested instructions advising the jury that Mrs. Willie Martin and Rena McMonagle were both accomplices as to the crime charged against the appellant. Under the state of the record as we have described it, there should have been left to the jury no discretion of judgment to determine as to whether these witnesses were accomplices; the testimony showed as a fact that they were. For aught that appears, the jury may not have applied the rule of section 1111, Penal Code, to the testimony of these witnesses, but may have given full credit and weight to their testimony, and left out of account altogether the requirement that such testimony, before it was sufficient to warrant a

conviction, should be corroborated by other and independent evidence."

Those observations apply with equal force to the instant case. In this case eleven witnesses testified. Without a direct and unequivocal instruction that the complaining witness was an accomplice, the jury might well have been left with the impression that he was a mere victim, in which event his testimony would be as credible as that of any other witness.

In addition to the authorities already cited the following cases hold that it is *prejudicial error* to fail to instruct that a witness is an accomplice when his own testimony, or other undisputed evidence, shows that he is, i. e., People v. Allison, 200 Cal. 404, 253 P. 318; People v. Bailey, 82 Cal.App. 700, 256 P. 281; and People v. Schumann-Heink, 98 Cal.App. 225, 276 P. 625. There is no case in this state which we have found holding that this is not error, but there are cases which, while conceding it to be error, hold that it is not *prejudicial.* The leading case in this line is People v. McDermott, 75 Cal.App. 718, 243 P. 485, where the jury were instructed "that an accomplice is one who, knowing that a crime is being committed, willfully and with criminal intent intentionally aids, abets, and assists another in the commission of such crime, or criminal act, and whether or not one is an accomplice as defined in these instructions is for the jury to determine from all the testimony and circumstances in the case." The court conceded that the jury should have been told explicitly and directly that the witness was an accomplice, instead of having been given the foregoing instruction, but points out that "In other instructions *the definition of an accomplice was correctly stated* * * *." (Emphasis added.)

In People v. Ferlin, 203 Cal. 587, 265 P. 230, 236, a similar situation was presented and the court said: "The question as to whether or not the witness Hill was an accomplice, under the evidence, was not seriously disputed upon the trial of the cause. It was the duty of the trial court, therefore, to instruct the jury, as matter of law, that Hill was an accomplice of the defendant. People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L.R.A.,N.S., 704; People v. Howell, 69 Cal.App. 239, 242, 230 P. 991. However, this error cannot be said to have prejudicially affected the defendant. In People v. McDermott, 75 Cal.App. 718, 243 P. 485, it is declared that: 'The jury should have been instructed that Sova must be regarded as an accomplice. That question should not have been left to it to determine. However, it must be presumed that the jurors observed and applied the instructions given them. *In other instructions the definition of an accomplice was correctly stated.*' * * *" The court concludes: "Practically an identical situation is presented in the instant case, for the court below *in several instructions correctly stated the definition of an accomplice* * * *." (Emphasis added.)

The McDermott and Ferlin cases were followed in People v. Knoth, 111 Cal.App. 250, 295 P. 577 (where the instructions are not quoted in the opinion); in People v. Rous, 118 Cal.App. 534, 5 P.2d 470, 472 (where the instructions are not quoted, but where the court says that the verdict could not "be said to have been founded entirely upon the evidence elicited from accomplices"); in People v. Menne, 4 Cal.App. 2d 91, 41 P.2d 383 (where the instruction given differed from that in the McDermott case only in the addition of the word "felonious"); in People v. Bonner, 5 Cal.App.2d 314, 42 P.2d 694, 696 (where the court, without quoting the instructions, says that "in several of them the jury was given the correct definition of an accomplice"); and in People v. Wahnish, 20 Cal.App.2d 58, 66 P.2d 677, 679 (where it was conceded "that the court fully and fairly charged the jury as to the definition of an accomplice * * *").

The respondent argues that, even conceding error is failing to give the direct instruction, appellant "is nevertheless foreclosed under *section 4½ of Article 6 of the State Constitution*", but we are satisfied that it is not a tenable argument. If in the case at bar the court had given an instruction such as that given in the McDermott case, supra, or one based on the several definitions found in People v. Coffey, supra, much could be said in favor of a holding that the McDermott and Ferlin cases

should be followed herein and the error held non-prejudicial. But the jury was told only that an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." No instruction was given supplementing, enlarging upon, aiding or clarifying this statutory definition.

The evidence shows that the prosecuting witness was 16. Because of his youth, however, and because the case was tried in the juvenile court, the jury might have doubted whether he was "liable to prosecution for the identical offense" in the absence of an instruction defining persons capable of committing crimes, sec. 26, Pen. Code. They might have questioned his criminal liability for other reasons (which need not be elaborated), in the absence of more specific definition. The instruction defining the offense itself, taken from sec. 286, Pen.Code, could not be said to enlighten them as to whether or not he could be so prosecuted.

The fact that the instruction was given in the language of the statute is not an answer to the problem, for there are exceptional cases where such a strictly legal definition (sufficient, perhaps, for lawyers and courts) would not, by itself, be sufficiently comprehensive. Indeed it might even be misleading. See 8 Cal.Jur. 326, sec. 374; People v. Plyler, 121 Cal. 160, 163, 53 P. 553; People v. Lon Yeck, 123 Cal. 246, 247, 55 P. 984; People v. Dobbins, 138 Cal. 694, 698, 72 P. 339; People v. Ruiz, 144 Cal. 251, 253, 77 P. 907.

In the case of People v. Howell, 69 Cal. App. 239, 230 P. 991, an accomplice instruction was given, as it was here, in the language of section 1111, but it was followed up, as might have been done in this case, by a further instruction. The court said, 69 Cal.App. at page 244, 230 P. at page 993: "It is also contended by appellant that the instruction conflicts with another instruction given to the jury. The objection appears to be based upon the fact that by the one instruction an accomplice was defined as 'one who is liable to prosecution for the identical offense charged against the defendant,' etc., and by the instruction here under consideration an accomplice is defined as 'one who, knowing that a crime is being committed, willfully and with criminal intent intentionally aids, abets, and assists another in the commission of such crime or criminal act.' The two instructions are not in conflict, but, to the contrary, are in harmony one with the other. The first instruction tells the jury that an accomplice is one who in given circumstances, 'is liable to prosecution,' and the second instruction is *an aider of the first in making it plain that those persons are accomplices who, knowing that a crime is being committed, willfully and with criminal intent aid in its commission. Otherwise, as heretofore indicated, any person, without reference to his intent, who in any manner assisted in the commission of a criminal act, would be an accomplice and 'liable to prosecution.'*" (Emphasis added.) See, generally, People v. Shaw, 17 Cal.2d 778, 779, 112 P.2d 241, on the question of accomplices.

[6] It might also be argued that the judgment should be affirmed because of the appellant's confession, but we are satisfied that this is not a tenable ground. On the night of his arrest appellant gave to the arresting officers a signed statement in question and answer form wherein he admitted the commission of the offense. Thereby he definitely connected himself "with the commission of the offense", sec. 1111, Pen. Code, and that statement, plus two oral admissions, were laid before the jury, and were and now are relied on by the state as furnishing the requisite corroboration. Such statement, if legally obtained, would afford sufficient corroboration. People v. Frazer, 80 Cal.App. 464, 468, 252 P. 633; People v. Negra, 208 Cal. 64, 69, 280 P. 354; People v. West, 4 Cal.2d 367, 371, 49 P.2d 276; People v. Ives, 17 Cal.2d 459, 466, 110 P.2d 408. That the statement was not freely and voluntarily given was one of the principal issues in this case and that point is now pressed on appeal. At the trial the appellant definitely repudiated the statement and claimed that it was forced from him by beatings and by threats of

further violence. Such violence and threats were denied by the officers.

This entire matter went before the jury without any instruction respecting proof of the corpus delicti or respecting confessions and admissions. In the enumeration of subjects upon which sua sponte instructions must be given the opinion in the Putnam case, supra, includes "admission of confessions and the necessity of independent proof of the corpus delicti", citing People v. Frey, 165 Cal. 140, 131 P. 127, 130. In the Frey case the necessity for the giving of such an instruction is stated as follows: "But * * * the court should have told the jury the true rule with reference to the admission of confessions and the necessity for independent proof of the corpus delicti. In such a case as this the defendant was entitled to the benefit of such a charge. The court utterly failed to instruct upon this matter, and thereby committed error." The rule is stated in 8 Cal. Jur. 348, sec. 389 as follows: "When evidence of a defendant's confession is admitted and the court submits to the jury the question whether or not the confession was voluntarily made, it should instruct the jury to disregard the evidence if they find it to have been involuntary." The failure to give such an instruction is not discussed by us as a ground for reversal *on that point*. Its pertinency is in connection with our "examination of the entire cause, including the evidence", Sec. 4½ of Article VI, Const., and only in connection with the inquiry, whether or not the error in failing to properly instruct on accomplices can be said to be prejudicial. In the same connection it might be remarked that although the jury was told that corroboration was required, no definition of corroborative evidence was given, sec. 1839, Code Civ. Proc.; People v. Sternberg, 111 Cal. 11, 43 P. 201, nor was the jury instructed that "the testimony of an accomplice ought to be viewed with distrust". Subd. 4, sec. 2061, Code Civ.Proc.; People v. Sternberg, supra; People v. Dail, 22 Cal.2d 642, 140 P. 2d 828. The prosecution relied on two oral admissions (in addition to the signed statement), but the jury was not told that the oral admissions of a party ought to be viewed with caution. Subd. 4, sec. 2061, Code Civ.Proc.

[7] We are satisfied from a careful "examination of the entire cause, including the evidence" that it cannot be held that the error in failing to give an instruction directly telling the jury that the complaining witness was an accomplice, was not prejudicial. That part of the judgment on the sec. 286 count must therefore be reversed. Such reversal renders it unnecessary to pass upon the appellant's other points raised in connection with count one.

With respect to the court charging a violation of the Juvenile Court law, the jury was instructed that "It is not essential in the prosecution for a violation of Section 702 * * * that the testimony of a minor boy as to what was actually done or said to him, if anything, by this defendant should have been corroborated by the testimony of other witnesses, but it is sufficient for a conviction for violation of Section 702 * * * if the jury believes beyond a reasonable doubt from all the evidence in this case that the crime charged in the information has in fact been committed by this defendant." This instruction is not criticized by appellant.

[8] We are satisfied that the evidence is sufficient to support the judgment of conviction on the 702 count. Indeed no insufficiency is claimed by the appellant.

[9] With respect to the other points under this head we find no error of sufficient seriousness to warrant a reversal. The fourth point,—the claimed prevention of a witness from testifying—was fully laid before the jury, and the appellant was in no way restricted in developing his position in that regard. The seventh point—that one of the arresting officers mingled with the jurors during a court recess—was taken care of by an instruction to the jury given immediately after the incident occurred, after which the trial judge asked appellant's counsel if the instruction satisfied him and he replied that it did. The judgment of conviction based on count one of the information (charging a violation of sec. 286, Pen.Code) is reversed and the cause remanded for a new trial on that

count. The judgment of conviction based on count two of the information (charging a violation of sec. 702 of the Welfare and Institutions Code) is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



74 Cal.App.2d 395

PEOPLE v. SUNSERI.

Cr. 3965.

District Court of Appeal, Second District, Division 3, California.

May 3, 1946.

Rape ⊂=53(2)

Evidence supported conviction of assault with intent to commit rape.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Joseph Sunseri was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S Kegley, Deputy Atty. Gen., for respondent.

SHINN, Justice.

In a trial by the court, defendant was convicted of assault with intent to commit rape and was sentenced to State Prison. He appeals from the judgment, and urges as the sole ground for reversal that the judgment is contrary to the law and the evidence.

The prosecutrix is a widow over 35 years of age and at the time of her encounter with defendant was employed at an aircraft plant in Inglewood, working from 5 p. m. until 3:30 a. m. She lived in the northern part of Los Angeles and traveled to and from work by street car. In the early morning hours of May 3, 1945, she alighted from a street car at a point 7 or 8 blocks from her home and had walked about a half block when she discovered defendant walking behind her. She crossed the street and recrossed it, walking rapidly, and defendant followed her, and after they had walked some distance he inquired of her, "Don't you want to be sociable?" She told him to go ahead and mind his own business and leave her alone. Defendant said, "All right, if that's the way you feel about it," and walked ahead of her slowly until they came to three vacant lots where a house was set far back from the street. Here defendant turned around and said, "Don't you want to be sociable?" and prosecutrix said, "I told you to go along and mind your own business. Leave me alone or you will get in trouble." The prosecutrix did not know defendant and had never seen him before. Up to this point there was no conflict in the account given by prosecutrix and that given by defendant. The former testified that when she last told defendant to leave her alone he hit her over the face and head with his fists, told her that if she screamed he would knock her down, and to keep quiet or he would kill her, choke her; that her upper lip was cut on the inside and front, her nose was caused to bleed, the side of her face was swollen, and that she was later treated at a hospital; that he pushed her down, pulled down the zipper on her slacks, pulled her slacks and panties down but not all the way off, and that he then made an effort to accomplish an act of intercourse with her. She testified that she called for help.

Defendant testified that he grabbed prosecutrix and threw her to the ground; that he removed her slacks part way, and opened his own trousers. He testified that she did not resist him or call for help. At this stage of the affair a policeman approached and fired two shots and, according to defendant, prosecutrix then called for help. Defendant admitted on the stand having struck prosecutrix in the face once and having attempted an act of intercourse, and he testified that he threw her to the ground with that purpose in mind.

He struck her, he said, because she would not cooperate. He also testified that he had consumed about a pint of whiskey earlier in the evening and that he was intoxicated.

The occurrence took place near the residence of the police officer, who testified for the prosecution. He was awakened shortly before 5 o'clock by a woman's call for help, clothed himself, took his gun, and went to the scene of action, some 60 to 80 feet from his house. There he saw a man standing some 15 feet from a person who was lying in the grass; the man started to run, the officer followed him, called on him to stop, and fired two shots in the air, but the man escaped. The officer returned and found defendant lying on top of the prosecutrix. Defendant refused to move from his position, saying to the officer, "What business is it of yours?" and the officer then used force to lift him to his feet. Defendant started getting rough with the officer but was subdued at the point of a gun. Defendant argued with the officer, threatened him and spoke, apparently to the other man, saying, "Let him have it, Frank [or some similar name]." The officer testified that defendant was not intoxicated.

Another witness, who lived across the hall from the officer and heard a call for help, looked out of the window and saw nothing, but immediately left the house to go to work, and arrived at the scene while defendant was lying on top of prosecutrix, whose legs were bare. He heard another man say, "Come on, Frank, let's get out of here." The witness testified that he was not "tangling up with no two men," and that he "backed away" and waited for the officer, who he knew had gone ahead of him. Defendant testified that he had no companion with him at the time.

There is no merit whatever in this appeal. A more detailed recital of the evidence would only tend to refute the argument that defendant's conduct, while rough, was merely playful and without a criminal purpose. We concur in the statement of his counsel that "If he [defendant] was trying to rape her, then if it was coupled with an assault, there is a sufficient showing to establish guilt." But we are wholly unimpressed by the argument that there was no connection between the assault and the attempted act. The testimony of the defendant alone was enough to convict him of the offense charged. He struck the prosecutrix in the face and threw her to the ground, for the purpose of accomplishing an act of intercourse, and he persisted in his efforts until he was interrupted and even then was unwilling to desist. The trial judge was asked to interpret the acts of defendant, described by him and the other witnesses, as a mere effort to persuade the prosecutrix to voluntarily consent to an act of intercourse. No rational analysis of the evidence could lead to that conclusion.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.



74 Cal.App.2d 363

PEOPLE v. TAYLOR.

Cr. 3972.

District Court of Appeal, Second District, Division 3, California.

May 2, 1946.

1. Larceny ⇐64(1)

Possession of stolen goods is not in itself sufficient to justify a conviction of grand theft, but possession of goods recently stolen may be considered by the court, in connection with other incriminating evidence and, if not satisfactorily explained, is a circumstance tending to show guilt.

2. Criminal law ⇐260(11)

The truth and plausibility of an attempted explanation of the possession of goods recently stolen is for the trier of fact.

3. Larceny ⇐65

Evidence sustained conviction of grand theft.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Alphonso Taylor was convicted of grand theft, and he appeals.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants Taylor and Bryant were charged in an information with the crime of grand theft of property of the value of $650. They were also charged in another information with the crime of grand theft of other property of the value of $1,500.

Trial by jury was waived, and the cases were consolidated and tried together. The court found defendants guilty as charged in each information, and Taylor appeals from the judgments.

Appellant contends that the "decision" is contrary to the law and the evidence. He asserts that possession of the stolen property by appellant is all that was shown, and that appellant met the burden of explaining that possession satisfactorily.

In the evening of April 9, 1945, one Seidman, a representative of a New York surgical instruments company, who was a guest at a hotel in Los Angeles, parked his automobile in the hotel parking lot, and locked the doors. At that time articles, which Seidman testified were of the value of $650, were in the automobile. Those articles included a brief case containing blueprints, a box of surgical instruments, a box of tools and a tobacco pouch with Seidman's name on it. When he returned the next morning the doors of his automobile were unlocked and the articles which were in it the night before were missing. In the evening of April 6, 1945, Merie Bosh, a resident of Salt Iake City, parked her automobile on a street in Los Angeles, and locked the doors. At that time her baggage and the baggage of her lady friend, which she testified were of the value of approximately $1,500, were in the automobile. The baggage included a great quantity of women's clothing, jewelry, and personal effects. The next day when she returned, the doors of her automobile were unlocked and her baggage and her lady friend's baggage were missing. On April 18, 1945, appellant was arrested as he and his girl friend alighted from an automobile across the street from 1637 South Essex Street, at which address they lived together in Room No. 7. Most of the articles which were missing from the Seidman and Bosh automobiles were found in that room.

A police officer testified that he was one of the two arresting officers; that immediately after appellant was placed under arrest, the officers took him and the girl to Room 7 at 1637 South Essex Street and told appellant to open the door to the room; that appellant said, "I don't know what you are talking about. This isn't my room"; that the witness then went to the landlady's apartment and had a conversation with her, after which he returned to Room 7 and again told appellant to open the door; that either appellant or the girl then "produced" the key and unlocked the door; that the two officers, appellant and the girl entered the room; that there were tires, radios, flashlights, cameras, 2 guns—a .38 revolver and a .22 rifle—fishing poles, a box of doctor's instruments, an alligator-leather tobacco pouch with Seidman's name and address on it, blankets, clothes of different sizes, fur coats, several small "satchels or brief cases," trunks, suitcases, a soldier's uniform, jewelry and classpins in the room; that appellant told him he got the surgical instruments from his grandmother; that appellant said, in answer to questions as to where he acquired the other articles, that he had purchased them, or that he had won them while gambling, or that they were "just left there" by persons whose names and addresses he did not know.

Another police officer testified that he was assigned to investigate the case; that appellant told him that he did not have any women's clothes in his room; that the witness and 3 other police officers went to appellant's room and found a great quantity of women's clothing and other articles in the room, and it was impossible for the 4 officers to get into the room and some of them had to stand in the hall.

Appellant testified that 2 or 3 nights of each week he had dice games in his room; that certain articles (which were exhibits at the trial and identified by Seidman as articles missing from his automobile) including a box of surgical instruments, tools, and a leather "grip" and its contents came into his possession about a week before appellant was arrested when a man, whom appellant had never seen before and whose name he did not know, participated in a dice game in appellant's room and lost $65; that appellant lent the man $10 and took the box and grip as security; that he looked in the box before he made the loan and saw that it contained pliers, a screwdriver and some "shiny stuff" about 6 inches long, but he did not look in the grip at that time; that the man did not return to redeem the box and grip; that the man also had a tobacco pouch (the one with Seidman's name on it) which he offered to sell for fifty cents, and that he (appellant) gave him one dollar for it and the tobacco in it; that there were 5 or 6 men in his room when he acquired said property, but he did not know any of their names; that 3 or 4 of them were shipyard workers, and some of them lived in the "apartment" where he lived; that he had seen "practically two" of them about 2 or 3 times before—they came to his room to gamble, but they never told appellant their names. He further testified that he and his girl friend had been living together about 2 years; that one day she asked him if she could buy some clothes from a boy whose wife had left him; that appellant told her to buy any of the clothes that would fit her; that she purchased wearing apparel and other articles (identified by Mrs. Bosh as those missing from her automobile) from this boy whose first name was Louie and whose last name he did not know but who was then living at the Pacific Hotel; that she paid for the articles with her own money; that they cost $45 or $50, and included blouses, a bracelet, a dress, and blankets; that his girl friend had "a great deal" of clothes before she made this purchase; that at the time of his arrest he didn't have anything in his room except his clothes and his girl friend's clothes. In answer to a further question, he stated that he also had at the time of his arrest one automobile tire, one fishing pole, one gun and one rifle in his room. He also testified that he did not tell the police officer he got the surgical instruments from his grandmother—that the officer asked him about an electric "smoothing iron" in his room, and he told him his grandmother gave that to him.

[1, 2] Possession of stolen goods is not in itself sufficient to justify a conviction of grand theft. Possession of goods recently stolen may be considered by the court, however, in connection with other incriminating evidence and, if not satisfactorily explained, it is a circumstance tending to show guilt. People v. King, 8 Cal.App. 329, 332, 96 P. 916; People v. Azbill, 134 Cal.App. 616, 621, 25 P.2d 1010. If an explanation of such possession is attempted by the accused it is for the trier of fact to judge of its truth and plausibility. People v. White, 35 Cal.App.2d 61, 68, 94 P.2d 617; People v. McClain, 115 Cal.App. 505, 508, 1 P.2d 1085. It was stated in People v. Taylor, 4 Cal.App.2d 214, at page 217, 40 P.2d 870, 871: "* * * false statements showing consciousness of guilt or as to how the property came into defendant's possession, * * * inability to find the person from whom defendant claimed to have received the property, have each in turn been held to be sufficient to connect the accused with the crime when proven in connection with possession of the stolen property." As shown above, appellant falsely stated that he did not live in Room 7, that there was nothing in his room except clothes, and that there were no women's clothes in his room. He also said, according to the officer, that he obtained the surgical instruments from his grandmother. At another time he stated that he obtained the surgical instruments and certain other articles from a man he had never seen before and whose name he did not know; that said instruments and articles were obtained in the presence of 5 men whose names he did not know; and that his girl friend (who did not testify) purchased the large quantity of merchandise (identified as the property of Mrs. Bosh) from a boy named "Louie" whose last name he did not know.

[3] The evidence in the present case was legally sufficient to justify the conclusion of the trial court.

The judgments are affirmed.

DESMOND, P. J., and SHINN, J., concur.



74 Cal.App.2d 341

OTTEN v. SAN FRANCISCO HOTEL OWNERS ASS'N et al.

Civ. 12909.

District Court of Appeal, First District, Division 2, California.

May 2, 1946.

Hearing Denied June 27, 1946.

1. Master and servant ⇐9

The presumption that servant, who continued, after expiration of period for which he was hired, to render similar services, without explicitly entering into new agreement, was re-engaged for same term and subject to all conditions of original contract, is limited to master and servant relation. Labor Code, § 3003.

2. Attorney and client ⇐133

An attorney, maintaining separate office for general practice of law throughout period of his service as attorney for hotel owners association under one-year contract and after expiration of such term, was not association's "servant" within rule that parties continuing their relation of master and servant after expiration of employment agreement are presumed to have renewed agreement for same wages and term, but attorney was an "independent contractor" retained to perform professional services. Labor Code, § 3003.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor" and "Servant".

3. Attorney and client ⇐133
Master and servant ⇐9
Principal and agent ⇐29

While adoption of codes did not abrogate common law, adoption of code section, expressly applying common-law presumption that one continuing to render services after expiration of contract therefor without explicitly entering into new agreement, was re-engaged for same term, to relation of master and servant, codified such rule as then developed and interpreted the court decisions as applying presumption to such relation only, not to agents or ordinary case of attorney and client. Labor Code, § 3003.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by A. Otten against the San Francisco Hotel Owners Association to recover the balance due plaintiff's assignor under a contract for services as defendant's attorney. Judgment for defendants, and plaintiff appeals.

Affirmed.

Wayne R. Millington, of San Francisco, for appellant.

Albert Picard, of San Francisco, for respondents.

DOOLING, Justice.

Plaintiff's assignor is an attorney at law. In 1939 he was retained as the attorney for the defendants pursuant to a resolution adopted by defendants' labor conciliation committee which read in part: "that Mr. Lynch be retained under contract from January 1, 1939 until January 1, 1940, at $250.00 per month and these services include any arbitration that might arise during this period."

After 1939 plaintiff's assignor, without any express agreement, continued to act as defendants' attorney and was paid for his services regularly at the rate of $250 per month until February, 1942, when he was notified that the February payment of $250 was the final payment. Plaintiff's assignor thereupon gave notice in writing to defendants that his contract was on a yearly basis and extended through the year 1942 and that he was holding himself in readiness to render the services called for by his contract for the balance of the year. This tender having been refused the attorney's

claim was assigned to plaintiff and this action was commenced in 1943 to recover $2500 at the rate of $250 per month for the remaining ten months of 1942. Judgment went for defendants and plaintiff appeals.

The sole question presented on appeal is whether by continuing the attorney's employment after 1939, his employment thereafter is presumed to be for the same term specified in the original contract, i. e. by the year.

[1] Appellant relies upon the well settled rule that where a servant after the expiration of the period for which he was first hired has continued to render similar services without explicitly entering into a new agreement, a presumption arises that he was reengaged for the same term and subject to all the conditions of the original contract. 1 Labatt's Master and Servant, 2d Ed., Chapter VII, p. 707 et seq.; 39 C.J. 49, 50; 35 Am.Jur. 460; and cases collected in the notes in L.R.A.1918C, 708 and Ann.Cas.1918B, 1176.

This rule is one which, so far as an examination of the cases shows, has been limited to the master and servant relation. It was crystallized into statute law in this state upon the adoption of the codes in 1872 as section 2012 of the Civil Code, reading:

"Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service."

In 1937 this section was repealed in the Civil Code and incorporated in the Labor Code as section 3003.

[2] The evidence shows that plaintiff's assignor during the whole period that he was acting as defendants' attorney maintained his separate office in San Francisco where he engaged in the general practice of the law. He was not a servant of the defendants but an independent contractor retained to perform professional services. Associated Indem. Corp. v. Ind. Acc. Comm., 56 Cal.App.2d 804, 133 P.2d 698.

[3] The presumption upon which reliance is placed both in its common law growth and as codified in this state has been applied exclusively to the relation of master and servant. While it is true, as appellant points out, that the adoption of the codes did not abrogate the common law in California, Estate of Apple, 66 Cal. 432, 6 P. 7; In re Estate of Elizalde, 182 Cal. 427, 188 P. 560, the adoption of section 2012 Civil Code in 1872 applying the presumption expressly to the relation of master and servant conformed to the rule as theretofore developed in the common law courts. New Hampshire Iron Factory Co. v. Richardson, 5 N.H. 294; Wallace v. Floyd, 29 Pa. 184, 72 Am.Dec. 620; Grover & Baker S. M. Co. v. Bulkley, 48 Ill. 189; Vail v. Jersey Little Falls Manufacturing Co., N.Y., 32 Barb. 564; Tatterson v. Suffolk Manufacturing Co., 106 Mass. 56; Beeston v. Collyer, 4 Bing. (Eng.) 309, including California, Nicholson v. Patchin, 5 Cal. 474.

The Civil Code as then enacted contained Title VI dealing with the subject of "Service." Section 2012 is found in Chapter II, Article I of that title under the heading "Master and Servant." No similar section is found in Article II, which deals with "Agents" or elsewhere in Title VI. It is a reasonable inference that the legislature in enacting section 2012, Civil Code, intended to codify the common law rule as it had then been developed and interpreted the decisions as applying the presumption therein declared to the master and servant relation only. We find no authority for extending the presumption to the ordinary case of attorney and client, where the relation of master and servant does not exist.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

74 Cal.App.2d 292

NUTTER et al. v. CITY OF SANTA MONICA et al.

Civ. 14950.

District Court of Appeal, Second District, Division 3, California.

April 30, 1946.

Hearing Denied June 27, 1946.

1. Master and servant ⇐15(19)

In enacting labor relations statute, purpose of Legislature was not to inaugurate a state policy with reference to labor relations which would be applicable to the state or its subdivisions. Labor Code, § 923.

2. Master and servant ⇐15(9)

The purpose of labor relations statute is to safeguard employees from entering into or being bound by agreements that are not voluntary. Labor Code, § 923.

3. Master and servant ⇐15(6)

A contract negotiated with unorganized workers is not a "voluntary agreement" within labor relations statute providing that negotiations of terms of labor should result from voluntary agreement between employer and employees, but an agreement negotiated by employees' representatives chosen without interference, restraint or coercion of employers or employers' agents is a "voluntary agreement". Labor Code, § 923.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Agreement".

4. Master and servant ⇐15(19)

The labor relations statutes relate to private industry only and not to public employment. Labor Code, §§ 921–923.

5. Master and servant ⇐15(6)

The labor relations statutes affirm a natural right of labor in private industry to enjoy freedom of contract and outlaw the type of contract depriving workmen of right of free collective bargaining over terms and conditions of employment. Labor Code, §§ 921–923.

6. Master and servant ⇐15(19)

Persons entering public employment do not thereby acquire a right to arrange, by negotiation and contract, terms and conditions of employment which are defined by law or, under established systems, are subject to regulation by governmental bodies. Labor Code, §§ 921–923.

7. Master and servant ⇐15(19)

In adopting National Labor Relations Act, Congress did not recognize existence of right of collective bargaining in public employment and did not adopt a national policy which would extend into field of public employment. National Labor Relations Act § 2(2), 29 U.S.C.A. § 152(2).

8. Officers ⇐11

County civil service systems may be set up under county charter. Const. art. 11, § 7½.

9. Municipal corporations ⇐214(1)
Officers ⇐6
States ⇐53

The policy of the state in the matter of public employment by the state, municipalities and other political subdivisions is reflected in Constitution, laws and county and city charters, and is a progressive policy of maintaining public employment at a high level of desirability and efficiency.

10. Statutes ⇐233

General language in a statute is insufficient of itself to indicate an intention to make the statute applicable to government.

11. Statutes ⇐233

Where a statute is not expressly made applicable to the government, courts must determine whether Legislature intended statute to so apply by considering all matters which, under rules of statutory interpretation, shed light on legislative intent.

12. Statutes ⇐233

General terms of statute will not be construed as including the government if statute would trench upon sovereign rights, injuriously affect the capacity to perform state functions or establish a right of action against the state.

13. Master and servant ⇐15(19)

The labor relations statutes would not be construed as applying to public em

ployment where such a construction would largely nullify the elaborate system of laws constituting the policy of the state in the domain of public employment. Labor Code, §§ 921–923.

14. Master and servant ⇐15(19)

The labor relations statutes would not be construed as requiring the state and municipalities to contract for terms and conditions of public employment in respect to matters not covered by state law or county and city charters or ordinances. Labor Code, §§ 921–923.

15. Master and servant ⇐15(19)

The labor relations statutes would not be construed as requiring that terms and conditions of public employment should be fixed by contract in respect to all activities of the state or municipalities conducted in a proprietary capacity as distinguished from a governmental capacity. Labor Code, §§ 921–923.

16. Statutes ⇐220

In determining whether labor relations statutes were applicable to public employment by state or its political subdivisions, the subsequent defeat of a statute requiring the state and its political subdivisions to bargain collectively with public employees should be considered. Labor Code, §§ 921–923.

17. Master and servant ⇐15(19)

The labor relations statutes do not require City of Santa Monica operating a motor coach line to recognize union of bus operators and to bargain collectively with such union. Labor Code, §§ 921–923.

18. Master and servant ⇐15(6)

The word "negotiate" in labor relations statute providing that individual workman has full freedom of association, self-organization and designation of representatives of his own choosing to negotiate terms and conditions of his employment, means to confer regarding such terms and conditions, and incorporation of such terms and conditions in a contract. Labor Code, § 923.

See Words and Phrases, Permanent Edition, for all other definitions of "Negotiate".

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by W. F. Nutter and others against the City of Santa Monica, a municipal corporation, and others, for a mandatory injunction requiring the defendants to recognize Lodge No. 22 of the Brotherhood of Railroad Trainmen as bargaining agent and requiring defendants to bargain collectively with the Brotherhood. From the judgment, the defendants appeal.

Reversed.

Carvel C. Torrence, City Atty., and Hector P. Baida, Asst. City Atty., both of Santa Monica, for appellants.

A. L. Wirin and Abe F. Levy, both of Los Angeles, for respondents.

Katz, Gallagher & Margolis, of Los Angeles, amici curiae on behalf of respondents.

SHINN, Justice.

The City of Santa Monica operates a local and intercity motor coach line, serving the public in the City of Santa Monica, with one branch extending into the westerly section of the City of Los Angeles. The city employs 63 bus operators, 62 of them being members of Lodge No. 22 of the Brotherhood of Railroad Trainmen; they have designated the Brotherhood as their collective bargaining agent. Plaintiffs are members and representatives of the Brotherhood and they brought this action as such, and in behalf of the members of the Brotherhood and of Lodge No. 22 against the City of Santa Monica and defendants Freeman, Millikan and Murray, as commissioners and members of the City Council. Defendant Freeman is the commissioner in charge of the city's transportation lines. Plaintiffs, as representatives of the Brotherhood, have appeared before Mr. Freeman upon numerous occasions, and before the other commissioners, for the purpose of negotiating a contract between the city and the Brotherhood governing the terms and conditions of employment of the bus operators. They have also requested the city to acknowledge that the Brotherhood is the duly selected and authorized bargaining agent of the employees. Defendant commission-

ers have at all times received plaintiffs and entertained their complaints and suggestions but they have refused to recognize, in writing or otherwise, the Brotherhood as the representative of the employees for the purpose of negotiating a contract. No contract has ever been proposed to the city by the plaintiffs; the discussions never reached that point, but it is the avowed purpose of plaintiffs to negotiate and enter into a contract between the Brotherhood and the city, once the Brotherhood has been recognized as the representative of the employees, authorized to negotiate such contract. It is the position of defendants, acting under advice of the City Attorney, that the employees of the city may become members of the Brotherhood or any other organization, and that such organized group may make representations or suggestions in behalf of the employees and otherwise advocate the cause of its said members. Accordingly, at divers times grievances have been stated and suggestions have been made to the commissioners by plaintiffs, and these, upon one occasion, resulted in the removal and replacement of a supervisor of the bus employees. Upon other occasions defendants have referred plaintiffs to the personnel board of the city for discussion of the matter of wages. Defendant commissioners have, however, refused to negotiate with plaintiffs as representatives of the Brotherhood, or otherwise, for the purpose of agreeing upon and entering into a contract covering the terms and conditions of employment of the bus operators. They do not propose to enter into a labor contract with the Brotherhood or with the employees or anyone representing them. They decline to discuss the terms of any proposed contract inasmuch as they do no intend to enter into one on behalf of the city.

The sole purpose of this action is to obtain a mandatory injunction requiring defendants to recognize the Brotherhood and the individual plaintiffs, as members of the Brotherhood, as the bargaining agents of the bus operators and requiring defendants to bargain collectively with the plaintiffs and the Brotherhood, to the end that a voluntary agreement may be reached. After a trial a decree was entered, reading as follows: "Wherefore, by reason of the law and the findings of fact aforesaid it is ordered, adjudged and decreed that the plaintiffs do have and recover of and from the defendants their costs and disbursements incurred in said action amounting to the sum of $——— and that the defendants be and hereby are enjoined from refusing to recognize plaintiffs and/or the Brotherhood of Railroad Trainmen as the bargaining agent of the bus operators of the City of Santa Monica to the end that a voluntary agreement may be reached; and defendants are ordered to recognize the plaintiffs and the Brotherhood of Railroad Trainmen as the duly selected bargaining agents of the bus operator employees of the City of Santa Monica and to bargain collectively in good faith with plaintiffs as said representatives of the said employees of the defendants."

Notwithstanding the indirect approach to the objective of the Brotherhood, which is to secure a contract with the city, the judgment, which enjoins defendants from refusing to recognize the Brotherhood as bargaining agent "to the end that a voluntary agreement may be reached," amounts to a declaration that the city and the defendant commissioners are under a legal duty to enter into a contract with the Brotherhood, as representatives of the bus operators, if the terms can be agreed upon, and they are commanded to negotiate with plaintiffs for that sole purpose.

The theory of plaintiffs is that such legal duty exists by virtue of certain sections of the Labor Code and that the court may, under its general equity powers, compel the defendants to perform that duty. The defendants maintain that the Labor Code sections have no application to municipal corporations, they deny that those sections impose upon employers a legal duty to enter into labor contracts, or to bargain collectively for the purpose of negotiating the terms of labor contracts, and they urge other defenses to the action.

Section 921 of the Labor Code bans all promises to join or not to join or remain

or not to remain a member of a labor organization or an employer organization, as against public policy. The act of coercing any person to enter into an agreement not to join a labor organization as a condition of securing or continuing in employment is declared to be a misdemeanor by section 922. Section 923 reads as follows:

"In the interpretation and application of this chapter, the public policy of this State is declared as follows: Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[1-3] The discussion of these sections in the briefs covers a wide field. Plaintiffs contend that they set up the equivalent of the National Labor Relations Act, and a policy which the courts must define and administer under their general equity powers. Defendants criticize the judgment as judicial legislation, and in other respects. Whatever our views may be as to the authority of the courts, dependent upon these sections, to compel affirmative action on the part of either employers or employees in private industry, it would be inappropriate to state them here, since we have reached the conclusion that it was not the purpose of the Legislature, in the enactment of section 923, to inaugurate a state policy with reference to labor relations which would be applicable to the state or its political subdivisions. The purpose of the legislation is illuminated by the emphasis laid upon the evils which are sought to be corrected and the means by which correction is sought to be accomplished. The objective, we think, is stated in a nut shell in the sentence, "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees." Other declarations follow, and when these are considered as a whole, they mean, as we interpret them, that it is the policy of the state to safeguard employees from entering into or being bound by agreements that are not voluntary upon their part; a contract negotiated with unorganized workers is not a voluntary agreement, for the reason that "the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment"; voluntary agreement is one that is negotiated by representatives of the employees, chosen without interference, restraint or coercion on the part of employers or their agents.

[4] The several sections relate to the field of industry in which employer-employee relationships are fixed by contract. This is essentially the field of private industry. Section 923 recites that "Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control," as a basic fact, which makes it desirable that labor also be organized in order that its ranks may present a united front in negotiating with organized capital. It is well recognized that a serious obstacle in the way of better labor relationships has been the reluctance of employers to concede a greater share of the profits of industry to labor, whether in the form of higher wages, shorter hours, or other privileges the expense of which would be borne by employers and which would present the threat of reducing profits. The Legislature recognized that there has been, and is, oppression of labor in the field of private industry, where there has not been freedom of contract. The in-

centive of personal gain which is reflected in large profits and the expansion of business inheres in private ownership, but there is no intimation in the Labor Code sections that that incentive and its attendant evils are found in public employment. The text of section 923 indicates that the Legislature has not discerned in public employment the existence of the conflicts between labor and capital that exist in private industry. The reason for the silence of the Legislature upon that subject is not obscure. In Mugford v. Mayor and Council of Baltimore, 1944, Circuit Court No. 2 of Baltimore City, Maryland, 9 Mun.Law Journal 46, the court expressed it in the following appropriate language:

"The distinction between private employment and public service is an important one. Private employers if not restrained by law, are free to adopt any policy toward their employes which they believe calculated to promote the success of their enterprises, without regard to its effect upon the welfare of the employes; and it is therefore proper to restrain this freedom to some degree, and to safeguard the right of the workers to combine with each other, and to use the strength of this union in bargaining in the matter of wages, hours, terms and conditions of employment, and to strike if need be.

"In the field of public employment, on the other hand, altogether different conditions prevail. Public officers do not have the same incentive to oppress the worker; and fair treatment sought to be coerced by collective bargaining in the field of private employment, is in the public field, to a large extent, compelled by law. Public officers, therefore, do not have the same freedom of action which private employers enjoy. Their authority is confided to them by public law, and by that law is limited. That authority may not be delegated or surrendered to others, since it is public property. And so it has been almost uniformly held that governmental authority may not discriminate in favor of union labor."

[5, 6] In declaring the policy of the state as found in the Labor Code sections, the Legislature affirmed a natural right on the part of labor in private industry to enjoy freedom of contract and it outlawed the type of contract which deprives workmen of the right of free collective bargaining. It is not, however, an accepted practice for public bodies to enter into contracts with the employees of publicly owned operations with respect to matters which are usually embraced in labor contracts in private industry. Those who enter public employment do not thereby acquire the right to arrange, by negotiation and contract, terms and conditions of employment which are defined by law or, under established systems, are subject to regulation by governmental bodies.

[7] The principle espoused by section 923 is essentially the same as that fostered by the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., namely, the right of workmen to enjoy free collective bargaining over terms and conditions of employment. In adopting that act Congress did not recognize the existence of the right of collective bargaining in public employment and did not consider it necessary to adopt a national policy which would extend into the field of public employment. Section 2 (2) of the act expressly excepts from the definition of the term "employer" the United States and any state or political subdivision thereof.

By Statutes 1913 (Chap. 590, p. 1035), a civil service system for the state was created by the Legislature, affecting state employees, with the exceptions enumerated in the act or the Constitution. A more comprehensive act was passed in 1937, Stats. 1937, p. 2085; Deering's Gen.Laws, Act 1404. Among the purposes of the Act, Article I, section 1, are the following: "Second. Appointments are based upon merit and fitness ascertained through practical and competitive examination. Third. State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service wherever practicable. * * * Fifth. A high morale is developed among State civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of said em-

ployees. Sixth. Tenure of civil service employment is subject to good behavior, efficiency, the necessity for performance of the work, and appropriation of sufficient funds." In fixing salaries, consideration must be given "to the prevailing rates for comparable service in other public employment and in private business, improvement of living standards, the current costs of living, and the State's financial condition." Section 70. Minimum salaries and salary adjustments are provided for. Salaries for laborers, workmen and mechanics employed on an hourly or per diem basis must not be below the general prevailing rate for the various localities in which the labor is performed. Section 71. There is a comprehensive scheme for permanency of tenure during good behavior, for promotion, demotion, suspension, reprimand and removal, with discipline or dismissal permitted only after a trial upon written charges. Preferences are given to veterans and to those who have served as active nurses in the American Red Cross or the Army and Navy Nurse Corps. Art. 11.

[8] County civil service systems may be set up under county charters by virtue of section 7½, Article XI of the Constitution, added in 1911 and amended in 1914. Pullen v. Garrison, 85 Cal.App. 706, 259 P. 1021.

In 1935 the Legislature authorized the creation of a personnel system, merit system, or civil service system in cities. Stats. 1935, p. 380. Such system may be one for "the selection, employment, classification, advancement, suspension, discharge and retirement of appointive officers and employees," or it may "consist merely of the setting up of minimum standards of employment and qualifications for the various classes of employment in said municipality, or may consist of a comprehensive civil service system as in the sound discretion of said legislative body may be for the best interests of the public service in said municipality."

[9] The City of Santa Monica adopted a personnel system in 1937, which provides an exclusive method for the employment, suspension, demotion and dismissal of employees. So far as the state, municipalities and other political subdivisions are concerned, the policy of the state in the matter of public employment is reflected in its Constitution and laws and in the charters of counties and cities. It has been a progressive policy, developed through many years, and by means of considered legislation. We find nothing in the legislative history which would suggest, even remotely, that the Legislature would make a general surrender of its duty and responsibility to maintain public employment at a high level of desirability and efficiency.

[10-12] The language of section 923 is broad enough to include state and municipal government, but general language in a statute is not sufficient, of itself, to indicate an intention to make it applicable to government. Where a statute is not expressly made applicable to government, it is for the courts to determine whether the Legislature intended it to apply to government. In making that determination, it is proper to consider all matters which, under the rules of statutory interpretation, shed light upon the legislative intention. It is well established that general terms of a statute will not be construed as including government if the statute would operate to trench upon sovereign rights, injuriously affect the capacity to perform state functions or establish a right of action against the state. Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am.St.Rep. 451; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016; Skelly v. Westminster School District, 103 Cal. 652, 37 P. 643; Russ & Sons Co. v. Crichton, 117 Cal. 695, 49 P. 1043; Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; Irilarry v. City of San Diego, 186 Cal. 535, 199 P. 1041; Engebretson v. City of San Diego, 185 Cal. 475, 197 P. 651; Slayden v. O'Dea, 182 Cal. 500, 189 P. 1066; Berton v. All Persons, etc., 176 Cal. 610, 170 P. 151. In Balthasar v. Pacific Elec. Ry. Co., supra, the court quoted from Associate Justice Story of the Supreme Court of the United States, sitting in the First Circuit, in the case of United States v. Hoar, Fed. Cas. No. 15,-

373, 2 Mason, 311, as follows: "Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act. * * *" See also Estate of Miller, 5 Cal.2d 588, 55 P.2d 843; Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; Miles v. Ryan, 172 Cal. 205, 157 P. 5; Liebman v. Richmond, 103 Cal. App. 354, 284 P. 731. Other cases are listed in 23 Cal.Jur. pp. 625 and 769, in support of the same rule.

[13] If we are correct in the views expressed, the purpose of the legislation in question was to commit the state to participation in a movement which has long been under way in the field of national legislation, and generally in state legislation, to improve the status of labor in the field of private industry. We believe the legislation had no other objective. We have pointed out that the text of section 923 ties in with private employment only, and thereby tends to exclude the subject of public employment. There is also the fact that the elaborate system of laws which constitute the policy of the state in the domain of public employment would be largely nullified if the legislation should be construed as applicable to public employment, to the full extent that it is applicable to private employment. Government by law would then have to give way to government by contract, and this without action by the Legislature which expressed an intention to establish an entirely new system in the field of public employment.

[14] It was argued to the learned trial judge, apparently with success, that the Legislature intended to require the state and municipalities to contract for terms and conditions of employment at least as to matters not covered by the laws of the state or the charters or ordinances of counties and cities. If there is any such undefined territory, the Legislature has made no attempt to identify it, and we cannot. If section 923 should be construed to mean merely that terms and conditions of employment must be fixed by contract in all respects in which they are not fixed by law, it would be illogical and meaningless, for the state and the municipalities would retain the power to cover the entire field of employment by broadening the base of legislation governing the same so as to leave none of the terms and conditions of employment unprovided for. So construed, the legislation manifestly would not affect sovereign powers or interfere with the capacity to perform governmental functions but we cannot subscribe to this construction. An endeavor by the courts to define some limited field for the contract system would be an attempt at judicial legislation. The present system of public employment constitutes the state's policy and should stand, or it is entirely obsolete and wrong, depending upon whether the Labor Code sections were intended to relate only to private industry. If the Legislature intended to make public employment a matter of negotiation and contract, at all, it intended to give preference to the contract procedure over the existing system of laws, charters and ordinances as to all matters usually embraced in labor contracts. If a new policy has been announced to replace the existing one, the functions of government in a broad field which are now exercised by means of legislation, and through delegated authority, would be transferred to agencies which would have the power to bind the state, county and city government by contract. The rules of statutory construction we have stated forbid us to hold that this drastic result has been accomplished

by the general phraseology of section 923, or by the failure to specifically except the matter of public employment.

[15] It is also argued that terms and conditions of employment should be fixed by contract in all activities of the state or municipalities conducted in a proprietary capacity, if not in a governmental capacity. Much has been said in the briefs as to the capacity in which the city operates the bus lines, but that question, we think, is beside the point. If the courts were to say that the legislation relates to public employment in the exercise of proprietary functions, but not governmental functions, that would be judicial legislation. The distinction between employment in one field and the other would be wholly without legislative foundation. If any such distinction is to be drawn it must be by the Legislature. We are not aware of any rule of law which would furnish a basis for applying the provisions of section 923 to one group of public employees to the exclusion of all others.

[16] There is one other matter which has a proper place in our discussion. In 1943 there was introduced Assembly Bill No. 651 to add a new section, 924, to the Labor Code, reading as follows: "Nothing in the laws of this State shall be deemed to excuse or exempt the State of California, or any political subdivision thereof, from the duty to bargain collectively with its employees other than peace officers, under the public policy of this State as laid down in this code, and the term 'employees' wherever used in this code shall be deemed to apply to such public employees in the same manner and to the same extent as to private employees." The draft was amended by substituting "section 923" for "this code" and the remainder of the text of the original draft. The bill was refused passage. The failure of this legislation does not, of course, constitute a legislative interpretation of section 923, but it is a fact which is entitled to some consideration.

[17, 18] It appears to us that the defendants have a proper conception of their duties. They have given and expect to give respectful consideration to complaints registered by the bus drivers or their representatives. It is not claimed that they have ever turned a deaf ear to the requests of the employees with respect to the improvement of working conditions. As we stated in the beginning, the demand which the plaintiffs have made upon defendants, and which is in dispute, is not for different conditions of employment; it is a demand for union recognition. Defendants have no desire to deal with the bus drivers as individuals or to refuse to deal with their representatives. There is no reason to believe that they would refuse any request or demand of the employees, in the absence of a labor contract, which they would be willing to incorporate in a contract. They do not refuse to consider making changes in terms and conditions of employment insofar as they are subject to arrangement; they only refuse to take the preliminary steps toward entering into a contract with the Brotherhood.

The word "negotiate" as used in section 923, and as used by the parties, means to confer regarding terms and conditions governing the employment of the bus operators, which, so far as agreed upon, would be incorporated in a contract between the city and the Brotherhood. The command of the decree that defendants "bargain collectively" with the Brotherhood has a like meaning. We think the Legislature has not imposed that duty upon municipalities.

In our opinion, the complaint stated no ground for relief, and the demurrer of the defendants should have been sustained.

The judgment is reversed.

DESMOND, P. J., and WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

74 Cal.App.2d 459

AEBLI et al. v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13058.

District Court of Appeal, First District, Division 1, California.

May 13, 1946.

Appeal and error ⇐1194(2)

On issue involving interpretation of prior opinion of District Court of Appeal respecting ratings of appellant teachers, trial court's interpretation of opinion as denying appellants any relief, was proper as against contention that appellants did not fall into category assigned to them based upon their listings in briefs of counsel, and because in the prior opinion no specific reference was made to them, where respondents did not concede that classification in briefs of appellants was correct and records disclosed that the appellants were not overlooked in the opinion by the appellate court.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Ada Aebli and others against Board of Education of the City and County of San Francisco, Mrs. Mary Prag, and others, as Commissioners of the board to recover amount charged back against plaintiffs' salaries as excess payments for the period of 1930-1932 and by mandamus to compel the board to give plaintiffs for the school year starting July 1, 1932, the rating they had prior to the re-rating of 1932. From a judgment adverse to certain plaintiffs, such plaintiffs appeal.

Affirmed.

Piccirillo & Wolf, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy, both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for respondents.

PETERS, Presiding Justice.

The present appeal involves an interpretation of this court's opinion in Aebli v. Board of Education, 62 Cal.App.2d 706, 145 P.2d 601. The specific question presented is what was the legal effect of that decision on the rights of the six parties who are here appellants, they also being six of the 189 appellants on the prior appeal? The trial court in the present proceeding found that as to these six appellants the judgment was affirmed, and entered its judgment accordingly. From this judgment these six parties appeal, contending that as to them the judgment on the prior appeal was reversed.

A proper analysis of the question presented requires a reference to the issues and holdings on the prior appeal. The litigation started in 1932. In that year 189 teachers in the San Francisco School Department, including the six appellants on the present appeal, filed actions against the school board alleging that the actions of the board in ordering a reduction in their ratings and salaries, and in collecting back from them what the board claimed was excess payments made to them, were illegal. The actions prayed for a restoration of the money that had been deducted from their salaries and for writs of mandate to restore them to their previous ratings. The trial judge, the Honorable C. J. Goodell, after a protracted trial, prepared two exhaustive opinions in which he discussed in detail the facts and the law applicable to each of the litigants. Thereafter complete and carefully prepared findings and conclusions of law were filed. In these findings the trial court, generally speaking, divided the teachers into three main categories—the clerical or mechanical error cases, the non-uniformity cases and the estoppel cases. As to the teachers within the clerical or mechanical error category the trial court denied them any relief; as to the second category—the non-uniformity cases—the trial court granted them the right to recover back the sums that had been deducted from their salaries, but held that the re-ratings of the board, so far as they acted prospectively, were valid; as to the six estoppel cases the trial court held that because of facts peculiar to their individual cases the board was estopped from charging back the allegedly excess payments and from changing their ratings

prospectively. The trial court also included these estoppel cases in its findings relating to the non-uniformity group. The six teachers involved on the present appeal were not listed in any of these three categories by the trial court, but in both its opinions and findings, were separately treated. As to each of these six parties the trial court found that they had not sustained their respective burdens of proof. They were treated in the opinion of Judge Goodell as specialized types of mechanical or clerical error cases. Judgment was entered in accordance with these findings. From this judgment the teachers appealed from those portions adverse to them, and the board appealed from those portions adverse to it. This court accepted the classifications made by the trial court, and reversed the judgment in part and affirmed it in part. So far as is pertinent here this court affirmed all portions of the judgment from which the board appealed. So far as the appeal by the teachers is concerned the order of this court was that, 62 Cal.App.2d at page 760, 145 P.2d at page 628, "all portions of the judgment from which they appeal should be affirmed except the following:" The court then listed three specific portions of the judgment that should be reversed. The first two categories are not involved on the present appeal. The third portion of the order of reversal reads: "That portion of the judgment denying to the teachers discussed under the heading 'The non-uniformity cases' the right to a writ of mandate to be restored to their prior ratings should be reversed."

Upon the opinion of this court becoming final the six teachers involved in the present appeals contended that they were within the non-uniformity category and were entitled to writs of mandate to be restored to their prior ratings. The board refused to restore their prior ratings, it being its contention that as to these six teachers the judgment denying them any relief was affirmed. The dispute was submitted to the trial court. It determined that the trial court in its original judgment had denied these six teachers any relief, and that those portions of the judgment had not been reversed but had been affirmed by this court. It is from this order that the six teachers now appeal. We will assume, without deciding, that the present type of proceeding is a proper one to secure an interpretation of the prior opinion of this court.

The interpretation given by the trial court to our order made on the previous appeal is undoubtedly correct. The six appellants do not fall within the non-uniformity group, nor was the reversal ordered as to that group intended to include these appellants. The argument of appellants that they fall within the non-uniformity category is largely based upon the fact that in the briefs filed by the 189 teachers on the previous appeal counsel did not elect to follow the groupings as made by the trial court. In the non-uniformity group the trial court in finding No. 29 had listed 75 teachers, including the six estoppel cases. When appellants on the prior appeal came to list those included within the non-uniformity classification, they included only two of the estoppel cases, and included the six present appellants, who had not been so listed by the trial court. The result is that, in their briefs, they listed 77 names, including those of the six appellants, as being in the non-uniformity category. It is the theory of appellants that when this court reversed as to the non-uniformity group it was referring to the classification made by counsel for the teachers rather than the classification set forth in the findings of the trial court. This conclusion follows, say these six appellants, because when this court came to discuss the non-uniformity cases it started the discussion with the words, 62 Cal.App. 2d at page 744, 145 P.2d at page 620: "This group includes some seventy-five teachers." By the use of the word "some" the appellants argue that we were not limiting the discussion to exactly seventy-five as did the trial court, but meant to include some others, i.e., these six appellants.

The argument is without merit. The respondents on the prior appeal at no time conceded that the classification made by appellants as to these six teachers was correct. In fact, on page 323 of their brief they expressly challenged such classification. The classifications made by the liti-

gants were not accepted by this court. A reading of the lengthy opinion demonstrates that this court accepted the various classifications made by the trial court, and that when it started to discuss the "some seventy-five teachers" included within the non-uniformity group it was discussing the seventy-five teachers so classified by the trial court in finding No. 29. Why the word "some" was used is not clear. In some six different places in the portions of the opinion dealing with the non-uniformity cases we referred simply to the "seventy-five" teachers as found by the trial court.

This interpretation seems obvious when the form of the order of reversal is considered. As above pointed out, so far as the appeal by the teachers is concerned we affirmed "all *portions* of the *judgment*" except three specific "portions" including "that portion of the judgment" relating to the non-uniformity cases. Quite clearly we there referred to the classifications made by the trial court and not those made by counsel.

That the trial court did not include these six teachers in the non-uniformity group is conceded. In finding No. 29 the trial court listed 75 teachers as being within the non-uniformity group. These six appellants were not included. Unlike the non-uniformity cases, in which the trial court granted partial relief but denied re-ratings, these six appellants were listed among those who were to have no relief at all. In his second opinion Judge Goodell treats these six teachers separately, and holds that they did not sustain the burden of proof, and further states that they fall within the clerical or mechanical error cases. These six appellants were separately treated in finding No. 64.

It is true that in our prior opinion no specific reference was made to these six appellants, and it is now argued that either they were intended to be included in the non-uniformity group or they were inadvertently overlooked and their appeals still remain pending. They were not overlooked. There were 189 teachers involved on the prior appeal. For convenience most of the teachers were included within the three above-mentioned categories, or within the "miscellaneous cases" discussed in the opinion. When we discussed the mechanical error cases, we divided them, as did the trial court, into various subdivisions. After discussing each subdivision the following appears, 62 Cal.App.2d at page 733, 145 P.2d at page 614: "The above constitute the main groups found by the trial court to fall within the mechanical error category. We are convinced that as to all of these cases (those mentioned above as well as those not specifically mentioned but set forth in the findings of the trial court)" the judgment must be affirmed in its entirety. The trial court had treated these six appellants as a specialized group where a clerical error had been made in their original ratings. The reason for this was obvious. A reading of the record on the prior appeal demonstrates that the original ratings of these six teachers were based on erroneous information received by the board as to their prior teaching or vocational experience. They thus do not fall within the non-uniformity group, but more properly within the mechanical error category and were so considered in the opinion of this court as the above language indicates.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

74 Cal.App.2d 255

CRENSHAW et al. v. SMITH et al.

Civ. 7208. Sac. 5745.

District Court of Appeal, Third District, California.

April 29, 1946.

Rehearing Denied May 27, 1946.

Hearing Denied June 27, 1946.

1. Homestead ⇐43

A wife's homestead declaration failing to state that her husband had not previously made such a declaration or that she was filing declaration for spouses' joint benefit was fatally defective. Civ.Code, § 1263.

2. Evidence ⇐183(7)

In suit to quiet title to realty purchased by plaintiff at execution sale to satisfy default judgment for plaintiff against defendants in justice's court, showing by present justice of the peace and by the attorney who represented plaintiff when original action was filed that complaint and docket of case in justice's court had been lost and that justice who presided at hearing had since died authorized plaintiff to prove jurisdictional facts by secondary evidence.

3. Justices of the peace ⇐61

Secondary evidence, adduced after proof of loss of complaint and docket of case in justice's court and death of justice who presided at hearing, sufficiently established that justice's court acquired jurisdiction of subject matter and of defendants' persons so that default judgment was valid. Code Civ.Proc. §§ 112, subd. 2, 832, subd. 7.

4. Justices of the peace ⇐129(3)

Where husband and wife were named as parties to contract sued upon in justice court, contention that husband did not sign the contract and hence was not bound by venue statute giving justice court in place where contract is to be performed jurisdiction was a matter for proof in the action and was concluded by judgment of the justice and could not be raised by way of collateral attack upon such judgment. Code Civ.Proc. § 832, subd. 7.

5. Justices of the peace ⇐129(1)

Once jurisdiction has been established over the subject matter as shown by the complaint, judgment and subsequent proceedings of justice's court are entitled to same degree of immunity from collateral impeachment as those of any other court.

6. Justices of the peace ⇐82(2)

Certified copy of the summons and return showing personal service upon defendants at a specified time and place together with testimony of process server as to the service and identifying defendants as the persons served was sufficient proof of service of process to establish jurisdiction of justice's court over persons of defendants.

7. Justices of the peace ⇐82(2)

Testimony of constable who served the process on defendants in an action pending in justice's court that he served upon each of the defendants a copy of the summons and of the complaint cured any defect in return of service which was so phrased as to permit an inference that only one copy of summons was served upon both defendants.

8. Justices of the peace ⇐82(2)

Where issue in a quiet title action concerning land purchased at execution sale under a justice's court judgment was jurisdiction of justice's court over persons of defendants by reason of service of summons and complaint, testimony of constable who served process was competent.

9. Justices of the peace ⇐83(1)

The fact of service of process and not the proof of service determines validity or invalidity of the justice's judgment and a defective return of service does not render judgment void if service was actually made as required by statute upon proper person.

10. Justices of the peace ⇐83(1)

Where there was uncontroverted proof that defendants in action pending before justice of the peace were each personally served with a copy of the summons, judgment was not void because certified copy of summons disclosed that it was directed to "Frank C. Smith and Jane Doe Smith, his wife" while return showed service on "Frank C. Smith and Mrs. C. Smith, his wife."

11. Justices of the peace ⇐129(2)

Failure to comply with provisions of code section dealing with amendment to complaint when true names of fictitious parties are ascertained, as respects justice's court, did not render proceedings void or deprive court of jurisdiction so as to make judgment subject to collateral attack, particularly where defendant, who was described by a fictitious name, identified herself as execution debtor under an execution and certificate of sale thereunder notwithstanding that judgment perpetuated erroneous designation of names. Code Civ. Proc. § 474.

12. Justices of the peace ⇐135(6)

Testimony of real estate expert that real estate sold at execution sale under justice's court execution was worth between $4000 and $5000, in light of admission on cross-examination that, in view of judgment debtors' right to contest title of any purchaser based upon judgment debtors' discharge in bankruptcy, property wouldn't have much value, was insufficient to establish that sale for a little more than $100 was at a grossly inadequate price.

13. Justices of the peace ⇐135(6)

Showing of inadequacy of consideration for sale of property under execution issued by justice's court was not alone sufficient ground for declaring sale invalid.

14. Justices of the peace ⇐135(6)

Asserted irregularity of sale of property under execution issued by justice's court en masse instead of by parcels was not a matter of which court could take cognizance in subsequent proceeding by purchaser at execution sale to quiet title and to recover possession of property from judgment debtors after period for redemption had passed.

15. Adverse possession ⇐46

Adverse possession, which commenced when declaration of homestead was recorded by judgment debtor on property subject to judgment lien, was ineffective against judgment creditor who purchased land at subsequent execution sale, since constable's deed was equivalent to a quitclaim deed from judgment debtors and a new perscriptive period commenced.

16. Justices of the peace ⇐135(6)

Constable's deed conveying land sold under execution issued by justice of the peace was in effect from judgment debtor and was at least equal to a quitclaim deed and became prima facie evidence of title. Code Civ.Proc. § 700.

17. Stipulations ⇐19

Generally, where a stipulation is formally made, for the express purpose of relieving parties from proving a particular fact, stipulation, in absence of any limitation as to a particular purpose, can be introduced in evidence at any subsequent trial as proof of facts admitted.

18. Homestead ⇐95, 107

Homestead declaration filed on land after recordation of abstract of justice's court default judgment against landowners was subject to lien of judgment except that burden was on judgment creditor in subsequent quiet title action to prove affirmatively that justice's court had jurisdiction of subject matter and parties in action wherein judgment was rendered. Code Civ.Proc. § 674.

19. Husband and wife ⇐270(10)

Where judgment was rendered against both husband and wife, it became a lien upon the property of either or both of them and was not subject to challenge on the ground that property in controversy was community property and therefore not liable for contract obligations of wife.

20. Justices of the peace ⇐129(1)

Judgment of justice's court in the absence of jurisdictional defect, cannot be attacked collaterally.

21. Husband and wife ⇐264

Evidence warranted finding that property sold under execution sale was separate property of wife as against contention that property was community property and therefore not liable for contract obligations of wife.

22. Costs ⇐83

Where transferee of subject matter pending suit permits it to be prosecuted in name of original parties, such parties are entitled to costs of suit in absence of a contract to the contrary but where as-

signee is permitted to intervene and prosecute suit, assignee, upon recovering judgment, is entitled to costs.

23. Costs ⇐270

Where defendants were entitled to recover costs by virtue of their success on first appeal but plaintiffs were ultimately successful, trial court properly granted motion to set off and compensate costs.

24. Costs ⇐270

A judgment for costs and an indebtedness not reduced to judgment may be set off against each other.

Appeal from Superior Court, Siskiyou County; Albert F. Ross, Judge.

Suit by the Schuler-Knox Company against Frank C. Smith and Anna Clo Smith and others to quiet title to and recover possession of certain lots, wherein Orville F. Crenshaw and Loren A. Davis, successors in interest of the plaintiff, were substituted as parties plaintiff, and wherein defendant, Nora Kathleen Trapp, cross-complained.

Judgment for plaintiffs and defendants appeal.

Affirmed.

Morgan V. Spicer, W. W. Sanderson, and H. R. Whiting, all of San Francisco, for appellants.

Daniel S. Carlton, of Redding, and Roy A. Weaver, of Dunsmuir, for respondents.

PEEK, Justice.

This appeal arises out of a proceeding by the original plaintiff herein, Schuler-Knox Company, a corporation, to quiet title to certain real property located in Siskiyou County and to eject appellants therefrom. Respondents are the successors in interest to the said Schuler-Knox Company. It is the second time the case has been before this court. In our previous decision, which was entitled Schuler-Knox Co. v. Frank C. Smith et al., and is reported in 62 Cal.App.2d 86, 144 P.2d 47, the judgment of the trial court in favor of the plaintiff was reversed, primarily upon the grounds that since the functions of a justice's court are special and limited, nothing is presumed in favor of its jurisdiction, and as plaintiff's action necessarily was predicated upon a judgment rendered by such a court, plaintiff's failure to sustain the burden of proving every fact necessary to confer jurisdiction made reversal necessary.

At the conclusion of the second hearing, the judgment of the trial court was again in favor of plaintiff, and on appeal defendants again urge that the evidence was insufficient to establish the jurisdiction of the justice's court. In addition to that ground, it is further contended that the price for which the property was sold under the execution sale was grossly inadequate; that the trial court erred in failing to find upon the issue that appellants had acquired a prescriptive title to the property; that the trial court further erred in refusing to relieve them of a stipulation made in the prior trial; that additional error was committed in holding that the recorded abstract of judgment constituted a lien on the property; that further error was committed in failing to find that the property was community; and, lastly, that the trial court erred in denying defendants' motion to strike plaintiff's cost bill and in granting plaintiff's motion to compensate costs.

The record of these proceedings discloses the following facts:

On July 15, 1930, plaintiff Schuler-Knox Company obtained a money judgment against defendants and appellants herein in the Justice's Court of Butte Township, Siskiyou County. The action was predicated upon two written contracts for the sale of personal property, signed only by Mrs. Smith but made out in the names of Mr. and Mrs. Smith and carried on the books of the plaintiff in the names of both defendants. The contracts were specifically made payable at Mt. Shasta City, which is located in Butte Township where the original proceeding was instituted. Defendants were served with process in Mott Township in said county, and upon their failure to appear judgment by default was rendered against them in the sum of $100.95, together with attorney's fees in the sum of $25 and costs of suit in the sum of $6.

[1] On August 3, 1931, defendant Anna Clo Smith recorded a declaration of homestead, declaring the land to be worth the sum of $5,000. However, she failed to state in said declaration that Frank C. Smith, her husband, had not previously selected a homestead or that she was claiming the same on behalf of herself and her husband, and for these reasons we held said declaration to be void (62 Cal.App.2d 96, 98, 144 P.2d 47).

An abstract of judgment was duly recorded in the office of the County Recorder of Siskiyou County on October 28, 1931.

Subsequent to the recordation of said abstract of judgment, to wit, on November 7, 1931, Mrs. Smith, for the second time, recorded a declaration of homestead, in which she properly stated all of the facts required by section 1263 of the Civil Code.

On September 16, 1931, Mrs. Smith filed a petition in bankruptcy in the United States District Court, and thereafter was adjudged a bankrupt. Upon her petition therefor, the court set the homestead apart to her as exempt property.

On September 28, 1933, the Constable of Butte Township, Siskiyou County, sold the property, which consisted of ten lots together with the dwelling house and improvements thereon, en masse and not in separate parcels, to the Schuler-Knox Company for the unpaid balance of the justice's court judgment in the sum of $105.73.

Mrs. Smith was discharged in bankruptcy on February 19, 1934.

On November 22, 1934, after the time for redemption had expired, the constable conveyed the property by deed to the Schuler-Knox Company, the purchaser at said constable's sale.

Plaintiff's action to quiet title to the property and to recover possession thereof was commenced July 29, 1937. The complaint is in the conventional form, and sets out two causes of action, one based on defendants' claim of some right, title, or interest in the premises, the other based on the wrongful taking and retention of possession of the premises by the defendants.

On August 11, 1937, during the pendency of said action, Frank C. and Anna Clo Smith, for a valuable consideration, sold and conveyed their interests in the property to Nora Kathleen Trapp.

The defendants Smith answered plaintiff's complaint, denying the material allegations thereof and affirmatively alleging their homestead rights, and the adjudication of bankruptcy as a bar to the action.

Nora Kathleen Trapp, who likewise was made a party defendant, separately answered said complaint, denying the material allegations thereof, and also filed a cross-complaint alleging her purchase and ownership of the property as previously mentioned. She further pleaded the other affirmative defenses set up by Mr. and Mrs. Smith.

Plaintiff filed an answer to the cross-complaint, denying the material allegations and interposing defenses in conformity with the complaint.

During all of this time the appellants remained in possession.

At the second trial the plaintiff called Gerald L. Shannon, the present Justice of the Peace of Butte Township who testified that his immediate predecessor, who was in office at the time of the justice's court action, had died since entry of judgment in that case, and that he (Shannon) had searched for the complaint filed therein but could not find it, nor could he find the docket in the case. Mr. L. N. Lorenzen, the attorney who represented plaintiff in the justice's court action, testified that the complaint was predicated upon and drafted from the two written contracts which were in his possession at that time, and that the total amount of the demand in said complaint was $131.95. Over objection of counsel for defendants a certified copy of the summons was received in evidence. Mr. Richard Callick, Constable at Dunsmuir, California, testified that service of summons on Mr. and Mrs. Smith was made by him near Dunsmuir in Mott Township on June 12, 1930. At the first trial of the superior court action the counsel then representing defendants stipulated that execution had been issued on the justice's court judgment

on August 28, 1931. On the second trial, defendants' present counsel objected to the introduction of said stipulation and moved to withdraw the same, but was overruled, and the stipulation was received in evidence. The constable's certificate of sale of the real property and the constable's deed to Schuler-Knox Company were also admitted in evidence over the objections of defendants. Deeds were also introduced showing that the record title to the real property in question was in Mrs. Smith alone at the time of the execution sale. At the former trial it also had been stipulated that Mrs. Smith was the owner of the property at the time the quiet title action was filed. This stipulation was also received in evidence over objection of defendants.

[2, 3] Thus, it satisfactorily appears that the omissions in the proof of jurisdiction which occasioned the reversal by this court of the first appeal were cured in the present proceedings. Inasmuch as there was a sufficient showing by the present justice of the peace, and by the attorney who represented the plaintiff when the original action was filed, that the complaint and docket of the case in the justice's court had been lost and that the justice of the peace who presided at the hearing had since died, said plaintiff was entitled to prove the alleged facts by secondary evidence. The written contracts which were introduced in evidence show a balance owing of $100.95, specifically made payable in Butte Township. These facts, coupled with the further testimony of Mr. Lorenzen that the complaint was predicated upon said contracts and that the total demand, including attorney's fees and costs, was $131.95, sufficiently establish the jurisdiction of the justice's court of Butte County over the subject matter of the action, in accordance with the provisions of sections 112 and 832 of the Code of Civil Procedure as said sections read at the time such jurisdiction was exercised.

Section 112 then provided in part that justices' courts should have jurisdiction as follows: "2. In those [cities] having a population of less than thirty thousand, said courts shall have original jurisdiction in all cases at law in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars or less * * *," while section 832 of the Code of Civil Procedure in part provided that

"Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried:

* * * * * *

"7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary."

[4, 5] Appellants seek to avoid the force of this rule as to defendant Frank C. Smith, on the ground that because he did not sign the contracts the judgment is void as to him. This contention is without merit, and constitutes nothing more that a collateral attack upon said judgment. In the contracts "Mr. and Mrs. F. C. Smith" were named as the purchasers of the property in question; and whether Mrs. Smith had the authority to sign for her husband as his agent, or whether otherwise he was liable thereon, was a matter for proof, and one that has been concluded by the judgment thereon. Once jurisdiction has been established—jurisdiction over the subject matter as shown by the complaint (21 C.J.S. Courts, §§ 33, 82 pp. 42 and 122)—the judgment and subsequent proceedings of a justice's court are entitled to the same degree of immunity from collateral impeachment as those of any other court. See Gregory v. Bovier, 77 Cal. 121, 19 P. 232, a suit to quiet title based on a justice's court judgment and execution. See, also, Norcross v. Nunan, 61 Cal. 640, 643; Brush v. Smith, 141 Cal. 466, 470, 75 P. 55; Guthrie v. Carney, 19 Cal.App. 144, 157, 124 P. 1045.

[6] Likewise, the proof of service of process was sufficient to establish jurisdiction over the persons of the defendants

Smith and each of them. The certified copy of the summons and return show that Richard Callick, a duly qualified person, "personally served the within summons on Frank C. Smith and Mrs. C. Smith, his wife, defendant named therein, by delivering to said defendants personally, on the said 12th day of June, 1930, in the Township of Mott, County of Siskiyou, State of California, a copy of said summons attached to a copy of the complaint in the action therein named." On the present trial, Callick testified that at the time of the service he was the duly elected constable of Mott Township, that he served on Mr. Frank Smith and Mrs. Smith, in said township, the original of the certified copy of summons that was shown to him. He also testified that said defendants, who were then seated in the courtroom, were the persons he had so served.

A comparable situation was presented in the case of Cole v. Fisher, 66 Cal. 441, 442, 443, 5 P. 915, 916. There the plaintiffs filed a complaint in a justice's court in Los Angeles County, alleging that the obligation which constituted the basis of the action was to be performed in Los Angeles. Service of process was made upon the defendants in San Francisco. Defendants then sought, by a proceeding in the Superior Court of San Francisco, to prohibit the justice of the peace in Los Angeles from proceeding to judgment. The Supreme Court, citing subdivision 7 of section 832 of the Code of Civil Procedure, held that by virtue of the provisions in the contract "it was optional with the plaintiff in the action to bring it in the township or city where the obligation was to be performed, or in which the defendant resided."

[7, 8] The other matters urged by appellants to show want of jurisdiction in the justice's court over the persons of defendants are highly technical and disclose, if anything, mere irregularities rather than jurisdictional defects. One of the objections is based on the fact that the return of summons did not specifically state that a copy of the summons was served on each of the defendants, but was so phrased as to permit an inference that only one copy was served on both. Whatever merit might otherwise attach to this contention has been dissipated by the previously noted testimony of the constable who served the process, which testimony was properly admitted. Jolley v. Foltz, 34 Cal. 321, 326–328. The case of Harris v. Morris, 3 Cal.App. 151, 84 P. 678, relied upon by appellants in support of this contention, involved a direct attack on the judgment, and is therefore not in point.

A similar objection was raised in the case of Cardwell v. Sabichi, 59 Cal. 490, where a judgment rendered by the justice's court of Los Angeles Township was attacked as being void for want of jurisdiction over the person of the defendant therein. It was charged that it did not affirmatively appear that the parties had been personally served with summons since the return failed to name the individuals upon whom the service had been made, if any. The Supreme Court, however, overruled this contention, stating that, although the jurisdiction of a justice's court must be made to appear affirmatively, "there is a great difference between an entire lack of jurisdiction and irregularity in obtaining jurisdiction."

[9, 10] Appellants advance still another objection to the sufficiency of the proof of service of process in the justice's court, based on the circumstance that the certified copy of summons shows that it was directed to "Frank C. Smith and Jane Doe Smith, his wife," while the return shows service upon "Frank C. Smith and Mrs. C. Smith, his wife." This contention is likewise without merit, for "it is the fact of service and not the proof of service which determines the validity or invalidity of a judgment." City of Salinas v. Luke Kow Lee, 217 Cal. 252, 254, 255, 18 P.2d 335, 336. As this court stated in Alpha Stores, Ltd. v. You Bet Mining Co., 18 Cal.App.2d 249, 251, 63 P.2d 1137, 1138, "The law is well settled that a defective return of service of process does not render the judgment void, provided the service was actually made as required by the statute upon the proper person * * *. It is the actual service of process, rather than the mere

proof thereof which confers jurisdiction on the court, and an amended affidavit of service may be filed to support the validity of a judgment which is rendered by default." This principle applies likewise to proceedings in justices' courts. Allison v. Thomas, 72 Cal. 562, 563, 564, 14 P. 309, 1 Am.St.Rep. 89, cited by the Supreme Court in City of Salinas v. Luke Kow Lee, supra, and involving a variance in names. In the present case, proof has been made, and it is not questioned, that Mrs. Smith was personally served with a copy of the summons.

[11] Furthermore, as far as the asserted failure to comply with the provisions of section 474 of the Code of Civil Procedure, dealing with fictitious parties, is concerned, it is thoroughly established that such a failure would not render the proceedings void nor deprive the court of jurisdiction. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Brun v. Ivins, 154 Cal. 17, 96 P. 876, 129 Am.St.Rep. 137; Baldwin v. Morgan, 50 Cal. 585. The cases of Roseborough v. Campbell, 46 Cal.App.2d 257, 115 P.2d 839; and Flores v. Smith, 47 Cal.App. 2d 253, 117 P.2d 712, cited by appellants, do not hold otherwise. Appellants attempt to distinguish the decisions holding that a compliance with said section is not jurisdictional, on the ground that in the instant case the judgment perpetuated the erroneous designation of name and was therefore void. This argument does not aid appellants' case, since the execution and the certificate of sale thereunder conform to the said judgment; and since Anna Clo Smith has identified herself as the execution debtor thereunder, it would be immaterial on this collateral attack whether or not the judgment was irregular. Brush v. Smith, 141 Cal. 466, 470, 75 P. 55; Seaver v. Fitzgerald, 23 Cal. 85, 86, 93, 94. Because of the defect, the judgment was not as appellants contend, void. Welsh v. Kirkpatrick, 30 Cal. 202, 203, 206, 207, 89 Am. Dec. 85. The language of Whitwell v. Barbier, 7 Cal. 54, 64, on which appellants rely has been explained in the later case of Keybers v. McComber, 67 Cal. 395, 396, 397, 7 P. 838, 839, where the court, in pointing out the difference between inferior and superior court proceedings with respect to presumptions and mode of proof, succinctly stated: "It does not follow, however, that the rule of decision differs upon the same facts when ascertained. It is only in the mode of ascertaining them that the distinction exists."

Appellants' next contention contains three charges of error: (1) that the price for which the property was sold was grossly inadequate; (2) that the evidence was insufficient to support the finding of the trial court that the value of the property at the time of the execution sale did not exceed the sum of $105; and (3) that the inadequacy of price when coupled with the fact that the property had been sold en masse and the existence of irregularities in the process and judgment of the justice's court, renders said sale invalid.

[12] In support of their first point, appellants place reliance upon the testimony of the witness Porter, a real estate agent, who stated that in his opinion the property was worth between four and five thousand dollars. It is noticeable, however, that said witness on cross-examination, when asked what the property would be worth in view of alleged statements that defendants would contest the title acquired by any purchaser and base their attack upon the bankruptcy proceedings, replied that he thought such facts would substantially affect the value. He further added: "I was just wondering why a man would buy property that way." His testimony concluded in the following fashion:

"Q. What is the value with the strings on it? A. Well I don't know whether a man would want to buy it with strings on it or not.

"Q. It wouldn't have much, would it? A. No it wouldn't."

Without regard to the collateral nature of the attack, the showing made by defendants on this ground would be insufficient. Rauer v. Hertweck, 175 Cal. 278, 165 P. 946; Batini v. Ivancich, 105 Cal.App. 391, 287 P. 523. And see Mitchell v. Alpha Hardware, etc., Co., 7 Cal.App.2d 52, 55, 45 P.2d 442. This was our conclusion on the former trial, 62 Cal.App.2d at page 97, 144 P.2d at page 53.

[13] Defendants' argument on this issue concludes with a reference to a statement in our previous opinion wherein we referred in general to the rule that a court will not hesitate to declare a sale invalid where it clearly appears that the selling price was grossly inadequate and the sale was irregular, or if there is a lack of sufficient evidence to establish jurisdiction. However, it must be noted that in addition we stated therein that mere inadequacy of consideration "is ordinarily insufficient ground for declaring the sale to be invalid." [62 Cal.App.2d 96, 144 P.2d 52.] Therefore, under the cases we have cited on this point, even if we were to assume that the testimony of Porter was sufficient to show inadequacy of consideration, it cannot be held to amount to such a clear showing of a gross inadequacy as to come within the rule enunciated in said cases.

[14] The asserted irregularity of selling the property en masse instead of by parcels is not a matter of which we may take cognizance in this proceeding. As the court stated in Gregory v. Bovier, supra, 77 Cal. at page 123, 19 P. at page 232, "Neither was it available for the plaintiff in this collateral action to attack the defendant's title on the ground that the lots of land were sold en masse, the period for redemption having passed." In our prior opinion we called attention to this rule, discussing it at some length. 62 Cal.App.2d 96, 144 P.2d 47.

Furthermore, it is not inappropriate to point out that no evidence was offered nor was argument made to show that the premises were not operated as a unit or that any different price could or would have been obtained had the parcels been sold separately. Mitchell v. Alpha Hardware etc. Co., supra, 7 Cal.App.2d at page 56, 45 P.2d 442; Batini v. Ivancich, supra 105 Cal.App. at pages 394, 395, 287 P. 523.

We have previously determined herein that the jurisdiction of the justice's court was satisfactorily established. No question of fraud has been raised nor have any irregularities, such as would warrant a reversal, been proved, and therefore we must conclude that each phase of this contention of appellant likewise is without merit.

Appellants further argue that, as defendants were in possession of the premises from the date of the original action and a long time prior thereto, to the date of the present action in 1937, they therefore acquired title by prescription or adverse possession. Reference to the sequence of events discloses that the original justice's court action was filed in 1930; the abstract of judgment was filed October 28, 1931; the second and only valid homestead was recorded on November 7, 1931; the property was sold at the constable's sale in September, 1933; the constable's deed was issued in 1934; and in 1937 the present action to quiet title was filed.

[15, 16] It is readily apparent therefrom that, even though it be assumed the recordation of the valid homestead by defendants commenced the running of the prescriptive period in 1931, the acquisition of title by plaintiffs' predecessor in interest would date from the constable's deed in 1934, which deed, in effect, was from the judgment debtors, or, as stated in Frink v. Roe, 70 Cal. 296, at page 305, 11 P. 820, at page 823, was "at least equal to that of a quitclaim deed of the same property executed by the debtor on the day of sale." See, also, 11 Cal.Jur. 118, sec. 64. In other words, it was the constable's deed that conveyed to the original plaintiff all the interest of the defendants in the property sold and became prima facie evidence of said plaintiff's title. Hansen v. d'Artenay, 13 Cal. App.2d 293, 297, 57 P.2d 202. See, also, Code Civ.Proc. § 700.

[17] A further contention is made by appellants that the court erred in denying their motion to withdraw a stipulation made at the former hearing. It is the general rule that where a stipulation is formally made, as in this case, for the express purpose of relieving the parties from proving a particular fact, to wit, the date of the execution, such stipulation, in the absence of any limitation as to a particular purpose, can be introduced in evidence as proof of the facts admitted at any subsequent trial. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739. That was the situation here.

[18] Appellants next complain that the trial court erred in holding that the abstract of judgment constituted a lien on the premises in question. In support of this contention the same argument is advanced as that set forth in appellants' assignment of error which we have found to be without merit; and for the same reasons we conclude that on this issue appellants' contention is likewise without merit. Furthermore, we stated in our prior opinion, at pages 97 and 98 of 62 Cal.App.2d, at page 53 of 144 P.2d that

"We are of the opinion the judgment of the justice's court became a lien against the land as provided by Section 674 of the Code of Civil Procedure, before a valid homestead was filed, unless the judgment was void for lack of jurisdiction. The homestead was therefore subject to the judgment lien, except that in the subsequent suit to quiet title which was dependent on the validity of that judgment the burden was on the judgment creditor to affirmatively prove that the justice's court had jurisdiction of the subject matter and of the parties involved therein, which it failed to do in this action.

"The judgment of the justice's court was rendered July 15, 1930, but the abstract of judgment creating the lien was not recorded until October 28, 1931. * * *

"That first declaration of homestead therefore did not have the effect of creating a homestead interest in the land superior to the judgment lien. November 7, 1931, ten days after the abstract of judgment had been recorded, which created a lien provided the judgment was valid, Anna Clo Smith filed another declaration of homestead, for the apparent purpose of, and which did, supply the fatal omissions in the first declaration. But in the meantime, if the justice's court had jurisdiction, the judgment lien became vested. November 2, 1934, the land was sold under execution."

[19-21] As an additional argument on this phase of the case, appellants urge that the property in controversy was community property and therefore was not liable for the contract obligations of Mrs. Smith. The judgment in question was against both Mr. and Mrs. Smith, and thus became a lien upon the property of either or both of them; and, as we previously concluded, there being no jurisdictional defects in the judgment, said judgment cannot now be attacked collaterally. However, even if this were not the case, the record discloses ample evidence that the real property was the separate property of Mrs. Smith: In the first place the original deeds by which title was taken were introduced in evidence and showed the same to be in the name of Mrs. Smith alone; secondly, Mr. Smith, while testifying in his own behalf at a former hearing, emphatically denied that he ever had any interest in the property; thirdly, the record reveals that Mrs. Smith, in the bankruptcy proceeding, claimed the property as her own and had it set aside to herself as a homestead.

[22, 23] Finally, appellants urge that the trial court was in error in denying their motion to strike the cost bill and in granting plaintiffs' motion to set off and compensate costs. It appears that the original plaintiff, Schuler-Knox Company, conveyed its interest in the property to Orville F. Crenshaw and Loren A. Davis, and, upon proper motions, the present owners were substituted as plaintiffs in the place of Schuler-Knox Company. The cost bill was filed in the name of the new parties, whereupon defendants moved to strike the memorandum of costs on the ground that said costs had been incurred prior to said substitution. After the determination of the former appeal the appellants filed their cost bill, and after the trial court announced its decision in the second trial they filed a motion to compensate costs, which motion was granted. It has been stated that "Where the transferee of the subject matter pending a suit permits it to be prosecuted in the name of the original parties, such parties are entitled to the costs of the suit, in the absence of a contract to the contrary; but where the assignee is permitted to intervene and prosecute the suit, the assignee upon recovering judgment is entitled to costs." 20 C.J.S. Costs, § 104, p. 351. See, also, Crittenden and U. S. Oil and Land Co. v. San Francisco Savings Union, 157 Cal. 201, 107 P. 103.

[24] Upon the question of compensating costs, the last-cited text authority has stated the rule to be that "a judgment for costs and an indebtedness not reduced to judgment may be set off against each other." 20 C.J.S., Costs, § 431, p. 675.

For the foregoing reasons, the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER, J., not participating.



74 Cal.App.2d 324

FURNESS PACIFIC, LTD., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15152.

District Court of Appeal, Second District, Division 2, California.

May 1, 1946.

Hearing Denied June 27, 1946.

1. Workmen's compensation ⇐2016

Where injured employee seeks an award based on new and further disability in nature of permanent disability caused by original injury and not theretofore compensated for, the proceeding is within time if commenced with in 245 weeks subsequent to date of injury, although order is not made until expiration of such period. Labor Code, §§ 5410, 5804.

2. Workmen's compensation ⇐2008

A permanent disability is a new and further disability for which compensation may be allowed notwithstanding an award for temporary disability had been allowed and paid, provided that proceedings for the collection on account of permanent disability are commenced within 245 weeks after date of original injury. Labor Code, §§ 5410, 5804.

3. Workmen's compensation ⇐2017

Industrial Accident Commission had jurisdiction to award employee compensation for new and further disability in the nature of permanent disability caused by original injury for which temporary disability compensation was granted, notwithstanding permanent disability award was made more than 245 weeks after injury was sustained, where application for further disability was filled within 245 weeks of the injury since section 5410 and not section 5404 was applicable. Labor Code, §§ 5410, 5404.

Proceeding under the Workmen Compensation Act by Furness Pacific, Ltd., a corporation, employer, and St. Paul Mercury Indemnity Company, a corporation, insurance carrier, opposed by Sam M. Gega, employee, to review an award of the Industrial Accident Commission awarding compensation for personal injuries.

Affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

R. C. McKellips and Fred G. Goldsworthy, both of San Francisco, for respondent Industrial Accident Commission.

WILSON, Justice.

Sufficient facts are set forth in the petition for a writ of review to enable the court to determine the only issue involved in this proceeding without the necessity of the filing of a return by respondents.

An employee of petitioner, Furness Pacific, Ltd., was injured on June 11, 1940. He filed his application for adjustment of his claim and on April 2, 1941, respondent commission entered its findings and award determining that the employee had suffered a temporary total disability. Thereafter further proceedings were had and additional orders were made by the commission which are not under review. On June 24, 1944, the employee filed his petition reciting that after the date of the last order of the commission he had become totally incapacitated and asked that he be allowed total disability rating and allowance. On January 11, 1945, a recommended permanent disability rating of 37½ per cent was made and the commission served notice that unless good cause were shown to the contrary the case would stand submitted seven days thereafter. The applicant objected to the report and requested a further

hearing which was had on March 14, 1945. Petitioners then objected to further proceedings and to the taking of further evidence on the ground that the period of 245 weeks from the date of injury having expired on February 25, 1945, the jurisdiction of the commission had terminated. The commission disregarded the objections and on July 19, 1945, entered its order amending the previous findings and award and granting the applicant a permanent disability rating of 100 per cent.

[1, 2] The only question involved is whether the jurisdiction of the commission to make the award complained of expired 245 weeks after the date of the injury. See Labor Code, sec. 5804. Where an injured employee seeks an award based on new and further disability in the nature of permanent disability caused by the original injury and not theretofore compensated for, the proceeding is within time if commenced within 245 weeks subsequent to the date of injury although the order is not made until after the expiration of such period. Gobel v. Industrial Accident Comm., 1 Cal.2d 100, 103, 33 P.2d 413; Henry Cowell Lime & Cement Co. v. Industrial Accident Comm., 211 Cal. 154, 161, 294 P. 703, 72 A.L.R. 1118. In the Cowell case it is held at page 160 of 211 Cal., at page 705 of 294 P., that "a permanent disability is a new and further disability" for which a claim may be made and compensation allowed notwithstanding an award for temporary disability had been allowed and paid, provided that *proceedings for the collection* on account of the permanent disability are *commenced* within 245 weeks after the date of the original injury. In the Gobel case the employee had been awarded compensation for temporary disability and within two days prior to the expiration of the 245-week period filed a petition for an award on the ground that the original injury had caused "new and further disability." The commission dismissed the petition on the ground that sufficient time did not remain to permit reasonable notice and hearing before the expiration of said period. The order was annulled. The Supreme Court held at page 102 of 1 Cal.2d, at page 414 of 33 P.2d, that the injured employee did not seek an amendment or modification of the original award, but that by his last petition he instituted a new and independent proceeding "for an award based on new and further disability in the nature of permanent disability caused by the original injury and not theretofore compensated for."

[3] In the instant proceeding the commission did not alter or amend its former award, Labor Code, sec. 5804, but made a new award for a disability for which compensation had not been previously allowed. Section 5410 of the Labor Code is the applicable provision and section 5404 is not.

The award is affirmed.

MOORE, P. J., and McCOMB, J., concur.



74 Cal.App.2d 376

JOHNSTON PIE CO. et al. v. ACME EGG & POULTRY CO. et al.

Civ. 14779.

District Court of Appeal, Second District, Division 1, California.

May 3, 1946.

Rehearing Denied May 24, 1946.

Hearing Denied July 2, 1946.

1. Sales ⇨416(2)

In buyers' action to recover damages for breach of contract for sale of frozen eggs as requested by buyers, current price of fresh eggs on the market was immaterial.

2. Sales ⇨417

In action for breach of contract whereby seller agreed to deliver frozen eggs as requested by buyers but not to exceed 90,000 pounds, evidence sustained determination that during the period covered by the contract, buyers' requirements for frozen eggs were 90,000 pounds.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Johnston Pie Company, a fictitious firm composed of Elwood Johnston

and others, copartners, against Acme Egg & Poultry Company, a fictitious firm composed of N. E. Rabinoff and others, individually and doing business under the fictitious firm name and style of Acme Egg & Poultry Company, to recover damages for breach of a contract. From an adverse judgment, defendants appeal.

Affirmed.

Myer B. Marion, of Los Angeles (Eugene L. Wolver, of Los Angeles, of counsel), for appellants.

Albert G. Bergman, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an action to recover damages for an alleged breach of a so-called "requirements" contract, by the terms of which defendants agreed to sell and plaintiffs agreed to buy 90,000 pounds of frozen "Gold Bond" eggs, specifically designated as

"Approx. 25,000 'Gold Bond' lbs.
" 65,000 'Gold Bond' "

Frozen Whites @ 12½¢ per lb.
" Wholes @ 19½¢ " ".

Said contract covered the period from April 16, 1941 to April 1, 1942 and provided: "This contract is made for the requirements, but is not to exceed 90,000 pounds total. * * * Each delivery to be made separately by the seller within reasonable time after being requested to do so by buyer * * *."

The complaint alleged that early in December, 1941, plaintiffs orally requested defendants to increase their prior daily deliveries of eggs from 240 to 810 pounds per day to meet plaintiffs' requirements, but that defendants failed to increase said deliveries; that on January 14th and again on February 11, 1942, plaintiffs made written demand upon defendants for the delivery of a minimum of 810 pounds of eggs per day, and requested that said amount be increased so as to make delivery of the full 90,000 pounds before the expiration date of the contract; that from the first part of December, 1941, until April 1, 1942, defendants delivered not more than 240 pounds of eggs daily. It is also alleged in a second cause of action that plaintiffs on March 24, 1942, further notified defendants that they intended "to rely strictly upon and to have you (defendants) conform exactly with all of the terms and conditions of said contract and according to the previous notices sent you." Also, that at the time the contract expired defendants had delivered a total of 47,000 pounds of eggs, leaving an undelivered balance of 43,000 pounds; that by reason of defendants' failure and refusal to deliver the remaining 43,000 pounds of eggs, plaintiffs were compelled and obliged to purchase similar eggs in the amount of 43,000 pounds in the open market at a greatly increased cost, all to their damage in the approximate sum of $3,000.

From a judgment in favor of plaintiffs for the sum of $2,565.90, defendants appeal.

It is here urged by appellants that the trial court committed prejudicial error in ruling that "the burden of proof rested upon the sellers to prove the requirements of the purchasers."

Early in the trial the court made the following comment: "I think we will take a recess at this time for about five minutes. Counsel might consider this one question, which has not been suggested to the Court, and that is where is the burden of proof with reference to requirements. The showing is that the plaintiff demanded that the contract be filled to the extent of 90,000 pounds. Isn't there a presumption that that represented its requirements, and if it did not represent its requirements, isn't the burden on the defendant to show that it did not? You might think that over during the recess."

Later in the same day the court called attention to the case of New York Central Iron Works Co. v. United States Radiator Co., 174 N.Y. 331, 66 N.E. 967, and commented thereon as follows: "in which it is stated that a general manager in that case was entitled to testify to the requirements of the business as such, and that it did not call for a conclusion, but a fact,

and a fact with which he was familiar. Furthermore, the case seems to imply that the burden is on the defendant, if he denies that the plaintiff needed for its requirements, the number of pounds, to affirmatively allege that and set it up as a defense.

"Mr. Marion: Is that your ruling, your Honor?

"The Court: I say, that is the ruling of that case.

"Mr. Marion: May I ask whether or not that is the ruling and the position that your Honor is going to take in this case, that the burden is upon the defendants to show that the requirements of the plaintiff in this action were not 90,000 pounds per year?

"The Court: Yes.

"Mr. Marion: That is the ruling?

"The Court: Yes.

"Mr. Marion: I submit then, your Honor, of course, in a ruling which is adverse is deemed to be objected to, but for the sake of the record I wish to state the fact that we representing the defendants, do not concur in that ruling; that we concede the contract is predicated upon a condition or contingency; that it is obligatory on plaintiff as the promisee to whom the eggs were to be delivered, to show the fulfillment or the happening of the condition or the contingency, and that only when it has been established by the plaintiff in this action that the condition or the contingency upon which the obligation, if it exists at all, may come into being, has sprung into being; then only does the obligation to deliver on the part of the seller take place.

"The Court: I am inclined to think the burden is on the defendant here, but whether it is or not, of course at the moment there is proof on that very point. Now, whether the burden of proof rests on the one or the other I do not think is going to be so important. I just mentioned it as one of the cases that bears on that point. * * * As I see the case, the whole question remaining in the case—there are only two as I construe the contract: One is, did the plaintiff require during the period of the contract, the 90,000 pounds from the defendant Acme? It either did or it did not. Now that is an issue upon which you can introduce evidence, any proper evidence, whether it is by examination of the witnesses of the plaintiff or of the defendant, so long as other objections to it are not sustained, but that is the issue."

There is nothing in the foregoing discussion which indicates a definite intention on the part of the court to require appellants to assume the burden of proof. The trial judge in effect stated he had examined a case from another jurisdiction holding that a defendant was required to affirmatively allege and set up as a defense a lack of need, but that since respondents herein had assumed the burden of proof by the introduction of evidence as to their requirements, the ultimate question was whether respondents required the 90,000 pounds of eggs; and that he would consider any evidence introduced by appellants as to respondents' lack of requirements, whether set up as an affirmative defense or not.

Respondents, instead of simply introducing the contract and establishing appellants' failure to deliver in accordance therewith, which would have made it incumbent upon appellants to introduce evidence that respondents did not need the total amount of 90,000 pounds of eggs, went beyond the strict rules of law and negatived a defense by showing that their requirements were in excess of the amount agreed upon.

Respondent Victor Swan, one of the three copartners of Johnston Pie Company, testified that the company needed 880 pounds of eggs and more per day from November 1, 1941, to the date of the expiration of the contract; and that for the period of the contract their needs exceeded 90,000 pounds of frozen eggs. On cross-examination, said witness stated that when the contract was entered into, the copartners estimated they would need 90,000 pounds, which they later found to be inadequate. He also testified that they received a sample of frozen eggs from Nick Cirrino during the period covered by the contract, but received no other frozen eggs from any one.

Respondent Theodore Tepper, one of the copartners, testified that at the time the contract was made, they estimated their needs for the ensuing year would be "90,000 pounds of frozen eggs, frozen wholes and whites"; that beginning in October, 1941, they found that the 240 pounds a day that were being delivered were totally inadequate to met the orders which they had on hand for the manufacture of pies and that late in October they made a demand on appellants "for an increase in the frozen eggs"; that because of the increased volume of business after October, 1941, respondents estimated they would need about 900 pounds of frozen eggs per day; that this estimate was "based on the previous year's business, and also the fact that during that year business was increasing more than it had been my experience in previous years"; that during the months of November and December, 1941, the daily average remained constant and they "did need at least 900 pounds of frozen eggs a day"; that they were unable to get that amount of eggs, and "actually did three different things * * * in the first place we could not make the type of pies that required those eggs, and in the second place we had to make the pies that did require those eggs, or that type of eggs, with a greatly reduced quantity. * * * The pies that we made with frozen eggs we reduced in quantity the eggs that went into the mix, in other words we cut down the amount of eggs that were used in that type of pies. It was detrimental to the quality of the pie. * * * we could not make a certain type of pie due to the lack of frozen eggs." This witness also testified that after making oral demand on appellants for increased delivery of eggs under the contract and not being satisfied, a written demand was made upon appellants for the delivery of 810 pounds of frozen eggs per day for the remainder of the term; that "810 pounds daily would fulfill the contract"; that for the entire period of the contract, to-wit: from April 19, 1941 to April 1, 1942, respondents needed in excess of 90,000 pounds of frozen eggs and could have used 150,000 pounds; that from the end of November, 1941 to April 1, 1942, 240 pounds of eggs per day were the most that was ever received from appellants; that in order to supply the deficiency, they "bought fresh eggs, cracked them, in other words, shell eggs" and substituted them for the frozen eggs. Asked to describe the difference between a frozen egg and a fresh egg in the preparation of a pie, Mr. Tepper stated: "Oh, there could be any number of differences. In the first place, when you freeze an egg you change the egg entirely. A fresh egg has a separate white and a separate yolk. A frozen egg, the whites and the yolks are merged, in other words you get an entirely different product. A frozen egg is short and the fresh egg is tough."

Copartner Elwood Johnston testified that from November, 1941, to April 1, 1942, the partnership needed 810 pounds, or more, of frozen eggs per day in the conduct of their pie business; that during the period covered by the contract respondent pie company did not purchase any frozen eggs from other sources than that of appellant egg company, but did purchase fresh eggs after the breach of the contract. In answer to the question: "How did you know you would need 810 pounds * * *" said witness testified as follows: "The same way that we knew we were going to need 90,000 pounds of eggs, we just guess at it, and we hit it right the same way we sign a contract, we anticipate what we are going to need, sometimes we hit it, sometimes we miss it. In this particular case we ran short. * * * We did the best we could. For a while we quit washing the tops of our pies with eggs, we had to use milk and sugar on top of them. Then we had so many complaints we had to get eggs, wherever we could get them. * * * Q. And outside of the efforts you made to secure these eggs from Mr. Cirrino of the Holland Egg Company and of F. W. Getchel, you made no further efforts to secure your frozen eggs from any other stores after you made your demands upon the defendants to fulfill your increased needs, did you? A. I won't say, because I don't remember, just like I told you, I don't remember for sure about the Dundee, I know the eggs were awfully high, they went to 32 cents a pound, and we tried to get the eggs of

equal quality, and I don't know of any eggs on the market outside of one brand that I would consider equal quality with Gold Bond Eggs. * * * we try to keep the cost of the pies somewhere within reason, and at that particular time of year (Jan. 14, 1942, to Apr. 1, 1942) eggs are so high that we always use checks, the same as any bakery does, and we tried to get fresh checks, and we could not obtain all the fresh checks we needed, so we just had to make the pies accordingly, Mr. Tepper makes the pies with the eggs that he has."

Appellants urge that the evidence is insufficient to support the main findings of fact because respondents "failed to offer competent evidence that during the period of time covered by the contract their requirements for frozen eggs were 90,000 pounds." In this connection it is argued that, since appellants furnished all of the frozen eggs requested of them over a period of eight months or two-thirds of the contract period, to-wit: 38,040 pounds of eggs (Findings III and VI in part), the court's findings II and VI in part, to the effect that respondents required in excess of 90,000 pounds of frozen eggs during the period of the contract and that on January 14, 1942, there remained undelivered 51,960 pounds of eggs, are inconsistent with said findings III and VI in part, since they arbitrarily presuppose that during the remaining one-third period that the contract had to run respondents' requirements increased 270%.

This contention is apparently predicated upon the hypothesis that, since respondents accepted deliveries of approximately 240 pounds of frozen eggs per day until they made demand for increased deliveries, they needed nothing in addition thereto for the remaining term of the contract.

The foregoing resume of the testimony given by the three copartners completely refutes appellants' argument. Moreover, the contract which was drawn by appellants provided that "each delivery to be made separately by the seller within a reasonable time after being requested to do so by buyer", consequently respondents could request an increase in deliveries at any time during the period of the contract, keeping in mind that the total deliveries for the term should not exceed 90,000 pounds.

Appellants next contend that they demonstrated that respondents' requirements for frozen eggs approximated the quantities delivered to them, because it was shown by the witness Bryson that respondents had received a large quantity of frozen eggs from F. W. Getchel & Son. As to this point, the record discloses that the delivery of eggs by said company was pursuant to a contract between Getchel & Son and the former owner of the Mary Elizabeth Pie Company, and that the Mary Elizabeth Pie Company was acquired by respondents on October 1, 1941. As hereinbefore stated, the witness Swan testified unequivocally that "Johnson secured no frozen eggs" from any concern other than Acme Egg & Poultry Company during the term covered by the contract here under consideration.

It is also contended that the evidence proved that the anticipated needs of respondents at the time of the execution of the contract were for approximately 90,000 pounds of eggs of all kinds, including fresh and frozen. The contract herein called for deliveries of frozen eggs, and when appellants refused to deliver the requested increased amount of frozen eggs, respondents were forced "to get eggs wherever we could get them". In the words of the respondent Johnston: "At first we cut down on the eggs, because eggs were so high on the market, first I tried to get them from the Holland Egg Company, and he said there were no more frozen eggs, that everybody had their contracts originally. * * * So we changed the formulas of our pies for a while, and we were washing the top of our pies with frozen eggs and we had to discontinue doing that, and wash them with milk and sugar, which, that was the place where we were using and needing lots of frozen eggs, due to the fact that mince pies increased so much at that time of the year, we needed a lot of frozen eggs to wash them with, then we got by the best way we could, and we had several complaints, and I started buying more fresh eggs, as many fresh eggs as I

could possibly get, and even fresh eggs, we could not buy the fresh checks we needed, and our pies suffered due to the fact that we had to cut down on the eggs in the mixes."

[1] Appellants urge that the evidence clearly shows that respondents purchased fresh broken eggs during 1941 at prices less than the contract price, and that when the price of fresh eggs subsequently increased, demand was then made upon appellants for increased deliveries to 810 pounds per day. The contract here in question called for deliveries of frozen eggs as requested by respondents, hence the current price of fresh eggs on the market would not be material.

[2] An examination of the record herein discloses sufficient substantial evidence to support the findings and the judgment.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.



74 Cal.App.2d 443

HORWITH v. CITY OF FRESNO et al.

Civ. 3523.

District Court of Appeal, Fourth District, California.

May 10, 1946.

Hearing Denied July 8, 1946.

1. Municipal corporations ⇐592(1)

If subject matter affected by state legislation is of state-wide concern and deals with matters beyond the exclusive control of the municipality, it is not a "municipal affair" subject to local control.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

2. Municipal corporations ⇐592(1)

The licensing of contractors throughout the state is a matter of general and state-wide concern and is not a "municipal affair" concerning only the inhabitants of a chartered city and subject to local regulation by imposing additional requirements, since the field is fully occupied by state statutes. Business and Professions Code, §§ 7000 et seq., 7025 et seq., 7026–7028, 7065 et seq., 7090 et seq., 7110; Const. art. 11, § 6; St. 1921, p. 1821, § 1.

3. Licenses ⇐3

The examination and licensing of electricians comes under the general police powers as an endeavor to protect property and promote the safety of citizens.

4. Municipal corporations ⇐592(1)

A city ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by William Horwith against City of Fresno, a municipal corporation, and Arthur L. Hilderbrand, Commissioner of Finance, to require the issuance of a business license. From judgment dismissing the action after a demurrer to plaintiff's amended complaint had been sustained without leave to amend, plaintiff appeals.

Judgment reversed with instructions to overrule demurrer.

Robert M. Barnard, of Fresno, for appellant.

C. M. Ozias, City Atty., of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment dismissing the action after a demurrer to plaintiff's amended complaint had been sustained without leave to amend.

Plaintiff has a license as an electrical contractor issued by the Contractors' State License Board after he had successfully passed the examination required by that board under the provisions of sections 7000 et seq., of the Business and Professions Code.

The city of Fresno is a municipal corporation organized and existing under a city charter. An ordinance of that city

requires an electrical contractor to obtain and pay for a business license before engaging in business. Plaintiff applied for such a business license which was refused because he had neglected to pass an examination before the Electrical Board of Examiners of the city as required by the provisions of Ordinance No. 2728. He brought this action to determine his rights and to require the issuance of a business license to him.

The issues presented by the appeal are clear. Plaintiff contends that the State has provided a comprehensive system for the examination and licensing of all contractors; that the state law has occupied the entire field so that no municipality may provide for any further examination of a contractor licensed under state authority as a prerequisite to his engaging in business within its limits. No question is presented of the right of a city to impose a license fee on such contractor for doing business in such municipality. We understand that right is conceded by the plaintiff.

On the other hand defendants maintain that the licensing of contractors doing business in the city is a municipal affair solely within the regulatory power of the municipality; that requiring a contractor to pass an examination given by a local board is a proper prerequisite to the issuance of a business license under the police powers of the city. It is also argued that "the ordinance does not, as a matter of fact, conflict with the State Contractors' Law." Counsel for defendants states his position under this contention as follows:

"The ordinance of Fresno under consideration operates to require a much higher degree of skill and competence on the part of those making electrical installations than is required under the more or less superficial state contractors' law. The state law was never designed to, and in fact does not, 'occupy the field.'"

So far as we are advised the precise question thus presented is of first impression in California.

Section 17 of Ordinance 2728 of the City of Fresno creates an Electrical Board of Examiners to examine applicants for master and journeyman electricians' certificates. Section 18 of the ordinance provides for such examinations and prohibits the issuance of certificates to applicants who do not attain a required grade. Section 14 makes it unlawful for any person to engage in the business of master electrician without first having secured a city license and prohibits the issuance of such license to any person not possessing a master electrician's certificate issued by the city electrical board of examiners.

Article 1 of Division 3, Chapter 9 of the Business and Professions Code provides for a Contractors' State License Board. Article 2 of the same Chapter defines those coming within the jurisdiction of the board, particularly sections 7026 and 7027. It is admitted here that the board has established the classification of electrical contractors which includes both master electricians and journeyman electricians as defined by sections 11 and 12 of ordinance number 2728 of the city of Fresno.

Section 7028 of the Business and Professions Code prohibits any person from engaging in the business of contractor without first having obtained a State license permitting him to do so.

Article 5, Division 3, Chapter 9 of the Business and Professions Code has to do with the examination and licensing of contractors and vests those duties and powers in the Contractors' State License Board. Article 7 of this same Chapter provides for disciplinary proceedings against contractors, and for review of the board's actions by the courts. Section 7110 of the same chapter provides as follows:

"Wilful or deliberate disregard and violation of the building laws of the State, or of any political subdivision thereof, or of the safety laws or labor laws or compensation insurance laws of the State constitutes a cause for disciplinary action."

Section 6 of Article XI of the Constitution, generally referred to as the home rule amendment, gives certain chartered cities exclusive control over municipal affairs. Section 1 of Article I of the Fresno charter (Stats.1921, p. 1821) accepts the power tendered by the Constitution so that it must be conceded that the city has exclusive control of its municipal affairs. The first

question confronting us is whether or not an examination of electricians prior to their licensing to permit them to do business within the city is a municipal affair.

What is strictly a municipal affair is not always easy of determination. In Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 438, 126 A.L.R. 838, it was said:

"No exact definition of the term 'municipal affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power is, however, conceded in all the decisions, and it is recognized that it is not fixed but fluctuates in scope, and that changes in conditions make necessary new and broader applications thereof."

[1] The generally approved rule on the question seems to be that if the subject matter affected by the state legislation is of state-wide concern and deals with matters beyond the exclusive control of the municipality, it is not a municipal affair subject to local control. See, Department of Water and Power of City of Los Angeles v. Inyo Chemical Co., 16 Cal.2d 744, 108 P.2d 410; Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515; Wilkes v. City and County of San Francisco, 44 Cal. App.2d 393, 112 P.2d 759; Lossman v. City of Stockton, 6 Cal.App.2d 324, 44 P.2d 397; Ryan v. San Diego Electric Ry. Co., 52 Cal.App.2d 460, 126 P.2d 401; Phelps v. Prussia, 60 Cal.App.2d 732, 141 P.2d 440.

Many additional cases illustrating what are and what are not municipal affairs are cited in 18 Cal.Juris. 783, sections 95 and 96, and under the same sections in Volume 8, "Municipal Corporations" of the Ten Year Supplement.

[2] It is apparent that the State has adopted a broad and comprehensive plan for licensing contractors throughout the entire State, for examination as to their qualifications and fitness to engage in their various activities, for licensing only those who prove themselves qualified by satisfactorily passing examinations, and for punishing those who prove themselves incompetent or unfaithful to the trust imposed in them. This is a matter of state-wide concern and is not one that can be safely entrusted to regulation by each chartered city. Residents of the smaller municipalities and of rural districts are as much concerned with the safety of their citizens and the property within their limits as those in the larger cities that may operate under charters.

As the licensing of contractors throughout the State is a matter of general and state-wide concern we must conclude that it is not a municipal affair that concerns only the inhabitants of a chartered city and which is subject to local regulation such as that attempted to be imposed by the city of Fresno.

In Pipoly v. Benson, supra, in discussing the question of municipal affairs and the right of a chartered city to legislate on a subject fully covered by a state law, it is said [20 Cal.2d 368, 125 P.2d 484]:

"This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however, which is important in the present case. Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute."

In Ex parte Grey, 11 Cal.App. 125, 104 P. 476, 478, it appears that the legislature had passed a general law requiring master or journeyman plumbers to obtain a license from the Board of Health of a city in order to carry on business therein. In San Jose an ordinance was passed requiring such plumbers to secure licenses from a Board of Plumbing Examiners, a board differing in personnel from the Board of Health. Grey was convicted and imprisoned for violating the city ordinance. In ordering his release the court said:

"The act just quoted makes it the express duty of the board of health in any incorporated city to examine plumbers, and to issue a license to them if found qualified after such examination. The law is general, uniform in its operation, and applies to every board of health in every incorporated city and every city and county in the

state. The ordinance of the city of San Jose attempting to delegate to the board of police and fire commissioners the power to appoint a board of plumbing examiners to examine and issue licenses to plumbers is in conflict with the general law, and hence void." See, also, In re Means, 14 Cal.2d 254, 93 P.2d 105, 123 A.L.R. 1378.

The argument that the ordinance of the city of Fresno does not, as a matter of fact, conflict with the State Contractor's Law divides itself into two parts: First, that it is a reasonable police regulation passed under the general police powers of the city under the provisions of section 11 of Article XI of the Constitution, and, second, that in the exercise of this police power the city has required a higher degree of skill and efficiency of the contractors than does the state law.

[3] We may concede that the examination and licensing of electricians comes under the general police powers as an endeavor to protect property and promote the safety of citizens.

[4] We find nothing in the record before us, other than statements in the brief of defendants, indicating that in taking the city examination the applicant for a city license must exhibit a greater degree of skill and efficiency than is required by the state law. In both the state law and the city ordinance the details of examinations to be given are left to the examining boards. However, we regard this matter as unimportant as "the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute". Pipoly v. Benson, supra.

The state license implies permission to the licensee to conduct his business at any place within the State. This permission should not be circumscribed by local authorities. This does not limit the right of local governmental agencies to protect property and life through the enforcement of local regulations as to the quality and character of the installations. The right to enforce local ordinances is still in the hands of municipalities through the power of inspections and permits. In fact section 7110 of the Business and Professions Code shows clearly the intention of the legislature to have state authorities assist in the enforcement of local ordinances pertaining to electrical installations.

If the arguments of defendants are sound, and if they should be sustained, there is no reason why the city of Fresno could not require lawyers, doctors, dentists, and others holding state licenses, to pass other and more strict examinations before being permitted to practice there.

The judgment is reversed with instructions to overrule the demurrer and give defendants a reasonable time in which to answer if they be so advised.

GRIFFIN, Acting P. J., concurs.

BARNARD, P. J., being disqualified, has not participated herein.



74 Cal.App.2d 391

HIRSCH et al. v. HIRSCH.

Civ. 15244.

District Court of Appeal, Second District, Division 2, California.

May 3, 1946.

Hearing Denied July 2, 1946.

1. Divorce ⇐228

In divorce action, order vacating prior order for payment by defendant of counsel fees to plaintiff's attorney was not governed by statute authorizing relief from an order taken against a moving party through his mistake, inadvertence, surprise, or excusable neglect. Code Civ.Proc. § 473.

2. Constitutional law ⇐55

The statute authorizing relief from an order taken against moving party through his mistake, inadvertence, surprise, or excusable neglect does not circumscribe the inherent power of courts but rather enlarges such power. Code Civ.Proc. § 473.

3. Motions ⇐59(2)

The power to annul an order procured by fraud is inherently invested in courts.

4. Judgment ⇐375
Motions ⇐59(3)

An order or judgment obtained through practice of extrinsic fraud may be vacated at any time while trial court has jurisdiction thereof.

5. Divorce ⇐228

In divorce action, where plaintiff's attorney knew that he was about to be discharged by plaintiff at time of granting of order for payment by defendant of counsel fees to attorney, the concealment, on date of hearing, of the impasse already reached by attorney and his client was such an extrinsic fraud as justified annulment of the order.

6. Divorce ⇐221

In divorce action, court had no jurisdiction to authorize payment by defendant for past services of plaintiff's attorney.

7. Divorce ⇐228

In divorce action, where, at time of hearing of plaintiff's motion for payment of attorney's fees, plaintiff concealed fact that she was about to discharge her attorney and she was fully aware that proof of her bigamous marriage to defendant would defeat court's jurisdiction to entertain divorce action and would render void a decree of divorce, order for payment by defendant of counsel fees to plaintiff's attorney was properly vacated. Civ.Code, § 137.

Appeal from Superior Court, Los Angeles County; Carl S. Stutsman, Judge.

Action for divorce by Eileen Hirsch against Lawrence Charles Hirsch. From an order vacating a prior order for payment by defendant of $500 counsel fees to William H. Hodges, as attorney for plaintiff, William H. Hodges appeals.

Affirmed.

Paul C. Hill, of Los Angeles, for appellant.

Courtney A. Teel, of Los Angeles, for respondent.

MOORE, Presiding Justice.

In the preliminary stages of this divorce action an order was made on March 26, 1945, hereinafter referred to as the March order, for the payment by defendant of $500 counsel fees to appellant as attorney for plaintiff. The sum was to be payable in equal monthly installments of $50. On October 5 defendant filed his motion to modify and vacate such order on the grounds (1) that the consideration for the order had failed and (2) that the court had misapprehended the facts. The motion was supported by an affidavit of counsel for respondent who averred (1) that there was a change in the relations of the parties immediately subsequent to the order in that plaintiff had taken steps to discharge appellant and upon the following day or very shortly thereafter and previous to the performance of any part of the work by appellant he was (April 6, 1945) substituted out of the case in favor of other counsel; and (2) that prior to her marriage to defendant plaintiff had entered into a legal matrimonial alliance with one Murphy at Las Vegas, Nevada, and had never been divorced from him. Following a hearing the court on October 18 vacated the March order by reason of the facts alleged in the supporting affidavit. The validity of the October order is the question posed by this appeal.

[1-3] Such order is in no sense governed by section 473, Code of Civil Procedure. That section authorizes relief from an order taken against the moving party "through his mistake, inadvertence, surprise or excusable neglect." The authors of that section had in contemplation no class of moving parties other than one of those encompassed by the language last above quoted. They did not intend by that statute to circumscribe the inherent powers of the courts but rather to enlarge such powers. Had they designed to designate all situations in which the courts might relieve a party from an order they would have named fraud along with excusable neglect. But since the power to annul an order procured by means of fraud is inherently vested in the courts its mention would have been calculated to limit the jurisdiction of nisi prius courts rather than to extend it.

[4, 5] An order or judgment obtained through the practice of extrinsic fraud may be vacated at any time while the trial court

has jurisdiction thereof. McGuinness v. Superior Court, 196 Cal. 222, 231, 237 P. 42, 40 A.L.R. 1110; Bowman v. Bowman, 125 Cal.App. 602, 13 P.2d 1049, 14 P.2d 558; Chiarodit v. Chiarodit, 218 Cal. 147, 152, 21 P.2d 562. That the acts of appellant and of plaintiff constituted extrinsic fraud upon the court and the defendant is established by highly respectable authority. McGuinness v. Superior Court, supra; United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. When cited to show cause why the original order directing payment of counsel fees should not be vacated appellant was confronted with the solemn declaration of a member of the bar that at the time of the granting of the March order he knew he was about to be discharged by plaintiff. He denied such averment neither by testimony from the witness stand nor by affidavit. It thereupon became an established fact despite the technical observation that it was based upon hearsay. Had it been untrue appellant was in possession of all of the knowledge of his discharge that might have defeated the inference of the affidavit's verity or, by the available process of the court, he could have produced every witness possessing any knowledge of such discharge. All doubt of the correctness of the affidavit on that score is, however, removed by the substitution of other counsel in the place of appellant pursuant to stipulation filed on April 6, 1945, and by the record which discloses no court appearance by appellant subsequent to the entry of the March order. Concealment, on the date of the hearing, of the impasse already reached by appellant and his client was such an extrinsic fraud as justified annulment of the order.

[6] It may reasonably be presumed that had the court been advised of the pending discharge it would have made no such order as that of March 26. It had no jurisdiction to authorize payment for past services. Loveren v. Loveren, 100 Cal. 493, 35 P. 87; Secondo v. Secondo, 218 Cal. 453, 459, 23 P.2d 752. To direct the payment of $500 to an attorney who would render no service to the plaintiff in the future would have been unthinkable; at least illegal and improbable. Such order was the result solely of the fraud practiced upon the court and by reason thereof it was vitiated. 12 Cal.Jur. 721. No other justifiable course was open to the court save that which it pursued. 1 Cal.Jur. 1031, secs. 82, 83.

[7] Plaintiff's fraud in obtaining the March order was not confined to her concealment of the facts relative to appellant's discharge. By admitting that she knew at the time of the entry of such order that she was the legal wife of Murphy, plaintiff thereby admitted she had perpetrated a fraud upon the court. She knew that although an order for the payment of fees to her attorney might on its face be valid, yet she was as fully aware that proof of her bigamous marriage to defendant would defeat the court of its jurisdiction to entertain her action and would render void a decree of divorce. Marlenee v. Brown, 21 Cal.2d 668, 678, 134 P.2d 770; Carbone v. Superior Court, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260. And if it did not invalidate any ancillary order in the action, the evidence of plaintiff's knowledge of her own bigamy was sufficient to multiply the proof of her fraud in causing the March order to be entered, knowing (1) that she could not maintain an action for divorce and (2) that she had no legal right to require defendant to pay fees to her attorney for the prosecution of the action. Civil Code, sec. 137.

Appellant cites Carbone v. Superior Court, supra; Sharon v. Sharon, 67 Cal. 185, 7 P. 456, 635, 8 P. 709; and St. Laurent v. St. Laurent, 35 Cal.App.2d 345, 95 P.2d 475, as holding the original order valid and not subject to modification. Such authorities are distinguishable on their facts. They have no bearing upon the question whether plaintiff committed a fraud in procuring the order to be entered. In the St. Laurent case the annulment of the original order awarding plaintiff counsel fees was denied, but no showing was made that the court's refusal was based upon an admission by the plaintiff that she had in requesting the order knowingly defrauded the court. In the absence of such showing it is presumed that Mrs. St. Laurent acted in good faith in filing her action for divorce and in demanding that her ap-

parent husband pay her counsel fees. Moreover, an inspection of the files discloses that Mrs. St. Laurent had been separated from her former husband June 4, 1929; had been awarded her interlocutory decree on September 4, 1930; was entitled to her final decree September 5, 1931, and was married to Mr. St. Laurent November 1, 1931. This record would warrant the assumption that Mrs. St. Laurent had acted in good faith and that she honestly believed she was the legal wife of her defendant. This conclusion is further warranted by the fact that the final decree was entered at the request of Mr. St. Laurent eight years and four months after the interlocutory had been granted.

The order is affirmed.

McCOMB and WILSON, JJ., concur.



74 Cal.App.2d 389

In re THOMAS' ESTATE.

KNOUSE et al. v. HANCKEN.

2 Civ. 15213.

District Court of Appeal, Second District, Division 2, California.

May 3, 1946.

1. Wills ⇐359

Where appellants appeared at hearing for probate of will as amicus curiae and cross-examined witnesses but offered no evidence, made no objection, and filed no appearance, they were not entitled to appeal because they were not parties and because they were not parties to the record. Probate Code §§ 370, 380; Code Civ.Proc. § 938.

2. Wills ⇐359

Those objecting to probate of will had only such rights as were conferred by statute, and since no statute authorized them to appeal, they had no right to do so.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Dorothea Thomas, also known as Dorothy Thomas, deceased, wherein John Hancken, named as sole devisee and executor of the deceased, offered the will of the deceased for probate. Quincy Knouse and Gisela Steiner appeared at the probate hearing as amicus curiae and cross-examined the witnesses. From an adverse judgment, Quincy Knouse and Gisela Steiner appeal.

Appeal dismissed.

George H. Pratt and John A. Gilligan, both of Los Angeles, for appellants.

James V. Brewer, of Los Angeles, for respondent.

MOORE, Presiding Justice.

[1] Having made her last will on May 11, 1943, Dorothea Thomas passed on to her reward on February 18, 1945. One John Hancken, named the sole devisee and executor of decedent, promptly offered the instrument for probate and it was admitted March 13, 1945. While no contest was filed in the form of written grounds of opposition before probate (Probate Code, sec. 370) or by filing a petition for that purpose within six months after the will was admitted to probate (sec. 380), yet appellants appeared at the hearing for probate and as amici curiae cross-examined the witnesses. Thereafter they attempted to become parties to the record by filing their notices of appeal. This they cannot do.

No evidence was offered by either appellant; no oral objection was made by either to the probate of the will at the hearing or prior to the order; no appearance was filed by either of them. Not the slightest showing appears to indicate that either appellant is aggrieved by the order appealed from. (Code Civil Procedure, sec. 938.)

[2] They are not entitled to appeal (1) because they are not parties (Braun v. Brown, 13 Cal.2d 130, 133, 87 P.2d 1009) and (2) because they are not parties to the record. Allen v. Pugh, 206 Ala. 10, 89 So. 470; Bowe v. Pierson, 206 Ala. 250, 89 So. 711; Elliott v. Superior Court, 144 Cal.

501, 508, 77 P. 1109, 103 Am.St.Rep. 102. Although they are bound by the order which resulted from a proceeding in rem, they are not parties litigant (Estate of Allen, 176 Cal. 632, 169 P. 364; Estate of Bloom, 213 Cal. 575, 580, 2 P.2d 753; In re Stone's Estate, Cal.App., 133 P.2d 483) and cannot appeal merely because they appeared at the hearing and inquired as friends of the court. Since appellants have only such rights as are conferred by statute (Estate of Baker, 170 Cal. 578, 150 P. 989; In re Anthony's Estate, 127 Cal.App. 186, 15 P.2d 531; In re Whiting's Estate, 110 Cal.App. 399, 294 P. 502), and since no statute authorizes them to appeal, they have no right to do so.

It is ordered that the appeals be and they are hereby dismissed.

McCOMB and WILSON, JJ., concur.



74 Cal.App.2d 350

In re RICHARDSON'S ESTATE.

Civ. 15147.

District Court of Appeal, Second District, Division 2, California.

May 2, 1946.

1. Executors and administrators ⇐35(16)

Under provision of probate code authorizing court to cite executor to appear and show cause why his letters testamentary should not be revoked, and to suspend executor's power until question whether executor had wrongfully neglected the estate is investigated, court could revoke letters testamentary without a hearing on merits of executor's current account. Probate Code, § 521.

2. Executors and administrators ⇐35(1)

Substantial evidence that executor had not filed appraisement until long after three months after his appointment sustained his removal as executor under statute requiring filing of inventory and appraisement within three months after appointment of executor or within such further time as the court or judge might allow. Probate Code, §§ 522, 600, 610.

3. Executors and administrators ⇐35(11)

Nonresident heir who was also a residuary legatee under will was a "person interested in the estate" who could institute proceedings for removal of executor under statute permitting interested person to appear at hearing and file allegations showing that executor should be removed where hearing was instituted under statute requiring citation of executor to appear and show cause why executor neglected estate. Probate Code, §§ 521, 522.

See Words and Phrases, Permanent Edition, for all other definitions of "Person Interested in Estate".

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Sallie T. Richardson, deceased, to revoke letters testamentary issued to Charles S. Darden. From an order of probate court revoking letters testamentary, Charles S. Darden appeals.

Order affirmed.

Charles S. Darden, of Los Angeles, in pro. per.

Harold B. Pool, of Los Angeles, for respondent.

McCOMB, Justice.

From an order of the probate court revoking letters testamentary issued to Charles S. Darden, he appeals.

Three questions are presented for our determination which will be stated and answered hereunder seriatim:

[1] First: *Did the probate court have the right to revoke the letters testamentary without a hearing on the merits of appellant's current account?*

This question must be answered in the affirmative. Section 521 of the Probate Code provides in part as follows:

"Suspension and removal: Causes and procedure. Whenever a judge of the court has reason to believe from his own knowl-

edge, or from credible information, that any executor or administrator has * * * wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must cite such executor or administrator to appear and show cause why his letters should not be revoked, and may suspend his powers until the matter is investigated. * * *"

There is no requirement in such provision that the court must go into the merits of the executor's account, it being sufficient to warrant the revocation of letters testamentary if it be shown that the executor has mismanaged, wasted, embezzled the property of the estate, or has wrongfully neglected the estate, etc.

[2] Second: *Was there substantial evidence to sustain the trial court's finding that appellant had neglected the estate and should therefore be removed?*

This question must also be answered in the affirmative. The trial court found supported by substantial evidence that appellant had not filed an inventory and appraisement of the assets of the estate. The evidence discloses that appellant was appointed executor of the estate on May 17, 1943, and that an appraisement was not filed until early in January, 1945. Therefore, pursuant to the provisions of section 610 of the Probate Code, more than three months having elapsed after his appointment without the filing of an inventory and appraisement, the court was authorized on this ground alone to remove appellant as executor. (See Probate Code, sections 600 and 610.)

[3] Third: *Can a nonresident heir institute a proceeding to revoke letters testamentary?*

This question must likewise be answered in the affirmative. Petitioner was a nonresident of the state of California. She was likewise a residuary legatee under the will of Sallie T. Richardson. This being true she was entitled to institute proceedings for the removal of appellant as executor. Section 522 of the Probate Code provides that any person interested in the estate may appear at the hearing instituted pursuant to the provisions of section 521 of the Probate Code and file allegations in writing showing that the executor or administrator should be removed. It is clear under this section there is no requirement that the party seeking the removal of the executor should be a resident of California; it is sufficient that such party is interested in the estate.

In the present case it is clear that Mrs. Walker who appeared and sought removal of appellant was a person interested in the estate, since she was a residuary legatee.

Estate of Martin, 163 Cal. 440, 125 P. 1055, and Estate of Mintaberry, 183 Cal. 566, 191 P. 909, are inapplicable to the present case since such cases have to do with the interpretation of the language in section 1383 of the Code of Civil Procedure, now section 450 of the Probate Code. The cited cases deal solely with the question of revocation of letters of administration on the petition of someone, or the nominee of someone, who claims a prior right thereto. The cases have nothing to do with the question of revocation for mismanagement or failure to properly act as an executor.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and WILSON, J., concur.



74 Cal.App.2d 352

In re RICHARDSON'S ESTATE.

Civ. 15164.

District Court of Appeal, Second District, Division 2, California.

May 2, 1946.

1. Appeal and error ⇐907(1)

Where affidavit of alleged prejudice was not a part of the record on appeal, court must presume in favor of the acts of the trial judge that affidavit did not contain any statement of fact showing bias or prejudice of the trial judge.

2. Appeal and error ⇐1078(1)

Where appellant failed to present either argument or authority showing why

appealed from orders should be reversed, any objection appellant might have had was deemed abandoned.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Sallie T. Richardson, deceased. From orders denying motion to transfer the matter to some other court for trial after an affidavit of bias and prejudice had been filed against trial judge; granting a motion to strike the affidavit of bias and prejudice from the file; releasing the executor's attorney of record, and immediately ordering executor to take the witness stand without aid of counsel; and settling the executor's account and ordering him to deliver assets to Laura Bell Clark, the executor, Charles S. Darden, appeals.

Orders affirmed.

Chas. S. Darden, of Los Angeles, in pro. per.

Harold B. Pool. of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from orders:

1) Denying appellant's motion to transfer the matter to some other court for trial after an affidavit of bias and prejudice had been filed against the trial judge;

2) Granting a motion to strike the affidavit of bias and prejudice from the file;

3) Releasing the executor's attorney of record, and immediately ordering the said executor to take the witness stand without the aid of counsel; and

4) Settling the executor's account and ordering him to deliver the assets to Laura Bell Clark.

1 and 2

[1] The affidavit of alleged prejudice is not a part of the record on appeal; therefore this court is compelled to presume in favor of the acts of the trial judge that such affidavit did not contain any statement of fact showing bias or prejudice upon the part of the trial judge. Hence orders 1 and 2 were correct. (See Neblett v. Pacific Mutual Life Insurance Company, 22 Cal. 2d 393, 401, 139 P.2d 934.)

3 and 4

[2] Appellant has failed to present either argument or authority showing why the third and fourth orders mentioned above should be reversed; therefore any objection that he might have had will be deemed abandoned. (Ver Bryck v. Luby, 67 Cal.App.2d 842, 845, 155 P.2d 706.)

For the foregoing reasons the orders are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.



74 Cal.App.2d 410

ATWATER v. ARGONNE VAN & STORAGE CO.

Civ. 13032.

District Court of Appeal, First District, Division 2, California.

May 6, 1946.

1. Venue ⇐7

Under statute providing that county in which obligation is to be performed is a proper county for trial of action, motion for change of venue from Santa Clara county to Los Angeles county in which defendant resided was properly denied, where verified complaint alleged that defendant contracted to pay account sued on in Santa Clara county. Code Civ.Proc. §§ 395, 396.

2. Venue ⇐70

Allegations of verified complaint may be considered in opposition to motion for change of venue. Code Civ.Proc. §§ 395, 396.

3. Pleading ⇐291(1, 2)

In action to recover balance allegedly due on contract for exchange of motors in truck owned by defendant who pleaded notice of rescission in haec verba, plain-

tiff's failure to file affidavit of denial of notice admitted genuineness and due execution of notice of rescission, but was not an admission that grounds of rescission stated in notice were true or that the notice had the effect of rescinding the contract. Code Civ.Proc. § 448.

4. Pleading ⇐121(2), 377

The denial for want of information and belief of allegation of complaint that plaintiff was doing business under a fictitious name and had complied with statute requiring user of fictitious name to file certificate was insufficient, and allegation of compliance with statute stood admitted and did not have to be proved on the trial. Civ.Code § 2466.

5. Appeal and error ⇐931(1)

On defendant's appeal from judgment for plaintiff, District Court of Appeal must assume that the trial judge believed the evidence most favorable to the plaintiff.

6. Principal and agent ⇐123(3)

In action to recover balance allegedly due on contract for exchange of motors in defendant's truck, evidence warranted finding that defendant's San Francisco manager had authority to make contract binding on defendant.

7. Sales ⇐181(5)

In action to recover balance allegedly due on contract for exchange of motors in defendant's truck, refusal to permit defendant to testify that motor installed by plaintiff had to be replaced was not error as arbitrarily foreclosing defendant from proof of his defense that plaintiff installed a defective motor.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action, commenced in the justice court of Palo Alto township in Santa Clara county, by Ray Atwater, doing business as Peninsula Chevrolet Company, against Argonne Van & Storage Company, to recover the balance due for the installation of a motor in a truck owned and operated by the defendant, who filed an answer and cross-complaint. The justice transferred the case to the superior court of Santa Clara county. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

W. L. Carpenter, of Los Angeles, in pro. per., for appellant.

Lorenz Costello, of Palo Alto, for respondent.

DOOLING, Justice.

This is an appeal from a judgment for $81.21 with interest and costs. The action was commenced in the justice court of Palo Alto Township in Santa Clara County to recover the balance due for the installation of a motor in a truck owned and operated by appellant Carpenter, doing business under the name and style of Argonne Van & Storage Company. Defendant filed an answer and cross-complaint praying for damages in the aggregate sum of $1080, and moved the justice court to transfer the action to Los Angeles County, the county of defendant's residence. The justice denied the motion for change of venue and transferred the case to the superior court of Santa Clara County pursuant to section 396 Code of Civil Procedure. Defendant renewed his motion for change of venue in the superior court and his motion was again denied.

[1, 2] The denial of the motions for change of venue to the county of defendant's residence was proper. The complaint, which was verified, alleged that defendant contracted to pay the account sued on in the Township of Palo Alto, County of Santa Clara. This allegation in the verified complaint was proper to be considered in opposition to the motion for change of venue, East-West Dairymen's Ass'n v. Dias, 59 Cal.App.2d 437, 441, 442, 138 P.2d 772, and the county where the obligation is to be performed is a proper county for the trial of the action (sec. 395, Code of Civil Procedure).

[3] Appellant pleaded a notice of rescission in haec verba. No affidavit of denial of this notice was filed and appellant argues that the effect of this was to admit that the contract had been rescinded. The

only effect of the failure to file an affidavit of denial pursuant to sec. 448, Code of Civil Procedure was to admit the "genuineness and due execution" of the notice of rescission. There was in no sense, as appellant seems to argue, an admission that the grounds of rescission stated in the notice were true or that the notice had the effect of rescinding the contract. 21 Cal.Jur. 168.

[4] The complaint alleged that plaintiff was doing business under a fictitious name and had complied with the provisions of section 2466 of the Civil Code. These allegations were attempted to be denied for want of information and belief. The denial in that form was not sufficient and the allegation of compliance with sec. 2466, Civil Code stood admitted and did not have to be proved on the trial. Goldwater v. Oltman, 210 Cal. 408, 425, 292 P. 624, 71 A.L.R. 871.

[5, 6] The evidence most favorable to respondent, which we must assume that the trial judge believed, is that the driver of the truck asked respondent to replace a motor which was so badly damaged that it could not be salvaged; that the damaged motor was a Mercury motor and because it was impossible to secure another Mercury motor a Ford V-8 motor was installed; that respondent asked for confirmation of the order and was referred by the driver to a Mr. Reilly in the San Francisco office of the Argonne Van & Storage Company; that respondent telephoned to Reilly and Reilly authorized the replacing of the Mercury motor with a Ford V-8 motor and agreed to pay for it; that $80 was paid on account and Reilly gave the respondent a written authorization to deliver the truck to the driver with a receipt for the $80 payment, which order was on the stationery of Argonne Van & Storage Company and signed by Reilly as manager; that appellant Carpenter and Reilly afterwards called on respondent in Palo Alto and appellant introduced Reilly to respondent "as his San Francisco manager"; and that almost two months after the motor was installed appellant sent the purported notice of rescission to respondent which recited "that we hereby rescind that certain contract for the exchange of motors made on April 1, 1943." This notice stated as grounds of rescission "fraud and a failure of consideration" but contained no claim that Reilly was without authority to bind appellant by the contract. The facts above recited are ample to support the trial court's finding against appellant's contention that Reilly was without authority to make the contract binding upon him.

[7] The only other claim of appellant is that the trial court arbitrarily foreclosed him from proof of his defense and cross-complaint. The only ruling complained of is the refusal to permit the appellant to testify that when the truck arrived in Santa Barbara the motor installed by respondent had to be replaced. The answer and cross-complaint had alleged that plaintiff had negligently installed a defective motor and a motor not large enough for the truck. Mere proof that the motor had to be replaced in Santa Barbara would not reasonably support an inference that it was defective or inadequate when installed. As the trial judge pointedly said: "How do we know your truck driver took good care of the motor? You can ruin a good motor in ten minutes if you don't take care of it." There was no offer to prove that the motor when installed was in any way defective and we find no error in the ruling complained of.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

KROENERT v. ZASLOW et al.

Civ. 15079.

District Court of Appeal, Second District, Division 3, California.

April 29, 1946.

Hearing Granted June 27, 1946.

Taxation ⇐734(2)

An excessive levy of taxes upon realty acquired by state on sale to state for nonpayment of taxes does not invalidate a tax deed to the realty given by the state.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Helene Kroenert against Henry F. Zaslow and others to quiet title to realty. From judgment for defendants, plaintiff appeals.

Reversed and remanded with directions to enter judgment for plaintiff.

See also 168 P.2d 779.

Kaplan & Livingston, of Los Angeles, Alfred L. Armstrong, of Hollywood, and Harold D. Berkowitz, of Los Angeles, for appellant.

Richard A. Haley and Ernest A. Oswald, both of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Plaintiff appeals from a judgment rendered May 31, 1944, in favor of defendant Henry F. Zaslow in an action commenced by her on January 26, 1944, to quiet title to certain real property described as Lot 245, Block 4, Golden Bay Tract, in the City of Los Angeles, county of Los Angeles, State of California, recorded in Book 2, page 15 of Maps in the office of the county recorder.

The real property had been sold in 1926 to the State for nonpayment of taxes for the fiscal year 1925–1926 and in 1931 was tax deeded to the State. At a public auction sale plaintiff bid $4,700, which was accepted, and on November 19, 1943, she received a tax deed from the tax collector of Los Angeles County. At the trial plaintiff introduced this tax deed and also a certified copy of a tax deed from the tax collector of Los Angeles County to the State of California and rested. Defendant attacked the tax sale and deed on the ground that in preparing the budget of Los Angeles County for the four fiscal years 1927 to 1931, inclusive, the Board of Supervisors of said county failed to anticipate revenue from solvent credits and personal property taxes, and that said errors resulted in an over-assessment against said property for the period.

The court found that the County of Los Angeles illegally levied taxes upon the real property in excess of its requirements for the year 1927–1928 in the sum of $.21, for the year 1928–1929 in the sum of $.18, for the year 1929–1930 in the sum of $.04, for the year 1930-1931 in the sum of $.40. The conclusions of law drawn therefrom were stated as follows: "That the deed to the State of California is illegal and void by reason of the overlevy of taxes by the County of Los Angeles in the total amount of eighty-three cents ($.83)"; that "the State of California could convey to the plaintiff, Helene Kroenert, no greater title than it possessed and by reason thereof the title conveyed by said State to the plaintiff is illegal and void"; that "the defendant Henry F. Zaslow is entitled to judgment decreeing that plaintiff take nothing by reason of her Complaint."

Since May 31, 1944, the Supreme Court, under circumstances similar to those presented by the instant case has decided that such an overlevy does not invalidate a tax deed given by the State. This appears from the unanimous decision of that tribunal published on May 1, 1945, in City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397, which holds that the provisions of the so-called Curative Act of 1943, St.1943, p. 1993, therein referred to, were sufficient to defeat the claims of the defendants.

On the authority of that case we believe that the judgment in the present action should be reversed and the cause remanded to the trial court with directions to enter judgment for the plaintiff.

It is so ordered.

SHINN and WOOD, JJ., concur.

ZASLOW v. KROENERT et al.

Civ. 15031.

District Court of Appeal, Second District, Division 3, California.

April 29, 1946.

Hearing Granted June 27, 1946.

1. Taxation ⇐797

Where plaintiff leased property from the state which was subsequently sold at tax sale to defendant and plaintiff's lease was canceled by the state as authorized by the lease, and defendant took peaceable possession of the premises after a tenant of plaintiff moved out, plaintiff was not in actual possession nor entitled to possession of the premises and hence could not maintain ejectment against defendant.

2. Trespass ⇐36

The proper party plaintiff in an action for trespass to real property is the person in actual possession.

3. Trespass ⇐20(3)

The common-law rule that one in actual possession of realty can maintain trespass for forcible entry against any one not having a right to enter, but that no action can be maintained by one wrongfully in possession as against an owner having a right to enter, except where excessive force was used to dispossess him, obtains in California except insofar as it has been changed by the provisions of the code relative to summary remedy provided therein for forcible entry made upon real property. Code Civ.Proc. §§ 1159–1179a.

4. Forcible entry and detainer ⇐6(2)

Neither questions of title nor of right to possession arise in action for forcible entry.

5. Forcible entry and detainer ⇐14

Where tenant is in actual possession of the premises, any entry made by a third party during existence of his term is an unlawful entry upon him alone and only the tenant may maintain an action for forcible entry and detainer.

6. Forcible entry and detainer ⇐14

That plaintiff was for several days a lodger during subtenant's term on premises subleased by plaintiff was not such possession as would entitle plaintiff to maintain proceedings in forcible entry and detainer.

7. Trover and conversion ⇐4

To charge a defendant with conversion of plaintiff's goods, defendant must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods or some act inconsistent with plaintiff's right of ownership in repudiation of such right.

8. Trover and conversion ⇐40(6)

In action for conversion of goods left in home occupied by plaintiff of which possession had been taken peaceably under claim of title by defendant, evidence showed an express recognition of plaintiff's title and dominion over the goods not inconsistent with plaintiff's right of ownership or in repudiation of such right, and did not sustain finding of wanton, malicious, and reckless disregard of rights and privileges of the plaintiff entitling plaintiff to punitive damages.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by M. Zaslow, M. Zaslow as attorney in fact for Henry Zaslow, against Helene Kroenert and others, wherein a complaint in four counts entitled trespass, ejectment, forcible entry, and conversion was reduced to ejectment and conversion by dismissal of the first and third causes of action upon motion of plaintiff's counsel at commencement of trial. From judgment for plaintiff, defendants Helene Kroenert, and Claude Chapman, sued as John Chapman, appeal.

Reversed.

See also 168 P.2d 779.

Kaplan & Livingston, of Los Angeles, Alfred L. Armstrong, of Hollywood, and Harold D. Berkowitz, of Los Angeles, for appellants.

Richard A. Haley and Ernest A. Oswald, both of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Defendants Helene Kroenert and Claude W. Chapman appeal from a judgment ren-

dered in favor of plaintiff in the sum of $2,900.

On January 27, 1941, Marcus Zaslow was in possession of the real estate described as Lot 245, Block 4, Golden Bay Tract in the county of Los Angeles. There is a building upon this lot numbered 411 Ocean Front Walk, Venice. On the date mentioned Mr. Zaslow entered into an agreement with the State of California by which he leased the property from the State at a monthly rental of $8.00. The instrument provided that if the property should be sold by the State while the lease was in effect the State was authorized to cancel it as of the "date of sale by the State" and the lessee in that event would be entitled only to a refund of any unearned portion of rental which might have been paid in advance. The lease also provided that the lessee was not to "let or underlet" the premises without the consent of the lessor.

On November 19, 1943, defendant Helene Kroenert bought the premises from the State of California at a public auction tax sale for $4,700, overbidding the plaintiff's offer of $4,600. On December 10, 1943, the State notified the plaintiff that the lease was cancelled as of November 19, 1943, the date of sale. The notice contained the advice that "Arrangements for rental of the property, for the period subsequent to said date of sale, should be made with the successor in interest to the State." Enclosed with the notice was an application for refund of unearned rental.

Although the plaintiff was present when Mrs. Kroenert was awarded the property upon her bid, the record does not indicate that he ever made any arrangements with her as successor in interest to the State or otherwise to continue as the tenant of the property. On the contrary, he ignored any right that she might have had in the premises as the purchaser thereof and continued to receive rentals under a sublease which he had made with a Mrs. Dobis on October 7, 1943. The building was furnished and while at first Mrs. Dobis paid rent to plaintiff, it appears that her sister, Mrs. Bronson, who moved in with her family shortly thereafter, began to pay rentals in the month of January, 1944. Checks were introduced in evidence which showed that on January 4th and again on February 7, 1944, she wrote checks in favor of Marcus Zaslow in the sum of $25 and in favor of Marilyn Zaslow in the sum of $30. Mrs. Bronson testified that her rent was paid up to May 21, 1944.

On January 26, 1944, Helene Kroenert filed an action to quiet title to the property, naming various defendants, including Mrs. Bronson, Henry F. Zaslow and his wife, Marilyn. Marcus Zaslow filed an answer in that action as attorney in fact for his son, Henry, and on May 31, 1944, judgment was rendered against Mrs. Kroenert on the theory that the tax deed from the State was void because of an over-assessment of taxes by the Board of Supervisors for the years 1927 to and including 1931. That judgment we have reversed this day upon Mrs. Kroenert's appeal in action No. 15079, 168 P.2d 779.

While the quiet title action was pending, Mrs. Bronson, at the behest of the plaintiff who was contemplating going into possession again, endeavored to find another apartment. In that effort, she and her husband approached defendant Chapman, who was the owner of apartment house property. While she was waiting to learn of a vacant apartment, plaintiff, according to the testimony, told his subtenants that he needed the place and would move in if they could give him a place to sleep; that on or about May 10, 1944, they did so; that he slept there the next four nights but left in the morning to go to his business. On May 15th, 1944, the Bronsons were notified by defendant Chapman that one of his tenants had suddenly moved out and that they could have immediate possession of a furnished apartment. Although their rental was paid up to May 21st, the Bronsons within two hours after such notification vacated the premises, leaving the doors open and unlocked. Mrs. Bronson testified that when she returned to "clean the place" she found "notices tacked on the door." Defendant Chapman, acting as agent for his mother-in-law, Mrs. Kroenert, immediately upon the Bronsons moving out, peaceably entered

the premises, took possession, posted "no trespassing" signs and changed locks on the doors.

Plaintiff testified that when he came home that night to sleep he found that the doors were padlocked with "signs on each side not to trespass"; that a few days later, and on May 17th, he went back to look over the premises with his attorney and found defendant Chapman there; that he noticed the lock on the hamburger stand had been changed and asked Chapman how he did it, and he answered, "'With a hammer. I knocked it off and put mine on'"; that "No other conversation took place at all. We looked at the signs. That is all. Signs, no trespassing. I *think* Mr. Chapman says: 'Don't you dare to come close. You will find your head knocked off.'" (Emphasis ours.) He testified that he *thought* Chapman had a sledge hammer in his possession at that time.

On May 19, 1944, defendant Kroenert's attorney sent the plaintiff the following letter:

"Mr. M. L. Zaslow,

"325 North Oakhurst,

"Beverly Hills, California.

"Dear Sir:

"My client, Mrs. Helene Kroenert, has taken possession of the premises at, 411 Ocean Front, Venice, under claim of title by the virtue of a deed to her from the state of California.

"On the premises above named are certain pieces of personal property which I understand belong to you. I wish to inform you at this time that you may have possession of this property by applying to me at this office.

"If you do not call for these goods within ten days, my client will have them put in storage to be held for you at your expense."

The personal property was then placed in Chapman's basement, where it still remained at the time of trial.

The record indicates that plaintiff had paid no rental upon the premises to the State or to any individual after receiving notice from the State of the termination of his lease.

On June 8, 1944, plaintiff filed a complaint in four counts, entitled "Complaint (Trespass, Ejectment, Forcible Entry and Conversion)." At the commencement of the trial, the court, upon motion of plaintiff's counsel, dismissed the first and third causes of action, leaving the second and fourth causes for trial, plaintiff's counsel stating that "the dismissal is as to the causes of action for ejectment and forcible entry, leaving the causes of action for trespass and conversion." The second cause of action incorporated the charging allegations of the first cause of action, which were substantially as follows: That plaintiff had enjoyed the quiet and peaceable possession of the premises "from sometime in the year 1935 to and including May 15, 1944"; that on the date mentioned the defendants forcibly broke into and entered the premises and posted a "No Trespassing" sign thereon, removed the locks and replaced them with others "to the end that plaintiff was unable to enter therein or to keep and maintain his quiet and peaceable possession thereof"; that the county of Los Angeles since July 1, 1943, was and is an "acute housing area" and he had been unable to obtain adequate housing facilities for himself and family and was compelled to impose upon friends and relatives for the same; that the condition named is likely to endure for a considerable time, all to his great and irreparable damage. This cause then mentions the filing and hearing of Mrs. Kroenert's quiet title action and alleges that the acts complained of took place while that action was under submission and before judgment. The second cause further alleged that on or about May 15, 1944, "the defendants, and each of them forcibly broke and entered the premises * * * without the consent, express or implied, of the plaintiff and have continued to use and occupy the same continually thereafter to the damage of the plaintiff in the sum of Nine Thousand Dollars ($9,000.00)." The fourth cause of action charged that the defendants "unlawfully and without right or color of right took and carried away said property [personal property and effects of plaintiff] from said premises and converted and disposed of the same to their own use to the damage

of the plaintiff in the sum of Three Thousand Five Hundred Dollars ($3,500.00)." Plaintiff prayed that he might be restored to possession of the premises and for judgment in the amount of $100 per month from May 15, 1944, to date of entry of the judgment; also, for judgment in the amount of $14,500, as well as punitive damages in the sum of $5,000.

The court made no order that plaintiff be restored to possession of the realty or furniture but found that substantially all of plaintiff's allegations which were incorporated in the second cause of action were true, including the allegation that the plaintiff had enjoyed the quiet and peaceable possession of the premises from "sometime in the year 1935 to and including May 15, 1944." Also, "That on or about May 15, 1944, defendants Helene Kroenert and Claude Chapman forcibly broke and entered the premises in the Complaint described without the consent, express or implied, of the plaintiff and have since that date continued to use and occupy the same to the damage of the plaintiff in the amount of One Thousand Four Hundred Dollars ($1,400.00)." Another finding was that the defendants without consent of plaintiff took and carried away all his personal property and effects, which were located on the premises, to his damage in the sum of $1,200. The court also found "That the breaking and entering of the premises in the Complaint described by the defendants, Helene Kroenert and Claude Chapman, and the taking and carrying away of the personal property and effects of the plaintiff was done wantonly and maliciously and with a reckless disregard of the rights and privileges of the plaintiff and by reason thereof, plaintiff is entitled to punitive damages in the amount of Three Hundred Dollars ($300.00)."

[1-8] This last finding causes us to consider what, if any, were "the rights and privileges" of this plaintiff. We have concluded that he had no rights or privileges whatever that could be invoked successfully against the appellants since he was not the party in actual possession. "It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession." Lightner Mining Co. v. Lane, 1911, 161 Cal. 689, 694, 120 P. 771, 773, Ann.Cas.1913C, 1093. In holding over after the notice of termination of the lease by the State he was wrongfully doing so. At common law a person in the actual possession of real estate, whether rightfully or wrongfully, could maintain trespass for a forcible entry upon it against any one not having a right to enter, but no action could be maintained by one wrongfully in possession as against an owner having a right to enter except where excessive force was used to dispossess him. In Walker v. Chanslor, 1908, 153 Cal. 118, at page 127, 94 P. 606, at page 609, 17 L.R.A.,N.S. 455, 126 Am.St. Rep. 61, the court said: "The rule of the common law is the rule which obtains in this state, except in so far as it has been changed by the provisions of the Code relative to the summary remedy provided therein for a forcible entry made upon real property. Under these provisions a right of action is given to one wrongfully in actual possession of property where a forcible entry is made, even by the owner, in which action damages occasioned through the forcible entry may be recovered, and judgment for the restitution of the property had. But the Code prescribes a method of procedure and the extent of the remedy for such forcible entry, and that remedy is exclusive. A person wrongfully in possession, dispossessed by the owner of the property having a right of entry, and no excessive force being used in asserting it, is not entitled to maintain any other action than is afforded for a forcible entry under the Code. He was not entitled to maintain, under such circumstances, any action whatever under the common law, and the common-law rule has only been changed in this state to the extent, and no further, that the Code affords him a remedy under its provisions referred to which he otherwise would not have." See, also, Canavan v. Gray, 1883, 64 Cal. 5, 7, 27 P. 788. Plaintiff, therefore, could not maintain an action for trespass against Mrs. Kroenert, the owner having a right of entry, since he was not only wrongfully holding over but not in actual possession as hereinafter shown; nor could he pre-

vail on the theory that this action conformed to the code requirements for suits under summary proceedings, Code Civ.Proc. secs. 1159–1179a, for in such actions a plaintiff is required to show, in addition to the forcible entry or forcible detainer complained of, that "he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer." Code Civ.Proc. sec. 1172. Neither questions of title nor of right to possession arise in actions for forcible entry. California Products, Inc., v. Mitchell, 1921, 52 Cal.App. 312, 198 P. 646. By the act of subletting the premises, plaintiff placed in actual possession his subtenants, whose term, as heretofore shown, did not expire until May 21st. It has been held that where a tenant is in the actual possession of the premises any entry made by a third party during the existence of his term is an unlawful entry upon him alone and only he, the tenant, and not his landlord, may maintain an action for forcible entry and detainer. Treat v. Stuart, 1855, 5 Cal. 113; 12 Cal.Jur. 604; see, also, Chezum v. Campbell, 42 Wash. 560, 85 P. 48, 7 Ann.Cas. 921; 22 Am.Jur. 922. The rights, duties and liabilities between a sublessor and a sublessee are determined by the general rules governing the rights, duties and liabilities as between landlord and tenant (32 Am.Jur. 339), and since the entry was made during the existence of the term under which the Bronsons had been placed in possession, it follows that plaintiff could not maintain an action for forcible entry and detainer. The fact that plaintiff was for several days a lodger on the premises during his subtenants' term is not to be deemed such possession as would entitle him to maintain the proceedings. 22 Am.Jur. 922. It was immaterial so far as he was concerned whether defendants' entry was made without his consent, express or implied, or whether or not it was forcibly made. Therefore, there was no proper basis for the finding that the entry, use and occupation by the defendants occurred "to the damage of the plaintiff in the amount of One Thousand Four Hundred Dollars ($1,400.00)." Nor do we find any basis for the finding that the defendants without the consent of the plaintiff took and carried away all his personal property and effects to his damage in the sum of $1,200. It has been held that "In order to charge the defendant with the conversion of the plaintiffs' goods he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiffs' right of ownership, or in repudiation of such right." Steele v. Marsicano, 1894, 102 Cal. 666, 669, 36 P. 920, 921; see, also, 23 Mck.Dig. 642. We have quoted the letter of Mrs. Kroenert's attorney by which the plaintiff was notified that he might have possession of his personal property by applying at the attorney's office. Furthermore, he was given ten days within which to call for his furniture and we do not feel that when he failed within that reasonable time to take possession of the property that it could be fairly said that placing the goods in storage to be held for him at his expense was in defiance of his rights. On the contrary, it was an express recognition of his complete title to the goods and dominion over them.

Our views heretofore stated compel us to the conclusion that the acts of the defendants were not done, under the circumstances of this case, "wantonly and maliciously and with a reckless disregard of the rights and privileges of the plaintiff." Therefore, the finding by which he was held to be entitled to punitive damages in the sum of $300 finds no support in the evidence.

The judgment is reversed.

SHINN and WOOD, JJ., concur.

74 Cal.App.2d 424

DENIO et al. v. CITY OF HUNTINGTON BEACH.

Civ. 3408.

District Court of Appeal, Fourth District, California.

May 9, 1946.

Rehearing Denied May 27, 1946.

Hearing Denied July 2, 1946.

1. Judgment ⇐744

Judgment that attorneys were entitled to recover on issues as to validity of contract of employment calling for payment by city of percentages of royalties received by city did not estop attorneys from recovering percentages of royalty payments subsequently received by the city.

2. Judgment ⇐720

A matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, when either party, or the privies of either party, allege anything inconsistent with it, whether the subsequent suit is upon the same or a different cause of action.

3. Judgment ⇐744

A judgment upholding the validity and binding effect of a contract of employment calling for payment as attorney fees of percentages of certain royalties received by city was res judicata of the issues of frustration, ultra vires, failure of consideration, fraud, gift, and exemplary damages raised by city in action against it to recover percentages of royalty payments subsequently received by the city.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by E. C. Denio and others, partners, under the firm name and style of Denio, Hart, Taubman & Simpson, against the City of Huntington Beach, to recover attorney fees under a contract of employment. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Drumm & Drumm, of Santa Ana, Ray H. Overacker, of Huntington Beach, and Schell & Delamer, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

The defendant appeals from a judgment awarding the plaintiffs $19,718.83 as attorney fees under a contract of employment calling for the payment of percentages of certain royalties received by the defendant.

This action involves the same contract and the same general facts as those in Denio v. City of Huntington Beach, 22 Cal. 2d 580, 140 P.2d 392, 149 A.L.R. 320. The facts are rather fully stated in the opinion in that case and need not be repeated here. It was there held that the contract of employment was valid and binding upon the defendant city, that the plaintiffs were wrongfully discharged by the defendant, that payments made to the city under a certain other contract are royalty payments within the meaning of the contract of employment, and that the plaintiffs are entitled to recover the compensation specified in the contract of employment.

This second action covers the plaintiffs' claim, under the same contract of employment, to percentages of such royalty payments subsequently received by the city. The complaint alleged the facts upon which the first action was based; alleged the receipt by the defendant of certain sums as royalties from the Southwest Exploration Company since June, 1939, the date the former action was filed; alleged the facts in connection with the former action leading to a final judgment therein; and alleged that the judgment in the former action was final and conclusive of the rights of the parties to this action. There was a second count for money had and received in the same sum as that set forth in the first cause of action. The answer of the defendant set up the same defenses as those pleaded in the first cause of action and, in addition, set up a number of new defenses.

At the trial, by stipulation of the parties, the court first considered the issues with regard to res judicata and estoppel by judg-

ment. Pursuant to its findings on these issues the court declined to receive further evidence except with respect to the plaintiffs' readiness, willingness and ability to perform and the amounts received by the defendant from the Southwest Exploration Company subsequent to the institution of the former action. Briefly stated, the court found that the judgment in the preceding action is an existing final judgment rendered on the merits without fraud or collusion and is conclusive of the rights, facts and issues involved in this action; that in the former action between the same parties the question of the validity of this employment contract, its enforcibility against the defendant and the right of the plaintiffs to recover under said contract a percentage of the payments received by the defendant from the Southwest Exploration Company were all directly at issue and were actually raised and determined in favor of the plaintiffs; that a number of other matters, which need not be here set forth, were actually raised and determined in the former action; that all other issues raised by the answer in this action were within the scope of the former action, were relative to the subject thereof and relevant to the issues therein, were available and could have been raised and determined in the former action; and that the judgment in the former action is res judicata and conclusive of the defendant in this action and the defendant is estopped from raising the matters of defense alleged in its answer.

The new issues sought to be raised by the defendant in this action were that there was a frustration of the object of the contract of employment; that the contract of employment was ultra vires in certain respects; that there was a failure of consideration; that the contract was induced by fraud in that it was represented that extensive litigation would be necessary; that compensation for services performed is tantamount to a gift; and that exemplary damages may not be awarded against a municipality.

The question here presented is as to the effect of the judgment in the former action. While the respondents contend that said judgment is conclusive as to their right to the full percentage of all moneys received by the appellant from the Southwest Exploration Company in accordance with the terms of the contract of employment, the appellant contends that said judgment constitutes an estoppel against any further claim on the part of the respondents; that if said judgment does not constitute an estoppel in favor of the appellant it does not constitute res judicata at all, either by way of bar or estoppel; that if said judgment does constitute res judicata by way of an estoppel in favor of the respondents this estoppel extends only to those matters which were necessarily in issue and litigated in the former case; and that, in any event, a judgment cannot constitute res judicata where the giving of such an effect to it would be in violation of a constitutional provision.

[1] In support of its contention that the former judgment estops the respondents from claiming any further payments under the contract of employment, the appellant argues that it was thereby determined that the respondents were entitled to the reasonable value of their services and to nothing more. This is based on the fact that the percentage due to the plaintiffs in the former action, as provided in the contract of employment, would have amounted to $2794.09, whereas the amount awarded by the jury in that action was only $2000. It is argued that it follows that the contract of employment was not upheld in that action and that the judgment therein could have been sustained only on the theory that the $2000 awarded by the jury, together with the cash retainer previously received by the respondents, was fixed as the reasonable value of the services performed by the respondents up to the time they were discharged by the appellant. The pleadings, evidence and instructions in the former action, which are in evidence here, conclusively show that that action was not tried or decided on the issue of the reasonable value of the respondents' services. This is confirmed by the interpretation placed upon the entire matter by the Supreme Court in its decision on the former appeal. While the two dissenting opinions express the opinion that that action should

have been tried on the issue of the reasonable value of the respondents' services the main opinion is to the contrary, and is to the effect that the respondents are entitled to recover on the issues as to the validity and binding effect of the contract of employment, even though the jury awarded a sum which was less than that which might have been awarded, and that the verdict was sustained by the implied finding that the money in question was received by way of compromise of the city's claim for royalties. We must hold, therefore, that no estoppel appears in this connection in favor of the appellant.

This disposes of the appellant's contentions to the effect that there was nothing in the former judgment, or in the opinion of the Supreme Court on the appeal therefrom, which discloses or determines that the question of the validity and the binding effect of this contract of employment was litigated in the former action, or that the judgment in the former action could be res judicata in any manner, either by way of bar or estoppel. This brings us to the appellant's further contention that, in any event, any estoppel in favor of these respondents arising from the former judgment extends only to such matters as were necessarily in issue and actually litigated in the former action and cannot apply to the new issues, notably frustration and fraud, which the appellant here sought to raise.

Both parties rely largely upon the same authorities on the general question as to the effect of a prior judgment upon a subsequent action between the same parties and to a large extent involving the same facts. Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916; English v. English, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467; Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025; Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390; Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242; DeHart v. Allen, 26 Cal.2d 829, 161 P.2d 453; Ball v. Stephens, 68 Cal.App.2d 843, 158 P.2d 207. The appellant summarizes the general rules laid down by these cases as follows:

"1. In so far as the latter suit involves the same cause of action as the former, the judgment in that former constitutes a bar and is decisive in the second suit as to all matters which either were or might have been placed in issue in the former action.

"2. In so far as the latter suit involves a different cause of action from the former, the judgment thereon does not constitute a bar but does operate as an estoppel. This estoppel is, however, limited to such matters as were in issue and actually or necessarily determined in the former action."

The appellant also says:

"The true test is not whether the two suits are on the same cause of action, but whether they involve the same cause of action, that is, the same obligation already judicially determined, Horton v. Goodenough, 184 Cal. 451, 460 [194 P. 34].

"In so far as they do so, that judgment is a complete bar to further litigation. In so far as they do not, that judgment is a mere estoppel as to matters actually or necessarily determined in rendering that judgment."

The appellant's main argument is based upon the contention that the instant action is one upon an entirely different cause of action than that involved in the prior action. It is further argued, however, that a careful study of the cases which have passed upon the effect of a judgment in a prior action, those above cited and others, will disclose that a distinction is made between cases which are quasi in rem, and which involve some right or interest in particular property, and actions in personam, in which only a money judgment is sought. It is argued that two simple and practical rules thus appear: first, that where the former action was in rem or quasi in rem, where it sought to establish a status, title or property right, it constitutes a complete bar to the relitigation of that status, title or property right; and second, that where the former action was in personam it merely constitutes an estoppel as to matters which were actually or necessarily in issue and determined in the former action. The distinction thus attempted to be read into the cases is more

ingenious than convincing. Not only do some of the decided cases fail to fit into this pattern, but no sound reason appears for measuring the effect of a judgment by whether the form of the particular action happens to be in rem or in personam. These questions of status, title or property rights may frequently be involved in actions in which only a money judgment is sought. As an illustration in this connection the appellant argues that the decision in Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387, was correct because the first action there involved was one quasi in rem and that a different judgment in the second action would have destroyed the right of the county and city to enter into a contract when the judgment in the first case specifically declared that they had such right. It may be observed that a similar situation appears in the case now before us. It would be inconsistent in this case to admit evidence and to permit a decision which would have the effect of destroying a contract for compensation, the validity and binding effect of which, and the right to recover compensation under which, was specifically upheld in the former action. Incidentally, the appellant's answer in this case alleges that the compensation contract in question "purports to grant and convey to plaintiffs an interest in, or a portion of, beach frontage within the city."

[2, 3] Nor do we think the cause of action herein is so essentially different, in a sense material here, from that set forth in the former action as to avoid the effect of the usual rule against the splitting of defenses. As was said in Panos v. Great Western Packing Company, 21 Cal.2d 636, 134 P.2d 242, 244: "The cause of action is simply the obligation sought to be enforced." In a very real sense this action involves the same obligation which was litigated in the former action. The obligation sought to be enforced in this action, as well as in the former action, is that of the contract for compensation for legal services. If that contract is valid and enforceable to the extent of requiring the payment of a percentage of moneys received from a certain source for a certain period, it would be entirely inconsistent to hold that a judgment upholding that contract for a part of the period provided for had no binding effect on the claim for compensation for the remainder of the period covered by the contract. The validity and binding effect of the contract for services was the basic issue in the former action and is the basic issue in the present issue. In Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497, the validity of an assignment was the basic issue in a former action. It was also the basic issue in the case cited although somewhat different facts were involved. In holding that the judgment in the first action was res judicata the court said: "After that judgment became final, plaintiff's right to a portion of the production from those wells was conclusive as between the parties, even in the present suit on a different cause of action, because the basic issue thus decided in the first case is identical with that in the present case." In DeHart v. Allen, 26 Cal. 2d 829, 161 P.2d 453, a judgment in a former action was held res judicata since issues as to the validity and binding effect of a certain lease either were raised or could have been raised in the prior action.

Moreover, facts were settled in the former action, which was between the same parties, which are controlling here, namely, the execution, validity and binding effect of the contract for services between these parties. The validity and binding effect of that contract was actually litigated and determined in the former action. As was said in Re Estate of Clark, 190 Cal. 354, 212 P. 622, 625, a "judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far, as it settles and determines questions of fact. 23 Cyc. 1288–1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; Lamb v. Wahlenmaier,

144 Cal. 91, 77 P. 765, 103 Am.St.Rep. 66; Reed v. Cross, 116 Cal. 473, 484, 48 P. 491; Atchison T. & S. F. R. Co. v. Nelson, 9 Cir., 220 F. 53, 135 C.C.A. 621. That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; Rauer v. Rynd, 27 Cal.App. 556, 150 P. 780." And in Olney v. Cavell, 138 Cal.App. 233, 32 P.2d 181, 182, the court said:

"This case seems to come squarely within the meaning of section 1911 of the Code of Civil Procedure. The same question between the same parties being necessarily involved in the present case, the former adjudication was conclusive 'not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy * * * which also might have been raised and decided.' Minnis v. Equitable Life Assur. Soc., 204 Cal. 180, 183, 267 P. 538, 539; In re Estate of Bell, 153 Cal. 331, 95 P. 372; Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.2d 1003. 'It is not what was actually done, but what might have been done, that is concluded by a former judgment.' Henderson v. Miglietta, 206 Cal. 125, 127, 273 P. 581, 582."

The basic facts and the existence of the obligation here sued upon have been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action.

Some contention is made that constitutional questions were raised in this action which were not raised or considered in the former action, in that it was here attempted to raise the issue that compensation for services not actually performed is tantamount to a gift and that exemplary damages may not be awarded against a municipality. Not only could these questions have been raised in the former action (Andrews v. Reidy, 7 Cal.2d 366, 60 P.2d 832), but in view of the judicial determination that this was an enforceable contract for compensation for services no question of gift or exemplary damages is here involved.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



74 Cal.App.2d 357

In re DAVIS' ESTATE.

BOYLE v. PASADENA COLLEGE et al.

Civ. 15240.

District Court of Appeal, Second District, Division 2, California.

May 2, 1946.

Hearing Denied June 27, 1946.

1. Wills ⇨14

Educational institutions exempt from taxation under Constitution, were not subject to statutory limitations on bequests to charitable and benevolent organizations. Probate Code, § 41; Const. art. 13, § 1a.

2. Wills ⇨15

Where total value of residuary bequests to charitable institutions together with specific bequests to charitable institutions, exceeded one-third of net distributable estate of testator whose will bequeathed portion of residuary estate, bequeathed to charitable corporation which could not take, to other charitable corporations which could take, legatees, which were educational institutions exempt from statutory limitations on testamentary gifts to charity, were not entitled to have distributed to them portion of estate which but for restrictions on testamentary gifts to

charity would have passed to other charitable legatees, in view of substitutional noncharitable gifts to individuals. Probate Code, § 41; Const. art. 13, § 1a.

3. Wills ⇐849, 856, 858(1)

Where charitable gifts in will are voidable under statute imposing a limitation on gifts to charity by will, portion of estate represented thereby passes to surviving relative only to extent that such relative takes same under a substitutional or residuary bequest or devise, or, if there be no such substitutional or residuary bequest or devise, under laws of succession if there be no other effective disposition thereof in will. Probate Code, § 41.

4. Wills ⇐856

Where total value of residuary bequests to charitable institutions, together with specific bequests to charitable institutions exceeded one-third of net distributable estate of testator but will provided that if executors were unable to distribute any portion of estate as provided in residuary clause, such portion was to be distributed to two named individuals and that without intending to create any trust or other charge testator requested such individuals to dispose of property so as to carry out testator's wishes, substitutional gift to individuals was unobjectionable under statutory restrictions on gifts to charity and sister, nieces and nephews of testator were excluded from participation either as legatees, devisees or heirs. Probate Code, § 41.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceedings in the matter of the estate of Walter Davis, deceased, wherein James B. Boyle, executor, filed a petition for construction of the will and for instructions, contested by Pasadena College and others. From the order, Pasadena College appeals.

Affirmed.

Roland Maxwell, of Pasadena, and Paul H. Marston, of Los Angeles, for contestant and appellant.

Boyle, Holmes, Fry & Garrett, of Los Angeles, for petitioner and respondent.

Hahn & Hahn, of Pasadena, and Irving M. Walker and D. S. Hammack, both of Los Angeles, for legatees and respondents.

Meserve, Mumper & Hughes and Walter H. Odemar, all of Los Angeles, for contestants and respondents.

McCOMB, Justice.

Mr. Walter Davis died October 17, 1943, leaving surviving him a sister, nephews and nieces. On July 10, 1943, he had executed a will which contained, among others, these two provisions:

"Tenth: After carrying out all the foregoing provisions of this my will, I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed and wherever situated, in equal shares to the following named beneficiaries, to wit:

Pasadena Home for the Aged, of Altadena, California;

Boys' and Girls' Aid Society, of Altadena, California;

Pasadena Preventorium, of Altadena, California;

Salvation Army, Inc., Pasadena Branch, Pasadena, California;

Los Angeles Orthopaedic Foundation, Los Angeles, California;

San Francisco Theological Seminary, San Anselma, California;

Trustees of Pasadena College (Nazarene), Pasadena, California;

Travelers Aid Society, Los Angeles, California; and

Community Chest of Pasadena, Pasadena, California.

"In the event any of the charitable corporations or institutions hereinabove named in this Paragraph *Tenth* shall not be in existence at the date of my death, or for any reason under the laws of the State of California cannot take and receive the devise and bequest hereinabove made to such charitable corporation or institution, then in such event I give, devise and bequeath the portion of said residuary estate devised and bequeathed to such

charitable corporation, in equal shares, to the other charitable corporations or institutions hereinabove named which are then in existence and can take and receive the property herein devised and bequeathed to them.

"Eleventh: In the event that for any of the reasons set forth in Sections 41, 42 or 43 of the Probate Code of the State of California my executors or executor are unable to distribute any portion of my estate upon my death as hereinabove provided in Paragraphs *Eighth* and *Tenth* of this my will, I direct that in such event said portion of my estate shall be distributed, and I give, devise and bequeath the same, to James B. Boyle of San Marino, California, and to Clarence A. Matthews, of Pasadena, California, or to the survivor of them. Without intending to create any trust or other charge, condition or limitation enforceable in either law or equity, I request the persons or person receiving said property to use and dispose of the same so as to carry out my wishes."

The total value of the residuary devises and bequests, together with the specific bequests to charitable institutions, exceeds one third of the net distributable estate of the testator.

[1] Appellant Pasadena College and the San Francisco Theological Seminary, two of the nine legatees named in paragraph Tenth of the will, are exempt from taxation under Section 1a of Article XIII of the Constitution of the State of California and, therefore, are not subject to the limitations on bequests to charitable and benevolent organizations set forth in Section 41 of the Probate Code. The other seven legatees mentioned in said paragraph are not so exempt.[1]

An executor filed a petition for the construction of the will and for instructions to determine who was entitled to the distribution of the residuary estate. The probate judge held that the bequests of the residuary estate to the nine institutions named in paragraph Tenth of the will were valid and that upon distribution, the residuary estate should be distributed to such nine institutions. From this order the present appeal is taken.

[2] Appellant urges *that because the period of six months did not elapse between the making of the will and the death of the testator those provisions of the will giving to charity more than one third in value of the distributable estate are invalid and, therefore, under the provisions of paragraph Tenth of the will, the portion of said residuary estate devised and bequeathed to such charities which exceeds one third in value of the distributable es-*

1 Section 41 of the Probate Code as variously amended including the amendment of 1943 (Statute 1943, chapter 305, page 1296), now reads:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"[Takers of property: Persons not relatives: Amount taken.] Nothng herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

tate is devised and bequeathed to the other charitable corporations or institutions named in said paragraph Tenth which can take and receive the property, to wit: Pasadena College and the San Francisco Theological Seminary, which are exempt from limitations upon gifts to charity by will and are entitled to have distributed to them an appropriate portion of the estate which, but for the restrictions of law upon testamentary gifts to charity, would pass to the named charities.

This proposition is untenable. The legislature in 1943 added to section 41 of the Probate Code this provision: "Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, *unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will.*" (Italics added.)

[3] It is the italicized language of the amendment that is particularly pertinent to the case at bar. By said language the legislature has declared that where, as in this case, charitable gifts in a will are voidable, the portion of the estate represented thereby shall pass to a surviving relative only to the extent that such relative takes the same under a substitutional or residuary bequest or devise or, if there be no such substitutional or residuary bequest or devise, under the laws of succession if there be no other effective disposition thereof in the will.

Under the will of Walter Davis, his sister, nieces and nephews are not made beneficiaries under any substitutional or residuary bequest or devise and they cannot inherit under the laws of succession because there is no lack of effective disposition in the will of the portion of the estate represented by the charitable gifts in excess of one third of the estate.

[4] In the case at bar, if the gifts to charity in excess of one third of the estate were voidable under section 41 of the Probate Code, the portion of the estate represented thereby would go to Messrs. Boyle and Matthews under the substitutional clause of paragraph Eleventh or pass under paragraph Tenth. There is thus no intestacy as to said portion of the estate. The substitutional gift to Messrs. Boyle and Matthews is clearly noncharitable, creates no trust and, as shown by In re Estate of Purcell (1914), 167 Cal. 176, 138 P. 704,[2] is unobjectionable under statutory restrictions upon gifts to charity.

[2] In Estate of Purcell, supra, the testatrix left the residue of her estate to Charles A. Purcell, a brother-in-law, declaring: "* * * It has always been my desire and purpose to devote a large part of my property and estate to charitable purposes and uses, and to make such provisions therefor in my will. But under the exigencies of this will I am not now able to designate the particular charities and benevolences to which I Mary B. Purcell desire to extend my bounty. The said Charles A. Purcell, however, is fully aware of and understands my desires in this regard, and I have full confidence in him that he will, in his judgment, respect and endeavor to carry out my said wishes and desires. I therefore request of him to do so, so far as he may think proper, without, however, intending by this clause or anything that may be herein stated, to create any trust or to place any limitations upon the said Charles A. Purcell, residuary legatee, in respect to the said legacy."

The heirs attacked the residuary gift as violative of the statutory restrictions upon charitable gifts. The court said, on page 178 of 167 Cal., on page 704 of 138 P.: "* * * the part of the will quoted above was properly declared valid. It does not create a precatory trust. But, even if it did, the proportion of the estate not permitted by law to be so bequeathed and devised would, under the provisions of section 1313 of the Civil Code, [now substantially section 41 of the Probate Code] go to the residuary legatee if one were named in the will, and one is so designated. * * *"

This is a clear indication that under the law antedating the 1937 amendment of Section 41 of the Probate Code, heirs might not inherit the portion of an estate represented by an excessive gift to charity if a residuary beneficiary were named, In re Estate of Broad, (1942), 20 Cal.2d 612, 128 P.2d 1, holding otherwise, was based upon Section 41 as altered in 1937. The 1943 amendment restores the statute, in this respect, to its status precedent to the 1937 amendment.

Thus, the sister, nieces and nephews are excluded from participation either as legatees, devisees or heirs.

The conclusion must be that the only relatives of the prescribed classes surviving Walter Davis are precluded by law and by the terms of the will from participating in any distribution of that portion of the estate bequeathed or devised to charity. Therefore, the testamentary dispositions are valid and enforceable and the order of the probate court so construing the will is proper.

For the foregoing reasons, the order is affirmed.

MOORE, P. J., and WILSON, J., concur.



74 Cal.App.2d 384

OGG v. GUNDERSON et al.

Civ. 15167.

District Court of Appeal, Second District, Division 2, California.

May 3, 1946.

Rehearing Denied May 16, 1946.

Hearing Denied July 2, 1946.

1. Deeds ⇐54

The validity of a properly executed deed is determined by its delivery with the concomitant intention of the grantor to transfer the property described therein to the grantee.

2. Deeds ⇐56(1)

The validity of a deed is not necessarily impaired by the fact that the grantor after delivery of the deed continued to exercise control over the realty and to collect the rentals earned thereby.

3. Deeds ⇐56(2), 67

The primary test of the validity of a deed was whether grantor intended to make a present transfer, and if such was his intention, the title of the property thereby passed irrevocably to the grantee.

4. Evidence ⇐230(3)

A gift by deed is not necessarily defeasible by subsequent acts or declarations of the grantor outside of the presence of grantee inconsistent with the prior gift.

5. Appeal and error ⇐1008(1)
Evidence ⇐230(3)

Declarations subsequent to gift by deed are admissible as bearing upon the question of delivery but that issue is to be determined by the trier of fact from all of the evidence submitted.

6. Deeds ⇐194(2), 208(3)

A presumption of delivery arises from production by grantee of the deed of gift and in itself is sufficient evidence to warrant a finding of the delivery and acceptance of the instrument.

7. Deeds ⇐208(1)

Testimony of reliable witnesses attesting the actual delivery of deed with intent to make a gift sustained finding that conveyance was valid, notwithstanding subsequent acts of grantor claiming ownership of the property.

8. Deeds ⇐208(1)

Evidence of grantor's continued occupation of her home after date of alleged delivery of deed thereon with intent to make a gift was not conclusive proof that grantor did not deliver the deed or did not intend to part with her title.

9. Appeal and error ⇐1072

Denial of motion for new trial based upon newly discovered evidence consisting of a letter the existence of which and of its contents the movant knew at time of trial, was not prejudicial error.

10. New trial ⇐99

Trial court which considered affidavits of both parties on hearing of motion for new trial on ground of newly discovered evidence, and which was fortified by proof which it had already deemed satisfactory regarding validity of conveyance, was vested with a large discretion in deriving its decision to deny the motion.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by James B. Ogg as executor of the estate of Katerina Czech, also known as Katherina Czech, Katherine Czech and Kati Czech deceased, against Erma E. Gunderson and another, involving delivery of a deed. Judgment for defendants, and plaintiff appeals.

Affirmed.

James B. Ogg, of Alhambra, for appellant.

Keller & Smith and Richard J. Keller, all of Alhambra, for respondents.

MOORE, Presiding Justice.

The primary contention presented by appellant is that the evidence does not support the finding that the grantor executed and delivered to the grantee the deed whereby the latter became vested with title to the property described in the conveyance.

The testimony of attorney Richard J. Keller and of defendant Nehls establishes that for some years prior to July, 1943, Attorney Ogg acted as counsellor for decedent Katerina Czech. In that month she moved into the orbit of the influence of Nehls, her business agent, and for a time thereafter relied upon him for guidance. On July 24 she requested him to prepare a deed conveying her home on Palm Avenue in Alhambra to defendant Erma E. Gunderson, hereinafter referred to as respondent. After conversing with both women at Mrs. Czech's home and after being told by that lady of her preference not to call upon attorney Ogg concerning her gift to respondent, Nehls repaired to his office, prepared the deed, returned for the signature, explained the purport of the conveyance and after its execution affixed thereto his notarial certificate of the grantor's acknowledgment. At the same meeting Mrs. Czech stated that she wished to make a new will. Four days later, pursuant to arrangement, the ladies accompanied Nehls to the office of attorney Keller, a stranger to Mrs. Czech, for the purpose of having him prepare for her a new will. After he had read the deed which was exhibited to him by Nehls, Mr. Keller explained in simple and intelligible words that the effect of the deed she had executed was to make a gift entitling the grantee to immediate possession and that by virtue of its delivery she could be dispossessed by the grantee. Thereupon decedent stated that she was making the conveyance cheerfully in compensation for services of a faithful friend; wanted respondent to have the home, and took the deed from the lawyer and placed it in the hand of respondent who said "Mrs. Czech, you can live in that house just as long as you want to. I will never put you out." Respondent in turn requested Nehls to hold the deed and not to record it until after the decease of her benefactor.

After Mr. Keller had discussed the grant deed with the parties Mrs. Czech requested him to draw her a will and gave the attorney the names of the beneficiaries, but stated that she wished respondent to have the home place "right now" and not after her demise. The will was then drawn, bequeathing other property to relatives but with contingent remainder to respondent.

The next episode in the affairs of decedent was her request through Mrs. O'Dell, June 13, 1944, for Mr. Ogg to visit her in the South Pasadena Sanitarium. Following such meeting the attorney at Mrs. Czech's request applied to be appointed guardian of her person and estate. His petition for appointment listed her properties, including the home on Palm Avenue. Defendant Nehls called and conferred with Mr. Ogg concerning the guardianship of decedent. After reading the petition he made no comment upon the fact that the home place was listed among her assets. They discussed the matter of asking respondent to return from Idaho to care for decedent. Ogg then prepared a petition for authority to expend $100 a month for decedent's care and maintenance. Although both Nehls and respondent saw that such petition included the Palm Avenue property as a possession of Mrs. Czech, neither of them suggested that decedent had already executed a conveyance of the home place.

Subsequent to the last mentioned events Mrs. Czech accompanied by Mesdames Turner and O'Dell called on Mr. Ogg on September 14, 1944, and requested him to write her a new will. She described her properties and named her husband's four grand-

sons of Milwaukee as her devisees. At all times prior and subsequent to the publication of her will she occupied her home, collected rentals from the rear house and paid all taxes levied thereon until her decease on September 26, 1944. Thereupon Nehls filed for recordation the deed from decedent to Mrs. Gunderson.

[1-6] The validity of a properly executed deed of conveyance is determined by its delivery with the concomitant intention of the grantor to transfer the property described therein to the grantee. Severn v. Ruhde, 58 Cal.App.2d 704, 137 P.2d 466; Hansen v. Hansen, 82 Cal.App. 786, 256 P. 290; Marlenee v. Brown, 21 Cal.2d 668, 134 P.2d 770. The validity of a deed is not necessarily impaired by the fact that the grantor after delivery of the deed continued to exercise control over the realty and to collect the rentals earned thereby. The primary test is whether the grantor intended to make a present transfer, and if such was his intention the title of the property thereby passed irrevocably to the grantee. Severn v. Ruhde, supra; Stewart v. Silva, 192 Cal. 405, 221 P. 191. A gift by deed is not necessarily defeasible by subsequent acts or declarations of the grantor outside of the presence of the grantee inconsistent with the prior gift. Barcroft v. Livacich, 35 Cal.App.2d 710, 96 P.2d 951. While such subsequent declarations are admissible as bearing upon the question of delivery (Belser v. American Trust Company, 125 Cal. App. 344, 352, 13 P.2d 951; Fisher v. Oliver, 174 Cal. 781, 164 P. 800) still that issue is to be determined by the trier of fact from all of the evidence submitted. Moreover, from the production by the grantee of the deed of gift a presumption of delivery arises and is in itself sufficient evidence to warrant a finding of the delivery and acceptance of the instrument. Barr v. Schroeder, 32 Cal. 609; Branson v. Caruthers, 49 Cal. 374; Tunison v. Chamblin, 88 Ill. 378, 379.

[7] It follows that despite the acts of decedent in claiming the ownership of her home after July, 1943, the court's finding that her conveyance to respondent was valid is conclusive in view of the testimony of reliable witnesses attesting the actual delivery of the deed with intent to make a gift. Hinshaw v. Hopkins, 37 Cal.App.2d 230, 99 P.2d 283.

[8] Neither is the evidence of decedent's continued occupancy of her home after July 24, 1943, conclusive proof that she did not deliver the deed or did not intend to part with her title. Stewart v. Silva, 192 Cal. 405, 410, 221 P. 191; Knudson v. Adams, 137 Cal.App. 261, 269, 30 P.2d 608; Merritt v. Rey, 104 Cal.App. 700, 286 P. 510; Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St.Rep. 186. In the Merritt case the grantor remained in possession for 17 years after his conveyance, collected rents, paid taxes, frequently mortgaged it and made improvements. In Stewart v. Silva the facts fairly parallel those in the instant case. The grantor at the time of delivery stated that he would do all of the things ordinarily done by a proprietor. His deed was not recorded until after his decease. He kept the house insured. Such evidence was unavailing as against the proof of delivery with the intent to pass title. The fact that the grantee was the grantor's goddaughter and kept house for him does not alter the principle involved. Those were facts that might have aided the trial court in finding the intent to convey at the time of delivery. The same observation may be made as to Severn v. Ruhde, 58 Cal.App.2d 704, 137 P.2d 466, which appellant attempts to distinguish by the fact that the grantee was the grantor's daughter.

In his effort to overcome the weight of the authorities that uphold the validity of the deed to respondent appellant cites Bank of America National Trust & Savings Association v. Crawford, 69 Cal.App.2d 697, 160 P.2d 169, and Osterberg v. Osterberg, 68 Cal.App.2d 254, 156 P.2d 46. These authorities do not in the slightest support appellant's contention. Both of them were affirmances of judgments in favor of the alleged grantor, each holding that there had been no valid delivery of the deeds.

[9, 10] Appellant has assigned as prejudicial error the order denying his motion for a new trial. Such motion was based upon "newly discovered evidence." His affidavit avers that while he was preparing the case for trial he searched his files for a letter written to him by respondent a few

days after decedent's death. In that letter, written from Idaho October 2, 1944, Mrs. Gunderson expressed disappointment at decedent's having written the later will of September 1944, urged that the testator must have been incompetent, and suggested "proving that she wasn't mentally right to make another will." The affidavit argues that such letter clearly indicates respondent considered that by the new will she had lost all rights to property in decedent's name. The letter was not newly discovered. Appellant knew of its existence and of its contents. If it had been misplaced he could have proved its substance by parol. Furthermore the trial court considered the affidavit of respondent as well as that of appellant on the hearing of the motion and was vested with a large discretion in deriving its decision to deny the motion. It was fortified by the proof, which it had already deemed satisfactory, that decedent a year prior to her demise had made a gift of her home to respondent by delivering to her a valid conveyance of such property.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

PEOPLE v. OWENS.

Cr. 4702.

Supreme Court of California, in Bank.

May 7, 1946.

Rehearing Denied June 3, 1946.

1. Criminal law ⇐507(8), 511(10)

In prosecution for receiving and holding money to be wagered upon the result of a horse race in which each of two counts charged a violation as to a single named person, each named person was an accomplice only as to the offense resulting from his wager with defendant, and the testimony of each corroborated that of the other with respect to the transaction in which the other engaged. Penal Code, § 337a, subd. 3; § 1111; Business and Professions Code, § 19400 et seq.

2. Criminal law ⇐511(1)

In prosecution for receiving and holding money to be wagered upon the result of a horse race, paper upon which defendant had written the name of the horse and his own name and which he had delivered to witnesses at time money was delivered to defendant, corroborated testimony of witnesses as alleged accomplices and sustained conviction. Penal Code, § 337a, subd. 3; § 1111; Business and Professions Code, § 19400 et seq.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

John W. Owens was convicted on each count of information in two counts of wilfully, unlawfully and feloniously receiving and holding certain moneys of F. M. Jordan, and of R. E. Kilkelly, to be wagered upon the result of a horse race, and he appeals.

Judgment affirmed.

Prior opinion, 164 P.2d 28.

Cantillon & Glover and Richard H. Cantillon, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen. and Frank Richards, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was accused by information in two counts of violating subdivision 3 of section 337a of the Penal Code in that he did "willfully, unlawfully and feloniously * * * receive and hold certain monies * * * of F. M. Jordan [Count 1; and of R. E. Kilkelly, Count 2] to be wagered upon the result of a * * * horse race." He pleaded not guilty to both counts and waived a jury. The only witnesses called upon the trial were Jordan and Kilkelly. No evidence was offered by the defense. The court sitting without a jury found defendant guilty as charged and sentenced him to the county jail for one year on each count, the sentences to run concurrently. He appeals from the judgments and order denying a new trial.

Section 337a, subdivision 3, of the Penal Code, under which defendant was convicted, provides that: "Every person * * * Who * * * receives, holds, or forwards * * * any money, * * * or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast * * *" is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

The section is expressly made applicable not only to persons who may commit any of the acts designated in its several subdivisions "as a business or occupation," but also "to every person * * * who may do in a single instance" any one of the prohibited acts. At the time of the transaction here involved (April 26, 1933), the Horse Racing Act, as amended in 1935, Deering's Gen. Laws, Act 3421, now div. 8, ch. 4, Bus. & Prof. Code, which created certain exceptions to the general prohibitions contained in section 337a, had not been enacted. See In re Walker, 11 Cal.2d 464, 80 P.2d 990, 117 A.L.R. 825; In re Goddard, 24 Cal.App.2d 132, 74 P.2d 818.

The prosecution witnesses, Jordan and Kilkelly, testified that defendant called on them at an advertising agency where they were employed, stating that some of their friends had sent him to see them. He told them that he was a jockey and that each year a race was held which gave jockeys a chance to make some money, and that he would share his winnings with them if they would advance some money for the purpose of making a bet on the race. Each of the prosecution witnesses gave defendant a check for $100 to wager on the race. Defendant wrote the name of a horse on a piece of paper and signed his name and delivered the paper to the witnesses. This paper was introduced in evidence upon the trial.

Defendant contends that Jordan and Kilkelly were accomplices and that their testimony was not corroborated as required by section 1111 of the Penal Code. It is unnecessary for us to determine the correctness of defendant's contention that the witnesses were accomplices, since, if we assume for the purposes of this decision that they were accomplices, it is clear that there is sufficient corroborative evidence tending to connect defendant with the commission of the offenses.

[1, 2] Obviously, each prosecution witness could only be an accomplice with respect to the particular offense arising out of the wager made by him with defendant. He would not be an accomplice in the offense based on the wager made by the other witness. In other words, the witness Jordan, if an accomplice, would be such only as to the offense resulting from his wager with defendant and clearly would not be chargeable with or answerable for the wholly independent wager made by the witness Kilkelly. The converse is equally true with respect to the other wager. This being so, the testimony of one corroborates the testimony of the other with respect to the transaction in which the other engaged. Moreover, the paper upon which defendant had written the name of the horse and his own name, and had delivered to the witnesses at the time the wagers were made, also corroborates the testimony of the assumed accomplices by tending to connect defendant with the offenses described by the witnesses. People v. Harper, 25 Cal.2d 862, 876, 156 P.2d 249.

The judgments and order denying a new trial are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



28 Cal.2d 154

HANSEN v. BEAR FILM CO., Inc., et al.

S. F. 16989.

Supreme Court of California, in Bank.

May 7, 1946.

Rehearing Denied June 3, 1946.

1. Trusts ⇐44(1)

Evidence was sufficient to sustain finding that owner of corporate stock intended to, and did, transfer legal title, and such title only, to his mother, retaining in himself full equitable ownership.

2. Appeal and error ⇐1010(1)

Trial court's findings on a particular subject, when supported by evidence, must be accepted as conclusive.

3. Trusts ⇐372(3)

In an action to declare a trust, evidence must show with reasonable certainty the terms and conditions of the trust.

4. Trusts ⇐44(1)

Evidence established with sufficient certainty that plaintiff's father under an express oral trust transferred corporate stock to plaintiff's grandmother to hold the bare legal title in trust for father to be delivered and transferred back to him at his request.

5. Trusts ⇐68

Where trustor under an express trust transferred bare legal title of corporate stock to his mother as trustee to be transferred back to trustor at his request, and trustor did not demand a retransfer during his lifetime, upon trustor's death it was

trustee's duty to immediately convey title to stock into trustor's name or that of the representative of his estate, since upon trustor's death express trust failed and trustee then held stock upon a resulting trust for trustor's estate.

6. Appeal and error ⇐1008(1)

Although it is necessary in order to establish a trust to offer clear and convincing proof, such proof may be indirect, consisting of acts, conduct, and circumstances, and question of whether showing is clear and convincing is primarily one for trial court.

7. Evidence ⇐269(2)

In action to establish a trust in corporate stock originally owned by plaintiff's deceased father and transferred by him to plaintiff's grandmother, oral and written declarations of ownership of stock and of company by father, not within presence or to the proved knowledge of grandmother, whether, before, at the time of, or subsequent to transfers to her and in derogation of them were properly admissible under exceptions to hearsay rule on issue of delivery to grandmother, on issue of a claimed gift and to show the intent or state of mind of father.

8. Evidence ⇐269(2)

Where intent is a material element of a disputed fact, declarations of a decedent, made after as well as before an alleged act, that indicate intent with which he performed act, are admissible as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving.

9. Trusts ⇐43(1)

Where written instrument purported only to divest transferor of title to corporate stock and vest it in transferee and contained no recital that transferee was to hold property for her own benefit and did not mention a trust or beneficial interest, parol evidence rule did not preclude oral proof to show that purportedly absolute transfer was in fact transfer of legal title only subject to an oral trust to reconvey upon demand.

10. Trusts ⇐89(1)

Evidence showing that consideration for common stock purchased was paid by plaintiff's father with conveyance made through him to plaintiff's grandmother sustained finding that in addition to an express oral trust under which grandmother held stock there was a purchase money resulting trust for benefit of father.

11. Fraudulent conveyances ⇐299(8)

Where evidence warranted finding that intent and purpose of owner of corporate stock in transferring stock was to transfer legal title and to retain equitable ownership, that motive which prompted action was obscure, and that, at time of transfer, transferor had no outstanding money obligations other than small current personal bills and an obligation to pay purchase price of certain stock, trust was not rendered unenforceable as an attempt by transferor to defraud his creditors.

12. Trusts ⇐55

The question of whether transfer of corporate stock to a third person in trust resulted in evasion under federal taxing statutes was an exclusive concern of federal authorities and did not void the trust.

13. Trusts ⇐372(3)

Findings, supported by evidence, that buyer of corporate stock from trustee who held naked legal title for plaintiff's father did not in good faith believe that stock belonged to trustee as her own property, that, as a corporate officer, buyer had access to and controlled corporate books and acquired knowledge to put him, as a prudent man, on inquiry as to true ownership of stock, authorized enforcement of trust against purchaser regardless of adequacy of consideration paid.

14. Limitation of actions ⇐104(1)

Where plaintiff's grandmother held corporate stock in trust for plaintiff's father and, after father's death, became administratrix of his estate and, notwithstanding confidential relationship as administratrix and confidence placed in her by plaintiff deliberately concealed facts from plaintiff and claimed ownership of stock as a gift from plaintiff's father, statute of limitations did not commence to run until plaintiff's discovery of the real situation.

15. Limitation of actions ⇐104(1)

Where defendant is guilty of fraudulent concealment of cause of action, statute of limitations is deemed not to become operative until aggrieved party discovers existence of cause of action.

16. Limitation of actions ⇐104(1)

The fact that coadministrator with plaintiff's grandmother of the estate of plaintiff's father could have brought an action on behalf of estate against grandmother to recover for estate corporate stock held by grandmother as trustee for father did not commence running of limitations against estate and against plaintiff, where coadministrator made no independent investigation to determine what property belonged to estate but received information entirely from grandmother and those in league with her who concealed the true facts from coadministrator.

17. Appeal and error ⇐1008(1)

The question of laches is one for trial court's determination.

18. Trusts ⇐365(2)

Where facts were concealed from plaintiff as to her right to corporate stock belonging to her deceased father and held in trust by grandmother during plaintiff's entire minority and plaintiff commenced action within three years of time she attained her majority and almost immediately after discovery of facts, action was not barred by laches.

19. Executors and administrators ⇐207

Corporation, which paid alleged debts of a deceased officer after his death as a volunteer, without request for or promise of reimbursement, was not entitled to take credit for those payments in accounting to officer's estate. Probate Code, §§ 703, 710, 711.

20. Executors and administrators ⇐224

Persons who claimed that deceased corporate officer was indebted to them, by proper procedure, should have presented a creditor's claim for requisite amount against decedent's estate. Probate Code, §§ 703, 710, 711.

21. Executors and administrators ⇐231

Where no demand was made against decedent's estate by creditors during course of probate of estate, claims asserted long after estate was closed were barred. Probate Code, § 707.

22. Corporations ⇐308(11)

In action by decedent's sole heir to recover salary items which corporation allegedly failed to pay or credit to decedent, burden of proving that sums had been paid rested upon corporation, which burden was not carried in light of evidence of nonpayment found in state of book entries and inability of auditor to make a satisfactory explanation, which evidence was sufficient to overcome claimed presumption that ordinary course of business was followed and payment made. Code Civ.Proc. § 1963, subd. 20.

23. Corporations ⇐308(11)

In action by decedent's sole heir against corporation to recover decedent's pay as an officer of corporation for last three months of his life, where no general matter of accounting was at issue, trial court was not required to make an allowance for an apparent overpayment some two years prior to period in question or to prorate salary to allow corporation a credit for last three days of final month for which period no services were rendered because of decedent's death.

24. Corporations ⇐319(7)

Evidence sustained finding that corporate officer advanced a sum of money to corporation to open a branch in another city and that such sum was never returned to officer and authorized judgment in favor of officer's sole heir for that amount.

25. Judgment ⇐688

Judgment directing corporation to pay to deceased officer's administrators a specified sum as salary due, and decreeing that when such sum was paid it should constitute a final settlement between corporation and administrators, was not res judicata as to officer's sole heir, so as to preclude the assertion of a further claim, where, at time of action, administrator had made no independent investigation of as-

sets of estate and administratrix, who furnished the information, controlled the corporation.

26. Corporations ⇐308(11)

Evidence authorized finding that $10,000 bonus voted to corporate officer had not been paid.

27. Appeal and error ⇐994(3), 1012(1)

Questions as to credibility of witnesses and weight to be given their testimony are for trier of facts, and, although impeaching evidence in nature of contradictions or otherwise has been received, trier of facts must determine to what extent testimony is to be believed or disbelieved.

28. Witnesses ⇐316, 317(1)

Trier of facts may give credence to witness who has testified falsely in part or whose testimony contains contradictions or inconsistencies.

29. Appeal and error ⇐989, 1012(1)

An appellate court is not concerned with question of preponderance of evidence, but with single inquiry whether record contained substantial evidence supporting findings assailed.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Virginia J. Hansen against Bear Film Company, Inc., and others to establish a trust and for other relief. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion 158 P.2d 779.

Brobeck, Phleger & Harrison, of San Francisco, for appellants.

Richard S. Goldman, Gorman R. Silen, and A. B. Bianchi, all of San Francisco, for respondent.

CARTER, Justice.

Defendants appeal from a judgment which, among other things, decrees that plaintiff, as sole heir of her deceased father, is the equitable owner of all of the stock of defendant Bear Film Company, and which directs defendants, as trustees, to forthwith deliver the stock certificates to her and transfer legal title thereto in fulfillment of the trusts under which it is held.

The main question presented is that of the sufficiency of the evidence to support the trial court's findings that a valid trust exists and that plaintiff's claim is not barred by laches or the statute of limitation.

For convenience reference will be made to members of the Hansen family by their first names. Josephine T. Hansen, plaintiff's paternal grandmother, migrated from Copenhagen to the eastern United States, where she made a home for her sons, Charles, Oscar, and Albert. Oscar married a Michigan girl, Fay, and on October 18, 1916, their daughter Virginia (plaintiff) was born.

In 1919 or prior thereto, Oscar came to San Francisco and obtained work with Wakelee's Drug Store. He established a home for his wife and child, and also for Josephine who after a short time came west and joined the family. In 1920 Fay returned to Michigan, Virginia was sent back later and raised there. Oscar secured a decree of divorce on the ground of desertion, and from 1920 until his death in 1929 he saw Virginia only twice, on the occasion of business trips east. But he carried on a desultory correspondence with her, expressed great affection for her, contributed $25 a month to her support, and he was planning at the time he died to bring her to California. After the separation from his wife Oscar made his home with Josephine, toward whom he manifested great love, affection, and respect.

The brother Albert became a professor at Purdue University and attained some fame as a writer of articles touching the subject of his professional work. The brother Charles, with his wife and children, moved to California. Being incapacitated by a lifelong illness, he received constant financial help from Oscar and Josephine, and had their assurances of continued assistance.

Soon after his employment in the drug store Oscar conceived the idea of establishing an independent photo finishing busi

ness. He formed a partnership with Warren S. Quinn, the manager of the drug store, and in 1919 opened a small establishment in a basement on O'Farrell Street. Funds or equipment advanced by Quinn apparently furnished the little capital available. Oscar was given the full management of the concern. Whether Josephine made initial or later financial contributions to the business is a subject of uncertainty. Several witnesses testified to conversations wherein Oscar had commented on the fact that his mother had put up money for his business and that he wished her to profit by his success. It was also said that she may have been able to furnish several thousand dollars from money received from property in Copenhagen, from her earnings in running a rooming house in the east, and from her management of the apartment house in which she and Oscar lived in San Francisco. At any rate, the business was a success from its inception, and when it was incorporated in 1921 as Bear Film Company, with a capital stock of 5,000 shares, held in equal amounts by Oscar and Quinn, its assets were valued in an application to the Corporation Commissioner at approximately $9,775.

Quinn took no active part in the business. Oscar was elected president of the corporation and held that position as long as he lived. At all times he had active charge and management of the concern. In 1924 the partners agreed upon a reorganization. The articles of incorporation were amended to change the corporate stock from 5,000 shares of a single class to 2,500 shares of preferred stock, representing 70 per cent of the corporate assets, and 2,500 shares of common stock, representing the remaining 30 per cent of the assets. The old stock was surrendered. The new preferred stock was issued 2,499 shares to Oscar and one share to his nominee, and the new common stock was issued to nominees of Quinn. The effect of this reorganization was to increase Oscar's interest in the corporate assets from 50 to 70 per cent, and to decrease Quinn's interest correspondingly.

About November 2, 1926, Oscar executed an instrument in writing wherein he recited his ownership of the preferred stock and his intent "to divest himself of title to the said stock and vest such title absolutely in Josephine T. Hansen," and further stated: "Now, Therefore, for value received O. C. Hansen hereby transfers and assigns all his right, title and interest in the said * * * [2500] shares of the preferred stock of the Bear Film Co. * * * to Josephine T. Hansen." The trial court found that on or about the day of execution of this instrument Oscar delivered it to Josephine and at the same time surrendered his stock certificates, properly endorsed, and caused to be issued a new certificate for 2,499 shares of preferred stock in Josephine's name, and a certificate for one share in his own name. Oscar secured legal advice as to the means of validly effectuating the transfer, and, in addition to the steps mentioned above, he caused appropriate entries to be made in the stock certificate book, the stock journal, and the stock ledger of the corporation.

On November 3d, the day following the transfer, Josephine rented a Bank of America safe deposit box, which she retained until January, 1928. Whether she deposited in this box the instrument executed by Oscar and her certificate for 2,499 shares of stock is a subject on which there is no direct evidence, but the trial court found that delivery of these documents was made by Oscar to Josephine on November 2d.

A few days after the transfer, and on November 8, 1926, upon the resignation of Oscar's attorney from the board of directors of the corporation, Josephine was elected a director in his place, and she was also appointed vice-president in place of Quinn. At a director's meeting on November 16th, Oscar's salary, which had theretofore been $500 a month, was increased to $1,250 a month, retroactive from January 1, 1926, and he was also voted a $10,000 bonus "in consideration for services rendered in the past." The books of the corporation were made to reflect a credit of the $10,000 bonus to Oscar, and he returned that sum as income on his 1926 federal income tax statement, but he did not actually draw out the money.

On November 24, 1926, a dividend of $4.20 a share on the preferred stock and $1.80 a share on the common stock was declared, payable January 10, 1927. This was the first dividend declared by the company after 1922, when a dividend of 50 cents a share was paid. The check covering the $10,495.80 dividend on 2,499 shares of preferred stock was drawn in favor of Josephine and deposited in her bank account. Although the genuineness of her endorsement of the check is questioned, and it is claimed that her name was written by Oscar, the trial court found that the check was endorsed by her. The check covering the $4.20 dividend on the remaining share of preferred stock was made out to Oscar, endorsed over by him to Josephine, and deposited in her bank account. The $4,500 dividend on the common stock went to Quinn.

On February 5, 1927, Oscar and Quinn entered into an agreement whereby Quinn agreed to sell his 2,500 shares of common stock to Oscar for $30,000, $10,000 of which was to be paid in cash and the balance of $20,000 in monthly installments of $750 each, with interest on overdue installments at the rate of 7 per cent. To secure payment of the $20,000 balance, Oscar agreed to give Quinn his promissory note guaranteed by the corporation, and as collateral to assign to Quinn certain life insurance policies aggregating $13,000, and to procure and assign to Quinn an additional policy for $2,000. Josephine was the beneficiary of the pledged policies. One of the provisions of the $20,000 promissory note of Oscar was that "the entire unpaid balance of the principal sum shall immediately become due and payable in the event that the undersigned shall voluntarily dispose of the controlling interest of Bear Film Co., a corporation. * * *" On the same day that the agreement was executed (February 5, 1927), there was a meeting of the directors of the corporation, at which Josephine and all of the other directors were present, and a resolution was unanimously adopted to the effect that contemporaneously with the execution by Oscar to Quinn of his promissory note, the corporation would execute a guarantee of the note.

In performance of the agreement, the $10,000 down payment to Quinn was made by a personal check of Josephine, the source of which was the $10,495.20 dividend paid her on January 10th. The first monthly installment of $750 was paid by Josephine, the money being derived from a $750 salary check delivered to Oscar by the corporation, and by him endorsed and delivered to Josephine, who endorsed and deposited it in her account. All subsequent payments up to the time of Oscar's death were made by the corporation to Quinn and charged by the corporation against Oscar's salary on its books. At the time of Oscar's death a balance was still owing to Quinn. This balance was paid by checks of the corporation, as follows: April 20, 1929, $750; May, 1929, $750; and June, 1929, the balance with accumulated interest, $1,413.10. Each of these payments made after Oscar's death was likewise charged against his account on the corporate books.

On February 18, 1927, Quinn delivered over the certificates of common stock, endorsed in blank, and under Oscar's direction 2,490 shares were immediately reissued in the name of Josephine and 10 shares in the name of the secretary of the corporation. The trial court found, although the finding is challenged, that the certificate for 2,490 shares was forthwith delivered to Josephine and that she continued to retain possession of it until after the death of Oscar. The secretary's certificate was endorsed by her in blank and given to Oscar. Both Josephine and the secretary receipted for their certificates on the stub of the corporation's certificate book.

The completion of this transaction left three stockholders of record, Josephine with 2,499 shares of preferred and 2,490 shares of common stock, the secretary with 10 shares of common stock, and Oscar with one share of preferred stock. On February 21, 1927, Oscar and the secretary executed and filed with the Secretary of State and county clerk a formal certificate

of diminution, reducing the number of directors of the corporation from four to three. This document recited that Josephine was the owner and holder of 2,499 shares of preferred and 2,490 shares of common stock of the corporation, and that Oscar was the owner and holder of one share of preferred stock, and it quoted a writing signed by Oscar and Josephine consenting to the reduction. The reduction was also supported by appropriate entries in the corporate minutes.

Between the time of the transfers of the preferred and common stock to Josephine and Oscar's death, he was in full charge of the corporation and asserted complete control over its affairs. The trial court found that subsequent to the transfer of the common stock, Oscar "carried on, operated and managed the business of said corporation as his own personal business and in total disregard of the fact that the apparent ownership of all the corporate stock was in Josephine T. Hansen and as if the legal title to all said corporate stock was in his own name." With the exception of questioned entries late in 1928 and thereafter, the minute book of the corporation shows no record of meetings. It contains only two resolutions authorizing the borrowing of money, with no supporting minutes, and 25 uniform slips reciting that in the absence of a quorum the regular monthly meeting adjourned. At the end of 1927 a bonus of $10,000 was credited to Oscar on the corporate books and at the end of 1928 a similar credit was given him, both without formal corporate action.

The trial court found that during this time there was not a total disregard by Oscar of the corporate entity "but there was a disregard of the corporate entity in this: that during all said time the board of directors of said corporation was under his complete dominance, control and direction and all of the members of said board relinquished entirely to him their discretion and judgment in all corporate matters, and were not called upon to give, and did not give, any suggestions or advice respecting the control or management or direction of said corporation, nor did they assert their right to do so. In the keeping of the corporate minute books and bookkeeping books and accounts and otherwise in the management and handling of said business, an effort was made by Oscar C. Hansen and the employees acting under his control and orders, to carry out corporate forms and to give the appearance of the operations of a corporation. Whenever Oscar C. Hansen needed funds for any use or enterprise of his own he would draw them from the funds of said corporation by merely directing the employees to draw checks for such funds for such purpose as he directed, and to charge the funds so drawn as he directed, and his said orders and directions were never questioned or disobeyed. In this respect said Oscar C. Hansen commingled the funds of said corporation with his personal funds and commingled his personal funds with those of said corporation, and to that extent only. That this was with the knowledge and consent of Josephine T. Hansen."

In other words, as the trial court further found, Oscar's management of the business after the transfers to Josephine was exactly as it had theretofore been. In income tax returns Oscar listed some of the stock under his ownership. However, the returns, both before and after the transfer to Josephine, were apparently prepared by accountant Rosendorn, and were inaccurate in several of their declarations. In applications for insurance and in remarks to insurance agents Oscar referred to himself as the proprietor or owner of the Bear Company. On a number of occasions in the course of social and business conversations he referred to the company as his own. But on many other occasions he made affirmations of his mother's ownership of the stock and business. For the most part these remarks seem to have been casual conversational generalities.

On April 26, 1929, on his way to work, Oscar died suddenly. He was but 39 years of age and his passing prostrated Josephine and caused consternation at his office. Myrtle Hansen, wife of the invalid brother Charles, came immediately to offer comfort to Josephine. Search was made for a

will of Oscar but none was found. Oscar's private papers and all corporate records, exclusive of books of account and the corporate minute book, were found in his office safe. Josephine requested Mr. Levin, an attorney who had been performing legal services for the company, to take over its management until the brother Albert could arrive from Purdue University, Indiana. A resolution was adopted appointing Mr. Levin counsel and assistant secretary of the corporation at a salary of $200 a month.

On Monday, April 29th, the third day after Oscar's death, Josephine and Myrtle called at the office at Mr. Levin's request. There, according to the testimony of Myrtle, Mr. Levin handed Josephine some papers of a greenish hue which he referred to as shares of stock of the company which must be put in a safe place. He then drove the ladies to a bank, where Josephine rented a safe deposit box. Although it is urged that this event may have marked an attempted first delivery to Josephine of the corporate stock, that theory is weakened by uncertainties in Myrtle's testimony, by a bank record indicating that Josephine's first entry into the deposit box occurred at a later date, and by Mr. Levin's denial of any such occurrence. According to Mr. Levin it was not until the question whether the Oakland business was a branch of the corporation was under discussion that Josephine exhibited to him her stock certificates. He had never before seen them.

The trial court found, as aforesaid, that the delivery of the stock occurred in Oscar's lifetime, and in this connection commented: "With respect to delivery—there was a good deal of time put in on it and a great deal of handwriting testimony, and so forth—I am satisfied that there is not sufficient evidence on the plaintiff's side against the delivery of the certificates to make a finding to the effect that the certificates were not delivered. They were produced from that side of the house. They were not found in neutral territory. And in addition to that, there were writings made which would be consistent with delivery and would be inconsistent with the fact that the delivery had been incomplete."

Albert arrived from Indiana on the evening of April 30th. After a considerable period of indecision he yielded reluctantly to Josephine's insistence that he give up his professional career and take over the management of the company. Charles, who had long been aided financially by Josephine and Oscar, and to whom Oscar had promised continued aid and a place in the business, vigorously asserted a right to protection and a share of the earnings of the company, and protested the gaining of any advantage by Albert. The friction between Charles and Albert was a source of great disturbance to Josephine. Some consideration was given to possible sale of the concern. It then had an estimated value of $70,000 to $100,000 or more. Despite the drain of the Quinn purchase, it was solvent, and as more than $35,000 life insurance had been taken out by Oscar for the benefit of the corporation, working capital was available from that fund. Whether Albert fully disclosed to Josephine and Charles the then market value of the concern, and whether his discovery of its worth finally swayed his decision to remain in California is not conclusively shown.

The daughter Virginia was promptly notified of her father's death by telegram and letters. She was then about thirteen years of age. Through her mother's correspondence with members of the family, with Mr. Levin, and others in California she was given to understand that the business belonged entirely to Josephine and that Oscar left only a small and "heavily involved" personal estate. But she was assured that everything would be done to realize as large a sum as possible from it for her as the sole heir of Oscar. She and her mother were not suspicious and rested in the family assurances that their interests were being cared for.

Albert demanded financial protection in return for the sacrifice of his career and his promise to remain in California. After much negotiation, and in June, 1929, he and Josephine executed an instrument whereby, in consideration of his promise to

manage the business, Josephine agreed "to sign over" to him all of the corporate stock in her name, provided: 1. That she be placed on the payroll of the corporation for life at a salary of $300 a month; 2. That Albert should have no interest in any other property held by her; and 3. That either before or after her death Albert should contribute $10,000 to establish a trust fund for the benefit of Charles.

Josephine had already transferred some of her stock to Albert prior to the date of the agreement. Albert made two trips east to effect a final severance of his connection with the University, and after his return in September, 1929, the remainder of the stock was transferred to him. Charles was discontented with the provision made in his behalf, and in December, 1929, he was placed on the company payroll at $100 a month. This too failed to satisfy his demands and he continued to foment the family discord. He induced Josephine to consult an attorney and open further negotiations with Albert. As a result a new agreement was executed in March, 1930, by Josephine, Albert, and Charles. It confirmed the transfer of the stock to Albert, contained elaborate provisions for the benefit of Josephine, Charles, and Charles' children, reserved in Albert the right to terminate his obligations at any time by retransferring the stock to Josephine, and contained this further significant provision:

"If any final judgment hereafter shall be rendered against second party [Albert] finding that first party hereto [Josephine] was not the owner of said shares of Bear Film Company at the time of the transfer thereof by her to second party hereto and accordingly decreeing that second party hereto is not the owner thereof, then and in such event all obligations of second party herein contained to make payments or cause payments to be made shall cease and terminate."

On June 4, 1929, about the time of execution of the first agreement between Albert and Josephine, Josephine wrote Charles stating, among other things: "I am writing this to ask you not to write to Virginia, or at least look out that you are not unintentionally doing me harm, that would mean that you would be doing harm to yourself too, because you and Albert get it after me. If her mother should take another lawyer we are sunk. This morning a letter came here from Virginia to Albert, in it she says, that she heard Oscar say that he was the sole owner of the Bear Film Co., and if so (she says) it belongs to me, he kept Grandma all his life and she will be getting the furniture where she lives. Now carl what do you think of that? Her mother would just love to throw me in the gutter and leave me there, but fortunately Oscar did not intend for her to do so. I called up Albert and read part of the letter for him, so he can see the lawyer about it before he answers that. * * *"

During the transition period after the death of Oscar, Attorney Levin advised Josephine and Albert to some extent, and also received permission from Virginia's mother to look after her interest. At his suggestion Josephine and Mr. Uhle, manager of the Oakland branch of the company, were appointed to administer Oscar's estate. Virginia's mother was appointed by a Michigan court as her guardian to receive distribution. There was some correspondence between her attorney in Michigan and Mr. Levin.

In order to settle the question whether the Oakland business was a personal venture of Oscar, or was a branch of the corporation, an action was filed by the company against Josephine and Uhle as administrators of Oscar's estate. Judgment was permitted to go for plaintiff by default, thus settling the status of the Oakland business as part of the corporation, and not as part of Oscar's estate. At this time Josephine wrote Charles: "Tomorrow at 2 o'clock comes up the case in court whether the Oakland plant belongs to us or Virginia. I do hope the judge will decide in our favor. It would be terrible if it goes to Virginia."

Another business started by Oscar in Oakland, the Paru Rubber Company dealing in contraceptives, was conceded to be a personal venture and not a part of the film corporation, but it was not a success and

its losses were charged against Oscar. Credits in a considerable sum standing to Oscar's account on the books of the corporation were largely offset by debt entries made after his death. Insurance which he had taken out for the benefit of Virginia had been allowed to lapse. He had some money on deposit in the bank, but little other personal estate. Upon distribution Virginia received about $3,400 and a parcel of unimproved land in Oakland, from the sale of which she ultimately realized a very small additional sum.

Josephine discouraged correspondence with Virginia. In December, 1931, when there was a suggestion that Virginia might take a trip to California, she wrote saying: "Dear Virginia: Buy yourself a little something for Christmas. I am sorry to disappoint you about your suggested trip to California but I cannot possibly defray the expense. Hoping you are well and may pass a happy holiday. Love Grandmother."

Josephine died on December 7, 1932. No will was found and no probate of her estate was had. Albert meanwhile had continued to operate the business. From the time of the family agreement he was the record owner, in his name and through nominees, of all of the stock of the corporation except that in 1939 he transferred 500 shares of the preferred and 500 shares of the common stock in trust for his son Robert. The corporation prospered under his management, but on March 25, 1940, at the age of 48, he too passed away. By this will the remainder of the stock, over that transferred in trust for his son Robert, passed in trust for his wife, son, and daughter.

After Albert's death Charles again sought legal advice. He disclosed facts which caused his attorney to write to Virginia, then 23 years old. Almost immediately Virginia came to San Francisco, and on August 16, 1940, the original complaint herein was filed. The cause went to trial in February, 1941, on an amended complaint containing six counts. Count one sought a money judgment for the amounts due Oscar from the corporation. Counts two and three alleged that the preferred and common stock respectively were transferred to Josephine by Oscar upon an express oral trust to transfer it back to Oscar at his request or to Virginia upon Oscar's death. Counts four and five alleged that the preferred and common stock respectively were never delivered by Oscar to Josephine. Count six alleged a resulting trust for Oscar in the common stock.

In March, 1941, Charles, who was then 53 years of age, died without having been called upon to testify. Mr. Rosendorn, the accountant who had made out Oscar's tax returns, supervised the keeping of the corporate books, and advised Oscar in financial matters, was 70 years of age and in ill health. His testimony had to be taken by deposition. Other witnesses, old company employees, friends of Oscar and Josephine, and the surviving members of the families of Charles and Albert, were either lacking in clear recollection of the occurrences long past or without knowledge of them. Therefore, although the trial was a prolonged one and volumes of evidence were received, the trial judge was without the aid of any direct testimony from which he could determine the issues tendered by the pleadings, and was compelled to base his findings in favor of plaintiff upon his resolution of conflicting inferences.

The court found, as already stated, that the preferred and common stock were delivered by Oscar to Josephine, but it also found that the transfer by Oscar to Josephine of the legal title to all the preferred stock was made upon "her express oral promise and agreement that she held and would continue to so hold the whole thereof * * * in trust for the said Oscar C. Hansen, to be delivered and transferred back to the said Oscar C. Hansen at his request;" that she did not promise or agree that she held the stock in trust for the heirs of Oscar, or for his daughter (plaintiff) upon his death; that Oscar never demanded a retransfer from Josephine during his lifetime, although at all times he had the right, as the "real, true and equitable owner of all said stock" to require its immediate retransfer into his name, and upon his death it was the duty

of Josephine to immediately transfer all of the stock into his name or into the name of his administrators, as representatives of his estate.

With respect to the common stock, the court made a like finding of an express oral trust. It also found that none of the funds placed in the Quinn-Hansen partnership were furnished by Josephine, and none of the funds used to purchase the common stock were provided by her; that the funds used for the latter purchase were furnished by Oscar, who was the sole and beneficial owner of both the funds and the stock, and that Josephine held only the bare legal title to the stock as trustee for Oscar.

Elaborate findings were made to the effect that the transfer of the preferred stock to Josephine's name, the declaration of the dividends and the voting of the $10,000 bonus in 1926 were all a part of a single plan conceived and carried out by Oscar to enable him to acquire the common stock from Quinn and thereby to own for himself all of the stock, preferred and common, of the corporation.

Findings were also made in favor of plaintiff on her claim for money items, and on the issues of laches and the statute of limitation. The judgment ran against the widow of Albert, individually and as executrix of his will, and against his children and the Bear Film Company, all of whom are appellants herein.

[1, 2] From the above resumé it will be seen that the facts, and the inferences which may reasonably be drawn from them, afford sufficient support for the trial court's conclusion that Oscar transferred to Josephine only the bare legal title to the preferred and common stock and that he intended to and did at all times retain in himself the full equitable ownership. It is true that various motives for the transfer were suggested, such as a plan to effect tax savings, to secure protection in the Quinn purchase, or to guard against possible claims of creditors growing out of individual enterprises, but no *motive* was established, and the trial court expressly made no finding with respect to motive. But the *intent* to transfer legal title, and such title only, to Josephine was sufficiently established, and the trial court's findings on the subject must be accepted as conclusive.

The following comment, taken from a memorandum opinion of the trial court, shows in part the inferences which were reasonably drawn under his analysis of the evidence: "The Bear Film Company business just before November, 1926, had a net worth, easily, of $100,000, *and Oscar Hansen had made it all,* with Warren Quinn's financial help, and the great loyalty and cooperation of a number of 'old-timers' who had been with him, some of them from the very start, most of them from the early days. But nobody will say that Oscar Hansen was not the Bear Film Company or that the Bear Film Company was not Oscar Hansen. He dominated it from the very beginning, Warren Quinn taking but small interest in its management. After Mr. Quinn had committed himself to the sale, Oscar Hansen had nobody to consult but himself, and could see nothing ahead of him but continued growth, expansion and success, with eventual monopoly of the film-developing business in this city and its tributary territory. *A $100,000 business all his own.* Oscar Hansen, the testimony shows, was a man of unusual initiative and great determination. He was a man who could not imagine himself as dependent upon anybody, or a mere employee of anybody. He had accomplished these things almost alone. In a way it might be said he was a genius. In this particular business he was the outstanding leader. He had earned this position of leadership; he had worked night and day to reach it; and he was conscious of it every waking hour of the day. * * *

"The testimony is not very satisfactory as to just what Josephine T. Hansen was worth in 1926. She had the apartment on Geary Street and despite her age and Oscar's success she rented rooms. This would indicate a more or less dependent position. What is beyond dispute, however, is the fact that Oscar had taken out $20,000 or more life insurance in her favor, so she would be well provided for when he died. Meanwhile there never was any

question that Oscar would take good care of her while he lived. * * *

"Oscar *was* rich, and we will assume that his mother was, by comparison with him, poor. *But Oscar was rich only as long as he owned the stock.* Once that was gone he would have nothing but a job—a job in this prosperous company, which he had fathered, but, after all, only a job. He had, perhaps, a few dollars, and the Oakland lot which finally sold for about $1,500. *But he would no longer own his company; that would be gone.* Thereafter he would be subject to his mother's orders, for she would own what had been *his* stock. This needs no further elaboration. Oscar Hansen was not the man to do this thing. With all his devotion to his mother, he was not the person to turn over to her as a cold gift practically everything he had in this world. With what the evidence shows of his temperament, disposition and traits,—particularly his tremendous ambition, and his determination to eliminate competition in his line, all these things, coupled with the fact that he had made it all 'the hard way,' and after a very tough struggle, it simply cannot be concluded just when the acquisition of the Quinn stock was assured [that he decided] to immediately give away the whole thing, 'lock, stock and barrel', to his mother who was already apparently living comfortably and with a sufficiency considering her modest needs. *If ever there was an improvident gift this would be it.*

"One further suggestion: An outright gift to Josephine would have made it possible for her to divide the stock up, *inter vivos*, between herself and Albert and the other son. Such combination of interests might not have been as friendly to Oscar as if she alone held it; but it was a possibility and Oscar was too shrewd not to be mindful of it. And further: Such gift would have divested him of the wherewithal to properly take care of his daughter, the plaintiff, to whom he owed a legal as well as a moral duty of support, and who was, of course, the real and natural object of his bounty upon his death. Under the law plaintiff was his sole heir. * * *

"Under this test it cannot possibly be held that a gift was intended. It would have stripped him of practically every dollar in the world, won by the hardest kind of work and struggle; it would have divested him of the power—in his field—which meant so much to him, and which went only with the possession of money. It would have finished him, in his late thirties, so far as future accomplishment was concerned. It would have made rich an elderly woman who needed neither money nor power, and at the same time would have impoverished a man in his prime, who needed the money—his *own*—and wanted to retain the power that went with it. * * *

"From February 18, 1927, until his death in April of 1929 Oscar Hansen continued to run the business just as he had before the transfer of the stock to his mother. * * * There was no change. The appearance of Josephine at the plant occasionally meant nothing. She certainly had nothing to do with the real running of the business or the formation of the policy thereof at any time prior to Oscar's death. She was not in any way qualified to do so, particularly while he lived. She was an elderly woman, not trained in business, essentially a housewife, and certainly with no knowledge, experience or training in this highly specialized business,—a business rather unique and in a class by itself, and one where speed in turning out the work and in getting the pictures back to the customers was of the essence. There is an abundance of evidence in the record that Oscar continued not only to manage the business as before but to dominate it in every way as he always had, all with his mother's complete acquiescence. The grantee, mother, gave no appearance, to the employees, to the customers, to the competitors, or to the world generally, that she had anything to do with it. * * *

"In this connection the declarations of Oscar on the income tax returns that he owned the stock, and the declarations, both oral and written, to the insurance company that he was the sole owner of the Bear Film Company, are to be considered.

Oscar Hansen continued on as president of the company to the time of his death. On January 18, 1929, the company borrowed $10,000 from Bank of America * * * and a promissory note was given, signed by the Company by O. C. Hansen, President, and by Neita Drake, Secretary. On March 29, 1929, an additional note for $8,000 was given to the same bank, similarly executed and signed. * * * Both notes were endorsed and guaranteed by O. C. Hansen. This was two years after the stock had been put into Josephine's name. He thereby committed himself to respond for $18,000 if the Company did not pay. *With what would he have responded? It certainly was an implied or tacit representation to the bank that he owned the stock.*

"When O. C. Hansen died the Quinn stock had not been fully paid for. * * * Payments * * * were made by Bear Film Company, and each of them was charged post mortem to Oscar C. Hansen's account on the books of the company, just as the $750 monthly payments had been charged during his lifetime. It must be admitted that this was *consistent*; that it carried out the plan of the Quinn agreement. *But it was consistent with Oscar's beneficial ownership of the stock and not with Josephine's.* Oscar had died. These payments remained due. If Josephine owned the stock why did she not pay them?

"Finally, Josephine Hansen received no dividend, salary or other income by reason of her holding of the stock up to Oscar's death. What has just been said respecting Oscar's management and domination of the business is sufficient to cover Josephine's negative acts and conduct with respect to the running of the business. * * *"

[3-5] It is thus apparent that the evidence gives rise to the inference that the transfers made by Oscar to Josephine were transfers of legal title only, and that Oscar at all times intended to and did retain the full beneficial ownership. Nor can it be successfully contended that there is no evidence which shows with reasonable certainty the terms and conditons of the trust (see In re Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055; Chard v. O'Connell, 7 Cal.2d 663, 666, 62 P.2d 369; Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543), and that therefore the trust must fail. The evidence is susceptible of the inference that the terms of the express trust were precisely as found by the trial court, to wit: That Josephine was to hold the bare legal title in trust for Oscar, to be delivered and transferred back to Oscar at his request. Since Oscar did not demand a retransfer during his lifetime, it was the duty of Josephine, upon his death, to immediately convey title to all of the stock into his name or that of the representatives of his estate. In other words, upon the death of Oscar, the express trust failed, and Josephine then held the trust estate upon a resulting trust for the estate of Oscar. Rest., Trusts, § 411, p. 1258, § 419, subd. 2, p. 1295; 2 Bogert, Trusts and Trustees, § 468, pp. 1443–1444; 3 Scott on Trusts, § 419, p. 2193; 54 Am.Jur. pp. 155–156; 65 C.J. § 151, p. 376; Bainbridge v. Stoner, 16 Cal.2d 423, 428, 106 P.2d 423; Wittfield v. Forster, 124 Cal. 418, 57 P. 219; In re Estate of Ralston, 1 Cal.2d 724, 37 P.2d 76, 96 A.L.R. 953; In re Estate of Hamon, 136 Cal.App. 517, 29 P.2d 326.

[6] Although it is necessary, in order to establish a trust, to offer clear and convincing proof, such proof may be indirect, consisting of acts, conduct, and circumstances (Airola v. Gorham, 56 Cal.App.2d 42, 49, 133 P.2d 78; Kobida v. Hinkelmann, 53 Cal.App.2d 186, 127 P.2d 657; Cooper v. Cooper, 3 Cal.App.2d 154, 39 P. 2d 820), and the question whether the showing is clear and convincing is primarily one for the trial court. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P. 2d 583; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732.

[7] Appellants contend that the trial court erred in admitting in evidence oral and written declarations of ownership of the stock and of the company made by Oscar, not within the presence or to the proved knowledge of Josephine, but subsequent to the transfers to her and in derogation of them. Chard v. O'Connell, 1936, 7 Cal.2d 663, 667, 62 P.2d 369; Francoeur v. Beatty, 1915, 170 Cal. 740,

747, 151 P. 123; Bollinger v. Bollinger, 1908, 154 Cal. 695, 705, 99 P. 196; Miller v. Miller, 1942, 55 Cal.App.2d 199, 207, 208, 130 P.2d 438; Taylor v. Bunnell, 1926, 77 Cal.App. 525, 534, 247 P. 240. However, under well recognized exceptions to the hearsay rule, such declarations, made before, at the time of, or subsequent to the transfers, were properly admissible on the issue of delivery to Josephine (and it was found that the instruments were delivered to her), on the issue of a claimed gift, and also to show the intent or state of mind of Oscar. Whitlow v. Durst, 1942, 20 Cal.2d 523, 524, 127 P.2d 530; Jean v. Jean, 1929, 207 Cal. 115, 277 P. 313; Bridge v. Ruggles, 1927, 202 Cal. 326, 330, 260 P. 553; In re Estate of Carson, 1920, 184 Cal. 437, 445, 194 P. 5, 17 A.L.R. 239; Williams v. Kidd, 1915, 170 Cal. 631, 648, 151 P. 1, Ann.Cas.1916E, 703; Stout v. McNab, 1910, 157 Cal. 356, 107 P. 1005; Fanning v. Green, 1909, 156 Cal. 279, 285, 104 P. 308; In re Estate of Hall, 1908, 154 Cal. 527, 532, 98 P. 269; Sprague v. Walton, 1904, 145 Cal. 228, 234, 78 P. 645; Dinneen v. Younger, 1943, 57 Cal.App.2d 200, 207, 134 P.2d 323; O'Dea v. Hibernia Savings & Loan Soc., 1932, 119 Cal.App. 622, 7 P.2d 318; 19 Cal.L.Rev. 231, 249–254; 26 Cal.L.Rev. 631; Annotations, 105 A.L.R. 398.

[8] The rule is succinctly stated in Whitlow v. Durst, supra, 20 Cal.2d at pages 524, 525, 127 P.2d at page 531: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. Williams v. Kidd, 170 Cal. 632, 151 P. 1, Ann.Cas.1916E, 703; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; De Cou v. Howell, 190 Cal. 741, 214 P. 444; See [McBaine, Admissibility in California of Declarations of Physical or Mental Condition], 19 Cal.L.Rev. 231, 251. Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gift are admissible though the statements be self-serving. Sprague v. Walton, 145 Cal. 228, 78 P. 645."

[9] Appellants claim that the parol evidence rule precluded the trial court from admitting oral proof to show that the purportedly absolute transfers were in fact transfers of legal title only, subject to an oral trust to reconvey upon demand. In support of this position they cite the Restatement, Trusts, section 38, page 122, and 1 Scott on Trusts, section 38, page 226, where the text in part reads: "* * * Conversely, extrinsic evidence is not admissible to show that the grantor intended that the grantee should hold the property upon trust, if the instrument of transfer clearly states that he is to hold the property for his own benefit, free of trust." Here the written instrument purported only to divest the transferor of title and vest it in the transferee. It contained no recital that the transferee was to hold the property for her own benefit, nor did it mention a trust or beneficial interest. Under the circumstances, the applicable rule is that found in the Restatement, supra, section 38, subdivision 3: "If the owner of property transfers it inter vivos to another person by a written instrument in which it is not declared that the transferee is to take the property for his own benefit or that he is to hold it in trust, extrinsic evidence may be admitted to show that he was intended to hold the property in trust either for the transferor or for a third party." See, also, Beeler v. American Trust Co., 24 Cal.2d 1, 20, 21, 147 P.2d 583; In re Estate of Gaines, 15 Cal.2d 255, 265, 100 P.2d 1055; In re Kellogg, 41 Cal. App.2d 833, 840, 107 P.2d 964.

[10] With reference to the common stock, the trial court found, in addition to an express oral trust, a purchase money resulting trust. In the evidence showing that the consideration for the common stock was paid by Oscar, with conveyance made through him to Josephine, there is ample

support for the finding. Goes v. Perry, 18 Cal.2d 373, 379, 115 P.2d 441; Kirk White & Co. v. Bieg-Hoffine Co., 6 Cal. App.2d 188, 191, 44 P.2d 439; 25 Cal.Jur. 178–191.

[11, 12] By amendment to their answer after trial of the cause, appellants set up as an affirmative defense that Oscar's intent and purpose in making the transfer to Josephine was to defraud his creditors and to evade the payment of federal income taxes. Appellants contend that such a motive or purpose is illegal and therefore the trust cannot be enforced by Oscar or his heir; furthermore, that the trial court's failure to find on this material issue requires a reversal of the judgment.

Appellants confuse Oscar's "intent and purpose" in making the transfers to Josephine, with his "motive." Under the findings the "intent and purpose" of Oscar was to transfer legal title to Josephine and to retain equitable ownership in himself. The "motive" which may have prompted this action is obscure and, so far as this appeal is concerned, is immaterial. The trial court did at one point express the view that Oscar may have been considering a tax advantage, but it made no finding to that effect, and instead expressly refrained from making any finding of "motive." It did find, however, that at the time of the transfers Oscar had no outstanding money obligations of any considerable or substantial amount, or in excess of small, current, personal bills, other than the obligation to Quinn. Regardless of what Oscar's undisclosed motive may have been, there is in the record no evidence whatsoever of any fraud practiced upon his creditors. If there was a plan to escape future liability, it never materialized, so far as the record shows; and if the transaction resulted in evasions under the federal taxing statutes, that is an exclusive concern of the federal authorities. See Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 841, 119 P.2d 219; Nishi v. Downing, 21 Cal.App.2d 1, 4, 67 P.2d 1057; Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 728, 729, 48 P.2d 738, 742.

[13] It is urged that Albert was a purchaser for value of the corporate stock from Josephine without knowledge of any trust, and that therefore no trust may be enforced against him or his successors in interest. The court found that Albert did not in good faith believe that the stock belonged to Josephine as her own property; that as president, director, and manager of the corporation he had access to and controlled the corporate books and became possessed of sufficient knowledge and information to put him, as a prudent man, on inquiry as to the true ownership of the stock; that among other facts he learned that the purchase price of the common stock was paid for by the money and earnings of Oscar, that the installments had all been, and were still being charged against Oscar even after his death; and that at all times after the transfers to Josephine, Oscar had continued, as theretofore, to control and manage the corporation and that Josephine had taken no part whatever in such control and management. These findings, showing that Albert took with notice of the equities of Oscar's estate, have sufficient support in the evidence. And since Albert took with notice of the equities, it is immaterial whether the transfers to him are considered as having been made with or without a legal and adequate consideration. 25 Cal.Jur. 222–225.

Appellants pleaded as defenses the statute of limitation and laches, and the trial court found against them on both issues. Many of the facts bearing upon these issues have already been set forth. The trial court found that as early as May, 1929, Albert wrote plaintiff that Oscar owned no stock in the corporation at the time of his death and that all of the stock belonged to Josephine; that like information was furnished in 1929 and 1930 by the attorney for the corporation and for the administrators of Oscar's estate (Josephine and Mr. Uhle); that shortly after the death of Oscar, Josephine prevailed upon Albert and Charles to write nothing to plaintiff, or her mother, which would give them any information of what was being done in connection with the corporation, or any knowledge of the circumstances under which the stock transfers were made; that from and after the death of Oscar, and

while Josephine was administratrix and thereafter, she carried on a course of conduct designed to suppress and conceal and which did suppress and conceal from plaintiff and her mother the truth with respect to the stock and ownership thereof and with respect to the true assets of Oscar's estate.

The court further found that plaintiff, who was thirteen years old at the time of Oscar's death, believed that her father owned the Bear company, and believed it to be strange and peculiar that she did not receive whatever would represent or show her interest in that business, but that she had the utmost confidence in her grandmother Josephine, and her uncle Albert, and their attorney, and in the other persons in control of the business, all of whom had been close friends of her father, and, having such confidence, she was not suspicious that her rights had been violated, but had a definite conviction that said persons would not do anything to cause her rights to be violated. The court also found that as early as 1933 plaintiff received an anonymous letter telling her that her father had been the owner of the company and that she had been defrauded of property which rightfully belonged to her, and suggesting that she start an investigation, but that nevertheless plaintiff made no effort whatever to investigate her rights and when she came of age she still refrained from making any investigation; that Albert was the only person still alive at the time plaintiff reached her majority who was fully able to explain certain facts and answer charges concerning the transactions which eventuated in this litigation; that plaintiff came to San Francisco in July, 1940 (after the death of Albert and just prior to the time this action was commenced), to investigate and enforce her alleged rights in the premises; that at that time she had no more information than that contained in the anonymous letter of 1933, and a letter of June 27, 1940, written to her by the attorney consulted by Charles.

[14, 15] From these facts so found the court concluded that the action was not barred by the statute of limitation. In weighing the sufficiency of the evidence to support this conclusion, it is to be noted that Josephine was the administratrix of Oscar's estate, and that she occupied at the same time the inconsistent position of claimant to ownership of all of the stock of the company by gift from Oscar; also that the letter written by her to Charles on June 4, 1929, and hereinbefore quoted, shows conclusively her attempt to have the facts concealed from plaintiff. From this and other letters and the evidence as a whole the trial court could infer that Josephine deliberately set out to hide the true situation from plaintiff and her mother, notwithstanding she occupied a fiduciary position as administratrix of the estate of Oscar, and was also trusted by plaintiff because of their relationship. In other words, there is in the evidence sufficient support for the conclusion of the trial court that because of the misrepresentations and concealment practiced by Josephine, Albert, and those acting under Josephine's direction, the statute of limitation did not commence to run until plaintiff's actual discovery of the real situation in 1940. Where a defendant is guilty of fraudulent concealment of the cause of action, the statute of limitation is deemed not to become operative until the aggrieved party discovers the existence of the cause of action. Pashley v. Pacific Elec. R. Co., 25 Cal.2d 226, 229, 153 P.2d 325; Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39; Laraway v. First Nat. Bank of La Verne, 39 Cal.App.2d 718, 104 P.2d 95.

[16] There is no merit in the contention that because Josephine's coadministrator Uhle could have brought action on behalf of Oscar's estate, the statute of limitation commenced to run against the estate and therefore continued to run against plaintiff after distribution of the estate to her. 16 Cal.Jur. § 152, p. 557. Mr. Uhle testified that he made no independent investigation to determine what property belonged to Oscar's estate, but got his information entirely from Josephine, Albert, the attorney, and the company auditor. If the concealment of the facts from plaintiff, her guardian, and their attorney operated

to toll the statute until actual discovery, then the concealment of the facts from co-administrator Uhle had the same effect during the administration of Oscar's estate.

[17, 18] The question of laches was also one for the trial court's determination. Austin v. Hallmark Oil Co., 21 Cal.2d 718, 734, 735, 134 P.2d 777. The same evidence which supports the finding that the statute of limitation was tolled until discovery of the misrepresentation also necessarily supports the finding that plaintiff was not guilty of laches, particularly as this action was commenced within three years of the time plaintiff attained her majority and almost immediately after her discovery.

The court found that Albert and his estate received from the Bear Film Company for services rendered to it by him from 1929 until his death, the sum of $81,210.09, but that the reasonable value of his services to the corporation for that period was not less than that amount and the amount of dividends paid out to him and his estate, and that the corporation was not entitled to recover or attempt to collect from its codefendants any part of said sums paid Albert or his estate on account of dividends.

In addition the court decreed that plaintiff was entitled to recover from the corporation certain money items. The corporation has filed separate briefs on appeal challenging this award, as well as the findings and judgment as a whole.

The first item awarded plaintiff is $61,000, with interest in the sum of $17,676.09, representing dividends actually paid on the corporate stock subsequent to April 26, 1929. It is conceded that if the trial court's adjudication of ownership of the stock is upheld, this award must also be upheld.

The other items, five in number, comprise an award of $18,950, together with fourteen years' interest, $18,688.91, or a total of $37,638.91. $10,000 of this sum represents a bonus credited to Oscar on the books of the corporation at the end of 1928. $5,000 the court found was loaned to the corporation by Oscar for the use of its Oakland branch. $2,250 represents an alleged balance of unpaid salary at $750 per month for February, March, and April, 1929. $1,500 represents a charge made on the books of the corporation after Oscar's death with a corresponding credit to Josephine. The other $200 represents a sum paid to the attorney by the corporation after Oscar's death and charged against his account.

[19-21] That portion of the award representing the last two items listed is unquestionably correct. The corporation, as a matter of law, was not entitled to pay alleged debts of Oscar after his death, and take credits for those payments in accounting to Oscar's estate. If Josephine claimed that Oscar owed her $1,500 at the time of his death her proper recourse as an administratrix was to present a creditor's claim against his estate for that amount. The claim would in that event have come under the scrutiny of the probate judge for approval or rejection, as the proof warranted. Prob.Code, § 703. Similarly, if Oscar owed the attorney $200, the proper procedure was for the attorney to present a creditor's claim for that amount against the estate. Prob.Code, §§ 710, 711. When the corporation elected to pay these claims and deduct the sums so paid from the amount due Oscar's estate, it acted without legal authority. Since no demand was made against the estate by Josephine or the attorney, claims against the estate are now barred. Prob.Code, §§ 707, 716; 11A Cal.Jur. § 521, p. 734. And since the corporation by its own conduct prevented the allowance and payment of the claims in the manner contemplated by the law, it may not claim credit for the sums which it disbursed. It acted as a volunteer and cannot recover for its voluntary payment, made without request for or promise of reimbursement, of the debts of Oscar. Tabata v. Murane, 24 Cal.2d 221, page 224, 148 P.2d 605, and cases cited; 20 Cal. Jur. § 7, p. 907.

The item of $2,250 represents a balance of unpaid salary at the rate of $750 per month owing to Oscar for the last three months of his life, February, March, and April, 1929. Apparently it was the practice of the corporation to pay Oscar $500 on account of his salary each month from

the regular payroll, and to credit the balance of $750 to his account, said sum being used to cover the monthly payments to Quinn. In December, 1926, Oscar's account was credited with a single lump sum which included $9,000 to cover the retroactive $750 monthly increase in salary for the year 1926. In March, 1927, his account was credited with $2,250, representing $750 per month for the months of January, February, and March, 1927. On March 9, 1927, a duplicate payment of $750 was made, apparently representing an overpayment for that month. Thereafter, from and including April, 1927, to and including January, 1929, Oscar's account was credited each month with $750. But there were no credits of $750 per month for the months of February, March, and April, 1929, nor had the indebtedness to Quinn been extinguished at the time of Oscar's death on April 26, 1929. The trial court found that the $2,250 for said three months was due Oscar and that it was never paid or credited to him.

[22, 23] The burden of proving that the sums had been paid rested upon the corporation (Lloyd v. Kleefisch, 48 Cal.App.2d 408, 415, 120 P.2d 97), and the evidence sufficiently supports the trial court's conclusion that this burden was not met. Even if it be assumed that there was a presumption that the ordinary course of business was followed (Code Civ.Proc., § 1963, subd. 20) and payment made, the presumption was sufficiently overcome by supporting evidence of nonpayment found in the state of the book entries and the inability of the auditor to make a satisfactory explanation. The fact that an apparent overpayment was made in March, 1927, two years prior to the period here in question, did not require the trial court to make an allowance for that item. The payments in question were those for the stated three months of 1929. No general matter of accounting was at issue. Neither was it incumbent upon the trial court to prorate the salary and allow the corporation a credit for the last three days of April, 1929. The practice was to make payment to Oscar in advance of the end of the month, and had payment thus been properly made, it is inconceivable that the corporation would have presented a claim for refund to cover the last four days of the month after Oscar's death. We hold that the findings of the trial court on this point have sufficient evidentiary support.

[24] The $5,000 item represents cash which the trial court found was advanced to the Oakland branch of the corporation and improperly charged to Oscar's personal account on the corporate books. The charge was made in a negative manner through failure to credit Oscar's account with repayment of the $5,000 to him by the corporation, but instead entering, under date of March 31, 1929, a $5,000 credit to the account of Josephine, purportedly representing repayment of a loan made by her to the corporation. On the books of the Oakland branch it appears that a credit was originally given to Oscar for the loan, but at some later date his name was scratched out and that of the Bear Film Company was inserted over it. Plaintiff was able to produce the transcript of Oscar's bank account for this period, showing a $5,000 check drawn by Oscar practically contemporaneous with the date of the Oakland entry. The check itself was not produced, nor was it established to whom it was drawn. No check for that amount drawn by Josephine was produced and she had no bank account of that amount at the time. Although the auditor testified that the erasure of Oscar's name was made at his direction before his death, and the evidence showed other changes made by the auditor to correct errors of the bookkeeper, the testimony of the auditor as to the $5,000 item is impeached by the court's finding that, in connection with the $10,000 item, entries of the same date March 29th, were not regularly or properly made, but were inserted after Oscar's death, and did not correctly show the transactions they purported to set forth. The trial court weighed the evidence and concluded that the $5,000 was actually advanced to the corporation by Oscar and never repaid by it to him. This finding has sufficient support in the evidence and the reasonable inferences which may be drawn from it.

[25] After Oscar's death an action was commenced by the Bear Film Company

against the administrators of Oscar's estate to determine the interest, if any, of Oscar's estate in the Oakland branch. In that case a decree was entered determining that the Oakland business was in fact a branch of the corporation and not a personal venture of Oscar. In the present action the trial court reexamined the question and came to the same conclusion. As part of the decree in the first suit against the administrators, the plaintiff corporation was ordered to pay the defendant administrators $644.46 "salary due to the said Oscar * * * at his death and when such sum is so paid * * * it shall constitute a full and final settlement of the matter herein between the above named plaintiff and defendants as administrators. * * *" Appellants claim that this judgment is res judicata of the $5,000 item. But the parties to the first action were the Bear Film Company, at that time dominated and controlled by Josephine, on the one side, and Josephine, as administratrix of Oscar's estate with Uhle, on the other side. Mr. Uhle testified that he made no independent investigation of the assets of the estate. Under these circumstances the judgment could not conclude plaintiff as Oscar's successor in interest.

[26] Lastly, there is the $10,000 item. This award also rests upon the trial court's conclusion that the books of the corporation were changed after the death of Oscar so that they failed to reveal the amount in which the corporation was then indebted to him, which was $23,152.88, or $18,950 in excess of the sum paid over to his estate.

In December, 1926, pursuant to resolution, a $10,000 bonus was voted to Oscar and appropriate book entries were made. The same practice was followed in December, 1927, and 1928, except that in these two years the bonus was taken without corporate resolution. The corporate income tax prepared in 1929 reported the declaration of the bonus, and Oscar returned the $10,000 as income on his personal tax report. Subsequent to Oscar's death, and under an entry date of March 29th, the auditor made a journal entry crediting Oscar with $10,000, and then an entry debiting his account with the same amount as "Refund of Bonus. Year 1928—as per minutes Mar 29—1929—." The purported minutes of March 29th referred to in this entry recite that Oscar stated that he wished ". . . to return the Bonus of $10,000.00 voted him for the year 1928, as the Company was short of ready funds, and he wishes to make other investments for the Company, which he hoped would be more beneficial. * * *"

The minutes then show the adoption of a resolution accepting this proffered refund. The minute book also contains the purported minutes of a meeting of December 31, 1928, reciting the adoption of a resolution that the "customary yearly bonus of $10,000.00" be paid to Oscar. The evidence is in conflict as to whether such a meeting was held on December 31st. The purported minutes were typed after Oscar's death and pasted in the minute book to justify the position of the corporation in a dispute with the federal income tax authorities over its deduction of the $10,000 in its income tax return.

The employee who typed the minutes of both of the purported meetings at one point testified that the minutes of March 29th were dictated to her by Albert after Oscar's death, but this statement was shaken by contradictions on cross-examination, and it was also contradicted by the testimony of the then secretary and the auditor of the corporation and by an expert on disputed documents. However, the trial court chose to believe the statement.

[27-29] Questions as to the credibility of witnesses and the weight to be given their testimony are for the trier of the facts. As said in Turner v. Whittel, 2 Cal.App.2d 585, 588, 38 P.2d 835, 836: "* * * Although impeaching evidence in the nature of contradictions or otherwise has been received, it is still the right as well as the duty of the jury to determine to what extent they believe or disbelieve the testimony. [In re] Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am.St.Rep. 131; Secondo v. Secondo, 218 Cal. 453, 23 P.2d 752. They may likewise give credence to a witness who has falsely testified in part (Robinson v. Robinson, 159 Cal. 203, 113 P. 155), or whose testimony contains contradictions or inconsistencies. Bitsekas v. Parechanian, 67 Cal.App. 148, 226 P. 974.

An appellate court is not concerned with the question of the preponderance of the evidence but with the single inquiry whether the record contains substantial evidence tending to support the findings assailed. Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745; Johnson v. Risdon, 89 Cal.App. 768, 265 P. 505."

In the evidence as a whole there is sufficient support for the findings of the trial court to the effect that the corporate books were altered after the death of Oscar so that they would not reveal the true amount of the corporate indebtedness to him; and that the minutes of the purported meeting of March 29th were prepared and the improper entries in the books were made by employees of the corporation acting under the orders and directions of the person in control after the death of Oscar, for the purpose of depriving his estate of the money represented by said entries.

The record in this case is voluminous. The evidence bearing upon the principal issues is largely indirect or circumstantial. The conclusions reached by the learned trial judge were based upon inferences fairly deducible from what he saw and heard during the progress of the trial. There is abundant evidence of design on the part of Josephine and Albert to conceal from plaintiff and her mother the true state of Oscar's financial affairs. In this state of the case we cannot say that the trial judge was not justified in concluding as he did that the stock transfers made by Oscar to Josephine were in trust for him, and that he retained the equitable and beneficial interest therein. This conclusion seems reasonable and probable in light of the disclosures relative to the conduct of the parties involved. The remaining issues involve largely matters in the nature of accounting and there is ample evidence to sustain the conclusions reached by the trial court thereon.

The judgment is affirmed.

GIBSON, C. J., SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., and PETERS, Justice pro tem., concurred.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

28 Cal.2d 19

MONHEIT v. CIGNA et al.

BERNARD v. MONHEIT et al.

S. F. 17035.

Supreme Court of California, in Bank.
April 16, 1946.

As Modified on Denial of Rehearing
May 16, 1946

1. Taxation ⇐509, 786

The effect of varying statutory provisions in regard to the priority of general tax liens and special assessment liens, and rights under deeds given upon sales for delinquency thereunder, is that of parity and equality. Pol.Code, §§ 3771, 3785, 3787, 3897, 3898.

2. Taxation ⇐786

The statute providing that deed from city, after acquiring title for unpaid special assessments, should convey absolute title free from incumbrance except "liens" for general taxes, cannot be construed to mean that such deed will extinguish rights of purchaser of the property from the state, after sale for unpaid general taxes, on theory that the liens for general taxes were merged in the sales to and by the state and were therefore non-existent. Pol.Code §§ 3771, 3785, 3787, 3897, 3898.

3. Liens ⇐12

In order to preserve the priority of a right, a lien is not considered merged by a subsequent transaction.

4. Taxation ⇐786

The holder of title to lots by deed from city, after sale for unpaid special assessments, did not have rights superior to that of holder of a prior deed from the state based upon a sale for delinquent general taxes, but the rights of the two holders were on equal footing. Pol.Code, §§ 3771, 3785, 3787, 3897, 3898.

5. Taxation ⇐502

The law in effect at time the state executed its deed to purchaser, after acquiring title at general tax sale, governs in determining question of priority between general and special assessment liens, and not the law in effect at time the deed

was issued to the state. Pol.Code, §§ 3771, 3785, 3787, 3897, 3898.

6. Taxation ⇐786

Tax deed from the state based on title acquired for unpaid general taxes and deed from city authorities based on title acquired for unpaid special assessments are on equal footing regardless of the time that the liens arose or the deeds were executed with reference to each other. Pol. Code, §§ 3771, 3785, 3787, 3897, 3898.

7. Municipal corporations ⇐581
Taxation ⇐697(4)
Tenancy in common ⇐3, 20(1)

Purchaser of property based on delinquent special city assessments and purchaser of the same property from the state based on delinquent general taxes, being on equal footing, owned the property as tenants in common, each owning an undivided one-half interest subject to a lien in favor of each tenant against the entire property in the amount which he paid for his interest, and one could not pay off the amount the other had paid to acquire his title and thus secure to himself a clear title to all the property. Pol.Code, §§ 3771, 3785, 3787, 3897, 3898.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by A. M. Monheit against Anonio Cigna and others and R. B. Bernard to quiet title to certain lots in which defendant Bernard filed a cross-complaint. From a judgment declaring both plaintiff and cross-complainant owners of interests in the lots, the defendant named and cross-complainant appeal.

Modified and affirmed.

Prior opinion, 162 P.2d 41.

Rode, Burnhill & Rode and Lincoln Rode, all of Oakland, for appellant.

E. E. Grant, of San Francisco, for respondents.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., Harold W. Kennedy, County Counsel, and A. Curtis Smith, Deputy County Counsel, both of Los Angeles, and Henry McClernan, City Atty., of Glendale, as amici curiae on behalf of respondents.

CARTER, Justice.

Plaintiff commenced this action against defendants to quiet title to real property, basing his title on the following: The county taxes for the fiscal year 1928–1929 on the property became delinquent and the property was "sold to the state" pursuant to section 3771 of the Political Code. On July 16, 1934, the tax collector deeded the property to the state under section 3785 of the Political Code. On July 15, 1940, the tax collector sold the property to plaintiff under chapter VIIIa of title IX of part III of the Political Code, and the property was thereupon deeded by the state to plaintiff. Defendant and cross-complainant Bernard based his claim to the property on the following: In 1927 street improvement bonds were issued by the city of Oakland against the property pursuant to part III of the Improvement Act of 1911, Stats.1911, p. 730; Deering's Gen. Laws, 1937, Act 8199. The installments payable under the bonds were not paid on or after January 2, 1928. Defendant, holder of the bonds, procured a sale of the property by the city treasurer on October 16, 1940. He purchased the property and received a certificate of sale therefor on October 16, 1940, and on December 12, 1941, under the Improvement Act of 1911, a deed was executed by the city treasurer and delivered to him. The court gave judgment declaring plaintiff to be the owner of all rights acquired by the state under the deed to it, subject to the rights of defendant, and defendant to be the owner subject to plaintiff's rights. Each party claims sole ownership to the exclusion of any rights in the other. The issue is therefore one involving the respective rights of the parties in property acquired by one at a sale for delinquent county taxes and the other at a sale for delinquent special assessments levied by a city.

At the time the property was deeded to the state (1934) section 3787 of the Political Code provided: (referring to deeds to the state under § 3785) "Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien for taxes levied for municipal, or for irrigation, reclamation, protection, flood control, public util-

ity or other district purposes, or for special assessments which are collected on tax-rolls, and except any lien or assessment for other amounts which by law are collected upon tax-rolls by or for account of municipalities, and except interest and penalties on the same, and other amounts which would be paid municipalities or for their account in the event of redemption of such property from sales for such taxes, assessments or other amounts, * * *." That section was repealed in 1939, effective February 1, 1941, when the Revenue and Taxation Code became operative, Stats.1939, ch. 154, p. 1274. Its provisions were carried into the Revenue and Taxation Code (Revenue and Taxation Code, § 3520). It (§ 3787) was in effect at the time of the deed from the state to plaintiff (1940). At the time the property was deeded to the state (1934), the sections controlling a deed from the state to the purchaser of property that had been previously deeded to the state were 3897 and 3898 of the Political Code. Section 3897, as amended in 1933 and 1934, Stats. 1933, p. 2586; Stats. Ex. Sess., 1934, p. 22, provided that no sale could be made of lands deeded to the state situated in another taxing agency which has taken title to the land if the agency objects. If no objection is made, the proceeds are divided among the agencies and the deed (given under § 3898) shall convey title "free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property which are due" at the time of the sale. Pol.Code, § 3897. Those sections were again amended in 1935, Stats.1935, pp. 1437, 1441, and section 3898 in 1937, Stats.1937, ch. 916, p. 2567, with no change here pertinent. In 1939 those sections were repealed effective February 1, 1941. Stats.1939, ch. 154, p. 1274. However, at the same session section 3897 was repealed effective September 19, 1939, and sections 3833 to 3836.2 were added to the Political Code to be effective until the Revenue and Taxation Code became operative. Stats.1939, ch. 529, p. 1917. They made provision for notice to other taxing agencies similar to section 3897, but stated that if consent was withheld the sale could proceed but it would have no effect on the agencies' liens for taxes or assessments. If they consented, the sale would cancel their liens but they would share in the proceeds. Pol.Code, § 3833.4; Stats.1939, ch. 529, p. 1918, § 2. The deed from the state to the purchaser vested title "absolutely in the grantee free of all encumbrances of any kind existing before the sale, except: (a) Any lien for installments of assessments, which installments will become due after the time of the sale; (b) The lien for taxes or assessments or other rights of any taxing agency, which does not consent to the sale under this chapter; (c) Any lien for direct assessments." Pol.Code, § 3836.1, Stats.1939, ch. 529, p. 1921, § 2. "* * * 'direct assessment' means an assessment levied by a district the bonds of which are secured by assessments levied on a particular parcel of land described in the bond." Pol.Code, § 3833.2, Stats.1939, ch. 529, § 2.

The Improvement Act of 1911, as amended in 1923, p. 280, when the bonds were issued upon which Bernard's right is predicated, Stats.1911, p. 730, provided for the issuance of bonds secured by assessments levied to pay for local improvements. The assessment "shall be a first lien upon the property affected thereby until the bond issued for the payment thereof * * * shall be fully paid." Improvement Act of 1911, § 66. If the bonds are not paid the treasurer of the city sells the property and upon sale the purchaser has a lien and receives a certificate of purchase. After the lapse of a year's period of redemption he receives a deed which conveys: "Absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for State, county and municipal taxes." Stats.1911, p. 730, as amended, § 75. That provision remained the same until its repeal in 1941 when it was made a part of the Streets and Highways Code. Stats.1941, ch. 79; Streets and Highways Code, § 6555.

[1] It is thus apparent that, insofar as the Political Code sections dealing with priorities between special assessments and general tax liens are concerned, during the entire time here involved a deed *to the*

state preserved special assessment liens. However, at the time the deed here involved was made *to the state,* a deed *from the latter* to a private purchaser, if it had been made, would have conveyed title free from the special assessment lien. In other words, the deed from the state gave the purchaser rights superior to those held by the state by virtue of the deed to it. This provision for the acquisition of greater rights was altered between 1939 and 1941, the period when the deed from the state conveying the property here involved was given, by preserving the special assessment lien where the deed was from the state as well as where it was to the state. This same thought is expressed in the subsequent statutes. Revenue and Taxation Code, §§ 3520, 3712, 3900. The general policy is thus declared: "It is hereby declared to be the policy of the State and the intent of the provisions in this code contained, that the final tax deed or deeds of all taxing agencies, including counties, cities and counties, cities, irrigation districts, reclamation districts, and other taxing agencies that annually levy, assess and collect taxes or assessments upon real property within the State, should be and they are hereby declared to be upon a parity with each other, and that regardless of when the levy of such taxes or assessments is or has been made, and regardless of when the final tax deed or assessment deed is or has been taken by such taxing agency, that the rights of all taxing agencies and all such deeds shall be equal and upon a parity with each other." Revenue and Taxation Code, § 3900. If it be assumed that the rule giving priority to general tax deeds from the state of tax-deeded property over special assessments as it existed in 1934 when the property was deeded to the state, Pol.Code, § 3897, is applicable though the deed from the state was not given until after that priority ceased by reason of the change in the law, Pol.Code, § 3836.2, we have the counteracting provisions in the Improvement Act of 1911, that the assessment shall be a first lien on the property and the deed given to a purchaser after a sale for delinquency in the assessment shall convey the property clear of all other liens except for the lien of county taxes. The effect of those varying provisions in regard to the priority of the two liens and rights under deeds given upon sales for delinquency thereunder has been settled in this state and is that of parity and equality. That was determined in La Mesa etc. Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143. See, also, Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 82. In the La Mesa case, property had been deeded to irrigation districts after sale for delinquent assessments levied by the districts, where there were unpaid county taxes against the property and some of the property had been previously and some subsequently deeded to the state pursuant to section 3785 of the Political Code. The irrigation district law provided that a deed of property for delinquent assessments conveyed "absolute title * * * free of all encumbrances." The court stated the controlling rule to be that in the absence of statute a lien for general state or county taxes is superior to a lien for special assessments of every kind, that every presumption is against a legislative intent to prefer the lien of special assessments, and that "in the absence of clear statutory provisions to the contrary, a general tax lien is not only superior to an assessment lien, but a deed executed in the enforcement of the general tax lien will destroy the assessment lien and, conversely, a deed executed in the enforcement of an assessment lien will not extinguish a general tax lien." 216 Cal. 736, 17 P.2d 146. Reference is then made to section 3787 and it is held that: "This section has been construed by our own appellate court and by the Supreme Court of at least one other state which has enacted it into their law, from which it is concluded that *the legislative intent is to place all taxes, both for county, municipal and other governmental agency purposes and taxes in the form of assessments in favor of special agencies of the state upon an equal footing before the law.* (Citations.) [Emphasis added.]

"From the above authority and upon our construction of the section we may now safely conclude that under our system of taxation liens in favor of county and municipal corporations and special assessments, under the authority of state agencies for public purposes, are all on an

equality. By this is meant that in case of delinquency a deed to any one of these agencies for such taxes will not obliterate the existing liens on the property in favor of any or all of the others." 216 Cal. 737, 17 P.2d 146. In dealing with the effect of the clause in the irrigation district law that a deed executed after a sale for delinquent assessments passes title free of all encumbrances, the court states: "It is sufficient for the purposes of this cause to hold that land deeded to a state agency for delinquent taxes or assessments does not ipso facto necessarily destroy existing liens in favor of other state agencies or merge them into the tax deed, and, further, to hold that such liens are extinguished or merged only when necessary to protect property impressed with a public use. This construction of said section harmonizes with other provisions of the Political Code on the same subject and also with cognate provisions in the special acts under which the varied types of public corporations existing in this state operate." 216 Cal. 739, 17 P.2d 147. The Improvement Act of 1911 involved in the instant case (compared with the irrigation district law) calls more forcibly for the application of the rule in the La Mesa case, as it is not as broad as the irrigation district law which excluded all encumbrances without exception.

[2-5] The act here involved (Improvement Act of 1911) excepts *liens* for taxes, and it is urged that when the property is deeded to the state, and by the state to the purchaser, the tax lien is extinguished, and hence the clause in the act excepting only *liens* cannot apply. In the instant case it is true that we have a deed, that is, the lien has been foreclosed, and the Political Code and Improvement Act refer to liens as excepted, but there were also deeds in the La Mesa case, and we believe the holding there disposes of the matter. Moreover, if that contention were to prevail, a reward would be given for delay. If the general taxing agency were prompt in its procedure to obtain a deed or convey the property to a purchaser and thus return it to the tax rolls, it and the purchaser would suffer the penalty of having their interest destroyed by a later special assessment deed. There would be a strong motive to delay in perfecting a title after the lien became effective to avoid the penalty, all to the detriment of the taxing agencies. Also it is a settled principle that in order to preserve the priority of a right (here to preserve parity), a lien is not considered merged by a subsequent transaction. At any rate equity will save the priority. (16 Cal.Jur. 335.) From the foregoing we conclude that the defendant-holder of title by deed after sale for delinquent special assessments does not have a right superior to that of the plaintiff-holder of a deed from the state based upon a sale for delinquent general taxes, and the reverse is also true.

If we assume that a deed from the state executed prior to the 1939 amendment, Pol.Code, § 3897, would have destroyed the special assessment lien and title acquired pursuant thereto, see Rostain v. Guggenheim, 63 Cal.App.2d 127, 146 P.2d 247; Campbell v. Woolner, 57 Cal.App.2d 511, 134 P.2d 822; Smith v. Addiego, 54 Cal. App.2d 230, 129 P.2d 953; Brewer v. Feigenbaum, 47 Cal.App.2d 171, 117 P.2d 737, still under the law in effect at the time the deed was issued to the state, and at the time the state executed the deed to the purchaser in the instant case, which was after 1939, the title conveyed by the state did not cut off special assessment liens. The two liens were, under La Mesa, etc., Irr. Dist. v. Hornbeck, supra, on a parity. The parity doctrine has been a part of the law for many years and has been expressly declared the policy of this state by the Revenue and Taxation Code. We do not believe that that policy should be thwarted by the circumstance that because the law in effect at the time the deed was given to the state seemingly extinguished such liens, it should continue to apply when the deed from the state was made after a change in the law. It is not a case where the interest of the property owner in the taxed property is involved. See Bray v. Jones, 20 Cal.2d 858, 129 P.2d 357, 364. We know of no reason why the state may not declare a deed from it, with reference to its effect upon conflicting tax liens, to be different from that under the law as declared by it when it received the

deed. That is precisely what it did in adopting section 3836.1 of the Political Code to cover the period from 1939 to 1941, and thereafter by the Revenue and Taxation Code. It is the law in effect when the state issues its deed to the purchaser that governs.

[6] Not only do the tax deeds from the respective taxing agencies stand on a parity with relation to whether one destroys the other when we are not concerned with the time when the liens from which they flowed arose, but, moreover, in order that that parity and equality be made real and fully significant, it must follow that the time such liens arose or the deeds were executed with reference to each other, is immaterial. It has been held, in dealing with successive tax or assessment liens by the same taxing agency, that, in the absence of statute, the last in time is first in right. See Raisch v. Myers, Cal.Sup., 167 P.2d 198; Cullinan v. Grey, 18 Cal.2d 247, 115 P.2d 460; Thompson v. Clark, 6 Cal.2d 285, 57 P.2d 490; Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408; Balaam v. Pacific States S. & L. Co., 219 Cal. 612, 28 P.2d 1053; Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296; Cowell v. Washburn, 22 Cal. 519, 520; Diehl v. Hanrahan, 68 Cal.App.2d 32, 155 P.2d 853. Be that as it may, it is clear that under the statutes here involved, where we have separate taxing agencies and purposes, and a general tax lien against a special assessment lien, we should apply the parity rule without qualification. There may be some basis for the last mentioned distinction. See Cullinan v. Grey, supra, 18 Cal.2d 253, 115 P.2d 460. So far as tax deeds are concerned, if the rule that the first shall be last and the last shall be first is followed, the parity principle is seriously impaired, if not destroyed. It would only apply when the liens attached at the identical time, a situation occurring in a small minority of cases. We believe the principle stated in La Mesa etc. Irr. Dist. v. Hornbeck, supra, and expressly declared by the Legislature since the transactions here involved, Revenue and Taxation Code, § 3900, should control in cases of this character.

[7] This brings us to the difficult question of the character and extent of the interest and the nature of the estate in the property of the holders of deeds from the respective taxing agencies. It cannot be held, and preserve the principle of parity in its fullest sense, that the holder of one deed may pay off the amount the other has paid to acquire his title and thus secure to himself a clear title to all the property. The property may have greatly increased in value, thus giving a great advantage to the one permitted to pay off the other. In such event the equality and parity of right would be lost. Since there is no priority as between the several tax and assessment liens and since several purchasers of the same property hold the interests conveyed on a parity with each other, the respective purchasers become tenants in common. Also, since the property was originally subject to more than one lien on an equal basis, that is, without priority, the property should be subject to liens to the extent of the respective purchase prices paid. In that manner each purchaser is given the full benefit of the investment made by him in the purchase of the property. Otherwise absurd results would follow. One purchaser of the property would receive his interest for a few dollars, while another might have paid thousands. To effect equality and parity as between the co-owners there is therefore necessarily an equitable lien against the property in favor of each co-tenant to the extent of the amount paid by him. The result of such liens as between the co-tenants would be that in the event of the subsequent sale of the entire property, each co-tenant would be entitled to reimbursement for the amount paid by him before equal division of any excess. Should the property bring an amount less than the aggregate purchase sums, the amount of each co-tenant's reimbursement would be decreased proportionately. In the event of sale by one co-tenant, or in the event of partition, each co-tenant's share would be subject to one-half the amount of each lien as continued against the property.

It is not clear whether the judgment rendered by the trial court determines the rights of the parties in accordance with

the foregoing pronouncement, and the judgment is therefore modified to provide that the title to the property here involved is held by plaintiff and cross-defendant Monheit and defendant and cross-complainant Bernard as tenants in common, each owning an undivided one-half interest therein, subject to a lien in favor of each tenant against the entire property in the amount which he paid for his interest, and as so modified, the judgment is affirmed. Neither party to recover costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



74 Cal.App.2d 422

CATE et ux. v. BOURZAC et al.

Civ. 3199.

District Court of Appeal, Fourth District, California.

May 9, 1946.

As Modified on Denial of Rehearing June 7, 1946.

1. Municipal corporations ⇐581
Taxation ⇐697(4)
Tenancy in common ⇐3

Plaintiffs who claimed land under a sale for delinquent irrigation district taxes and defendants who claimed same land under a deed from the state after a sale for delinquent county taxes owned an undivided one-half interest in the land as tenants in common, the parity rule being applicable subject to a lien in favor of each against the entire property in the amount paid for the respective interests.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Clyde E. Cate and wife against Paul Bourzac and Rose Bourzac, and others, to quiet title to real property, in which defendants filed cross-complaint. From judgment quieting title to the real property involved in the defendants, plaintiffs appeal.

Judgment reversed with instructions.

Ralph Robinson, of Fresno, for appellants.

Cecil E. Edgar and Edmond A. Chevalier, both of Fresno, for respondents.

BARNARD, Justice.

In this quiet title action the plaintiffs appeal from a judgment quieting title to the real property involved in the defendants.

The appeal is presented on an agreed statement and the sole issue is as to the respective rights of the appellants, who claim under a sale for delinquent irrigation district taxes, and of the respondents, who claim under a deed from the state after a sale for delinquent county taxes.

The property in question was sold to the state on June 8, 1935, for delinquent taxes for the fiscal year 1934–35. Pursuant to that sale the property was deeded to the state on June 21, 1940. On March 23, 1945, it was deeded by the state to the respondents as the purchasers at a tax sale held on that date.

In the meantime, the property was deeded to the Fresno Irrigation District, for delinquent irrigation taxes, on September 20, 1938. On March 10, 1941, the Fresno Irrigation District conveyed the property by quitclaim deed to L. C. White, who conveyed it by quitclaim deed to the appellants on March 24, 1941.

On the undisputed facts before us the only question of law raised has been definitely settled by the recent case of Monheit v. Cigna, Cal., 168 P.2d 965. In that case, the court said: "* * * under the law in effect at the time the deed was issued to the state, and at the time the state executed the deed to the purchaser in the instant case, which was after 1939, the title conveyed by the state did not cut off special assessment liens. The two liens were, under La Mesa, etc., Irr. Dist. v. Hornbeck, supra [216 Cal. 730, 17 P.2d 143], on a parity." In the case now before us both the deed to the state and the deed from the state to the respondents were made after 1939, the former on June 29, 1940, and the latter on March 27, 1945.

There is no distinction between the two cases on the ground that the present case

involves, on the one hand, an assessment and sale for irrigation district taxes while the case cited involved an assessment and sale under street bonds. Each was a special assessment within the meaning of the rule laid down in the case cited, and an analysis of the pertinent statutes and decisions compels the conclusion that there is no difference, in this regard, between rights acquired through a deed based upon delinquent irrigation district taxes and rights acquired through a deed based upon sales for delinquent street assessments. In the case above cited, after referring to successive tax or assessment liens by the same taxing agency, the court said: "Be that as it may, it is clear that under the statutes here involved, where we have separate taxing agencies and purposes, and a general tax lien against a special assessment lien, we should apply the parity rule without qualification."

It follows that the parity rule is here applicable and that the appellants and respondents, respectively, own this property as tenants in common, each set of parties owning an undivided one half interest therein subject to a lien in favor of each against the entire property in the amount paid for the respective interests.

The judgment is reversed with instructions to the trial court to make findings and enter a judgment in accordance with the views herein expressed.

MARKS and GRIFFIN, JJ., concur.



28 Cal.2d 147

OLWELL et al. v. HOPKINS et al.

L. A. 19310.

Supreme Court of California, in Bank.

May 7, 1946.

1. Judgment ⇐570(5)

Ordinarily, a judgment of dismissal is not a judgment on merits, and hence does not bar another action on same cause of action, but a dismissal may follow actual determination on merits, so as to bar subsequent action.

2. Judgment ⇐570(5)

A judgment dismissing action on motion, alleging that contract on which action was based was void because corporate party thereto had not qualified to do business in state, was on merits, and hence barred subsequent action on same cause.

3. Judgment ⇐570(5)

The fact that trial judge stated, in memorandum opinion on dismissal of action as based on void contract, that such issue, raised by defendant, should be decided before trial on facts, and did not determine whether plaintiffs were entitled to damages, accounting, or declaration that defendants held certain property as constructive trustees for plaintiffs, as prayed by them, did not prevent judgment of dismissal from operating as bar to subsequent action on same cause, as decision on merits is not necessarily decision on facts and determination of such other questions was unnecessary.

4. Judgment ⇐570(5), 956(2)

A judgment dismissing action, wherein record showed that only issue determined was that raised by defendant's contention that cause of action was based on void contract, was on merits, and hence res judicata on such issue, though no grounds for dismissal appeared on face of judgment, as evidence was admissible to identify issues adjudicated in former action.

5. Judgment ⇐540, 713(2)

A final judgment on merits bars subsequent action on same cause between parties who are the same in law and settles not only every issue raised in first action, but every issue which might have been raised therein.

6. Judgment ⇐577(1)

A judgment dismissing action based on void contract, being res judicata in subsequent action between same parties on same cause, plaintiff's contention therein that cause of action depends, not on contract, but on alleged fraudulent acquisition of their property by defendants, cannot be considered, since erroneous judgment is as conclusive as correct one and plaintiff should have appealed from former judg-

ment if they believed that court erroneously denied them recovery.

7. Appeal and error ⇐1040(1)

Where complaint discloses number and title of a former action and facts that it was brought by plaintiffs against same defendant in same court as present action, that defendant's motion to dismiss previous action was granted, and that plaintiffs' motion for leave to file third amended complaint was denied, judgment dismissing present action as barred by judgment dismissing previous action on merits will not be reversed, even if defendant should have raised defense of res judicata by answer, instead of demurrer to and motion to dismiss complaint, since record of former action showed that plaintiffs could not overcome such defense.

8. Judgment ⇐958(1)

A judgment dismissing action as barred by judgment dismissing previous action on same cause was not erroneous as denying plaintiff's right to trial of issue of res judicata under statute, though such defense was raised by demurrer to and motion to dismiss complaint, instead of answer thereto, as evidence at trial under such statute would be record of former action, which was introduced at hearing on defendants' motion, and such trial would take place before trial of any other issue as in case of hearing on motion. Code Civ.Proc. § 597.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Eugene E. Olwell and another against W. L. Hopkins and others to declare defendants constructive trustees of certain realty for plaintiffs, require accounting, and recover damages. From a judgment of dismissal after sustaining a demurrer to the complaint without leave to amend, plaintiffs appeal.

Affirmed.

Prior opinion, 162 P.2d 297.

Norris Montgomery, Heaney, Price, Postel & Parma, and Francis Price, all of Santa Barbara, for appellants.

Schauer, Ryon & McMahon and J. F. Goux, all of Santa Barbara, and Combs & Murphine, of Los Angeles, for respondents.

TRAYNOR, Justice.

Defendant W. L. Hopkins and Independent Brokerage Company, a Washington corporation, agreed orally in 1927 to carry on joint farming operations in Santa Barbara County. The corporation was dissolved in 1936, and its business and assets transferred to a partnership composed of Eugene E. Olwell and Murray M. Olwell, the plaintiffs in the present action, and Merritt Bloxom. In 1942 the partnership transferred its business and assets to plaintiffs. The joint farming operations were discontinued in 1937.

In January, 1941, plaintiffs and their partner brought an action against defendants in the Superior Court of Santa Barbara County. Defendants filed an answer and thereafter moved to dismiss the action on the ground that since Independent Brokerage Company had not qualified to do business in California when it entered into the contract upon which the action was based, the contract was void under the laws then in effect in this state. The motion was heard and both parties introduced documentary evidence. Defendants established that up to December 1, 1942, the corporation had not qualified to do business in this state. The court dismissed the action without making any findings or conclusions of law, and its judgment became final.

The present action was begun in January, 1943, upon the same cause of action. In their complaint plaintiffs pleaded the contract entered into by defendant W. L. Hopkins and Independent Brokerage Company, alleged that defendant W. L. Hopkins fraudulently concealed certain facts connected with the joint operations under that contract and prayed that defendants be declared constructive trustees of certain real property for plaintiffs. They also sought an accounting and damages. The complaint took note of the filing and dismissal of the former action. The trial court sustained defendants' demurrer to the complaint without leave to amend and

granted their motion to dismiss the action on the grounds that it was barred by the former judgment and that the contract upon which plaintiffs' cause of action depended was void. Plaintiffs appeal.

[1] Plaintiffs contend that defendants' motion to dismiss the former action amounted to a mere plea in abatement and that the judgment rendered upon that plea was therefore not on the merits and cannot be res judicata in the present action. Ordinarily a judgment of dismissal is not a judgment on the merits and therefore does not operate as a bar to another action on the same cause of action. This court has recognized, however, that a dismissal may follow an actual determination on the merits (Goddard v. Security Title Ins. & Guar. Co., 14 Cal.2d 47, 53, 92 P.2d 804; see Campanella v. Campanella, 204 Cal. 515, 520, 269 P. 433; City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 223, 50 P. 277; Moch v. Superior Court, 39 Cal.App. 471, 475, 179 P. 440; Saul v. Moscone, 16 Cal.App. 506, 510, 118 P. 452) as have courts in other jurisdictions. See cases cited in 2 Freeman on Judgments, 5th Ed., § 752. In Moch v. Superior Court, supra, 39 Cal.App. at page 475, 179 P. at page 441, the court said: "In considering * * * whether or not this judgment was an adjudication of the merits of the controversy, * * * the word 'dismissed' is not determinative. The cases are not rare wherein judgments or orders purporting to be merely 'dismissals' have been held to be final adjudications upon the merits. This question is to be determined, not on the basis of any single word or phrase used, but upon a consideration of the entire 'judgment,' together with the pleadings and the findings. * * *" In McMickens v. McMickens, 220 Cal. 731, 734, 32 P.2d 597, consideration of the merits of the plaintiff's position was held to be foreclosed by the "judgment of dismissal" entered in a former action. The dismissal in that case may be distinguishable on the ground that it was entered upon the sustaining of a general demurrer without leave to amend, but the case nonetheless illustrates the fact that a judgment is not precluded from being a bar to a subsequent action merely because it is one of dismissal. Plaintiffs contend that the Code of Civil Procedure does not provide for the dismissal of actions decided upon the merits. The question is not, however, whether the trial court should have rendered a judgment other than of dismissal in the former action, but whether the judgment that it rendered was on the merits. An inquiry must therefore be made in the present case into the grounds supporting the judgment of dismissal in the former action.

[2, 3] At the hearing upon their motion to dismiss the present action, defendants introduced in evidence the record of the first action. It is clear from that record that the one issue passed upon by the trial court in dismissing the first action was that raised by defendants' contention that plaintiffs' cause of action was based upon a contract that was void. The defense thus interposed went to the merits of plainiffs' cause of action. Defendants did not merely contend that plaintiffs had no capacity to sue or that they had started their action prematurely or in the wrong court or that that particular action was barred on account of some other technical defect. See 15 Cal.Jur., Judgments, § 183; Rest., Judgments, § 49. They raised an issue as to plaintiffs' right to recover under any circumstances upon their alleged cause of action and upon that issue the court rendered judgment against plaintiffs. Plaintiffs point out that the trial judge stated in his memorandum opinion that the issue raised by defendants should be decided "before a trial is had upon the facts." A decision on the merits, however, is not necessarily a decision upon the facts. It is true that the court did not determine whether, assuming the validity of the contract relied upon by plaintiffs, they were entitled to damages, to an accounting, or to a declaration that defendants held certain property as constructive trustees. Such determination, however, was unnecessary since the court had just determined that plaintiffs were barred as a matter of law from any recovery.

In Maryland C. Co. v. Superior Court, 91 Cal.App. 356, 267 P. 169, upon which plaintiffs rely, a writ of mandate was sought to force the dismissal by the su-

perior court of an action brought upon a contract alleged to be void on the ground that the plaintiff corporation had not paid its license and franchise taxes. In denying the writ the court stated at page 359 of 91 Cal.App., at page 170 of 267 P.: "No reason exists why an action should be dismissed instead of being decided upon its merits because the claim sued upon is founded upon a void contract." In the present case, however, the dismissal occurred after and not in lieu of a determination on the merits. In Home Owners' Loan Corp. v. Gordon, 36 Cal.App.2d 189, 192, 97 P.2d 845, the defense that the plaintiff corporation had not qualified to do business in this state was said to be a defense in abatement. In the present case, however, the contention that plaintiffs failed to comply with certain statutory provisions is raised not merely as a challenge to their right to sue in this state, an obvious defense in abatement, but as a challenge to the validity of the contract upon which they rely.

[4] Plaintiffs contend that in the absence of findings, the former judgment alone may be resorted to for a determination of the issues concluded by that judgment and that, since it purports merely to dismiss the action without giving any grounds for such dismissal, it cannot be res judicata upon any issue of law or fact because a judgment must be held not to have been rendered on the merits when the grounds upon which it was rendered do not appear on its face. It is settled, however, that evidence is admissible to identify the issues adjudicated in a former action. Russell v. Place, 94 U.S. 606, 608, 24 L.Ed. 214; Graves v. Hebbron, 125 Cal. 400, 406, 58 P. 12; Gray v. Dougherty, 25 Cal. 266, 272; Johnston v. Ota, 43 Cal.App.2d 94, 97, 110 P.2d 507; Goodman v. Dam, 112 Cal.App. 244, 246, 296 P. 623; see 30 Am. Jur. 998. McDuff v. McDuff, 45 Cal.App. 53, 187 P. 37, upon which plaintiffs rely, is distinguishable. The cause of action sued upon in that case was not the same as that upon which the judgment alleged to be res judicata had been rendered, so that the judgment was conclusive only as to the issues actually raised and determined in the former action. See 15 Cal.Jur., Judgments, § 189. Since the record in that suit failed to disclose the ground upon which the judgment was based, that judgment was held not to conclude any issue raised in the second action.

[5, 6] A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action. Dobbins v. Title Guar. & Trust Co., 22 Cal.2d 64, 70, 136 P.2d 572; Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242, and cases cited therein; see 15 Cal.Jur., Judgments, § 189; 30 Am.Jur. 912; Rest., Judgments, § 63. Thus, the former judgment being res judicata in the present action, plaintiffs' contention that their cause of action depends not upon any contract, but on the alleged fraudulent acquisition of their property by defendants cannot be considered. Since "an erroneous judgment is as conclusive as a correct one" (Panos v. Great Western Packing Co., supra, 21 Cal.2d at page 640, 134 P.2d at page 244), plaintiffs should have appealed from the former judgment, if in their opinion the court rendering that judgment misunderstood their cause of action or otherwise erroneously denied them recovery. Their contention that the doctrine of election of remedies would not prevent them from recovering in the present action is immaterial, for defendants do not rely on that doctrine but on that of res judicata.

[7] Plaintiffs contend that the defense of res judicata cannot be raised on demurrer in the present action on the ground that the facts alleged in the complaint are not sufficient to support that defense. The complaint discloses the number and title of the former action and that it was brought against the same defendants and in the same court as the present action; that defendants answered plaintiffs' second amended complaint and subsequently moved to dismiss the action while plaintiffs moved for leave to file a third amended complaint; and that the court granted the

motion of defendants and denied that of plaintiffs. There is no need to determine whether the demurrer can be sustained on the ground that the record of the former action was incorporated into the complaint by the reference to the title and number of that action, or that the court's refusal to allow plaintiffs to file a third amended complaint is consistent only with the conclusion that defendants had presented such an absolute defense on the merits that no amendment could possibly improve plaintiffs' position. Assuming that defendants should have raised the defense of res judicata by answer instead of by demurrer and motion to dismiss, the fact remains that to reverse the judgment on that ground would serve no useful purpose, since the record of the former action makes it clear that plaintiffs cannot overcome that defense.

[8] Plaintiffs contend that under section 597 of the Code of Civil Procedure they were entitled to a trial of the issue of res judicata. That section provides: "When the answer pleads that the action is barred * * * by a prior judgment, * * * or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense * * * before the trial of any other issue in the case, and if the decision * * * upon any special defense so tried * * * is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had * * *." Although the defense of res judicata in the present action was raised by demurrer and motion to dismiss and not by answer, it was tried at the hearing upon that motion as it would have been tried under the provisions of section 597. The evidence at a trial under that section would be the record of the former action, which was introduced at the hearing upon defendants' motion to dismiss, and since that trial would take place "before the trial of any other issue," plaintiffs would find themselves in exactly the same position as they are now.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concurred.

SCHAUER, J., did not participate therein.



74 Cal.App.2d 523

ROBESKY v. ROBESKY.

Civ. 3511.

District Court of Appeal, Fourth District, California.

May 17, 1946.

1. Divorce ⇐303(1)

Where custody of child is involved in divorce action, the trial court retains jurisdiction so that the decree may be modified and the custody changed.

2. Divorce ⇐303(2)

A party to divorce action seeking to change custody of child should show a change of circumstances occurring since the rendition of an earlier order awarding the custody to one parent.

3. Divorce ⇐298(1)

In determining which divorced parent should have custody of the child, the trial court is primarily concerned with the welfare of the child and not with the wishes of either parent.

4. Divorce ⇐303(3), 312

An application to change custody of child from one divorced parent to the other parent is addressed to trial judge's sound discretion, the exercise of which will not be disturbed except on clear showing of breach of discretion.

5. Divorce ⇐303(3)

An order modifying divorce decree by changing custody of child from father to

mother was not an abuse of discretion, where child would live in a good house and would receive every attention and care necessary and proper for her physical, moral and educational development, notwithstanding that father would give child an equally good home and proper care. Civ.Code, § 138.

6. Divorce ⇐303(2)

A divorced mother's recovery of her health and the renewal of her ability to care for her child, and paternal grandmother's inability to continue caring for child, were sufficient change in circumstances to justify change of custody of child from divorced father to divorced mother. Civ.Code, § 138.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Divorce action by Maxine Young Robesky against Donald A. Robesky. The plaintiff was granted a divorce and the defendant was awarded the custody of the minor child of the parties. From an order modifying the interlocutory and final decree of divorce by changing the custody of the child from the defendant to the plaintiff, the defendant appeals.

Order affirmed.

Jackson Mahon, of Bakersfield, for appellant.

Mack, Werdell & Bianco, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from an order modifying an interlocutory and a final decree of divorce by changing the custody of Maxine Edith Robesky from defendant, the father, to plaintiff, the mother.

Plaintiff and defendant were married on July 18, 1936. Maxine was their only child. Plaintiff obtained an interlocutory decree of divorce from defendant on July 21, 1942. The final decree was entered on September 14, 1943. The parties had made a property settlement and the custody of Maxine, then four years of age, was given to her father by agreement of the parties.

At the commencement of the hearing of the order to show cause why the custody of Maxine should not be awarded to plaintiff it was stipulated that both the father and the mother were fit and proper persons to have custody of the child.

By stipulation the order to show cause was heard on affidavits. Many of them were filed and all of them contain much irrelevant, immaterial and redundant matter. When these matters are eliminated the material facts do not appear to be in serious dispute.

At the time of the interlocutory decree of divorce defendant was a teacher in a high school in Bakersfield. He placed Maxine with Edith Robesky, his mother, who lived in Glendale. Maxine remained with her grandmother until July, 1945.

At the time of the divorce plaintiff was in poor health, weighing only 85 pounds. After a few months she sufficiently regained her health so that she entered the employment of the United States Government at San Bernardino, later being transferred to Los Angeles. She accepted this employment so she could be near and frequently visit Maxine.

Defendant enlisted in the Navy in December, 1942. He was commissioned and served over seas from May, 1943, to December, 1944. He married Margaret Cain in that month. She was a teacher in the same high school where defendant had been employed and the affidavits picture her as a refined and competent lady.

Defendant and Margaret eventually took up their residence at the Naval Advance Base, personnel department, at San Bruno, California, where Maxine lived with them from July, 1945, to August, 1945. In August, 1945, defendant and Margaret permitted plaintiff to take Maxine to her home in Bakersfield under the promise, as maintained by defendant, that Maxine would be returned in September, 1945. Plaintiff failed to return Maxine and defendant obtained possession of her through habeas corpus proceedings. It was stipulated that these proceedings should not be considered as having any bearing on this proceeding to modify the decrees.

It appeared during the arguments that defendant has been discharged from the Navy and has returned to Bakersfield where he is living with his wife in their own home which is a suitable home for Maxine.

Plaintiff is living with her parents in Bakersfield. They are substantial people of means with a very good home in which is an apartment which can be occupied by plaintiff and Maxine. They will furnish this apartment to plaintiff with sufficient money for her support and that of Maxine if the $30 per month which the trial court ordered defendant to pay for the support of the child should not prove sufficient for that purpose.

It seems clear that either home open to Maxine is eminently suitable for her upbringing, moral and physical training and education. Thus it can be seen that the trial judge had a close and difficult question submitted to him when he was called upon to decide which parent should have the custody of the child.

[1, 2] In divorce actions where the custody of a child is involved the trial court retains jurisdiction so that the decrees may be modified and the custody changed. It is usually, but not always, true that the party seeking to change the custody should show a change of circumstances occurring since the rendition of an earlier order awarding the custody to one parent. Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719.

[3] It is also established that the trial court, in determining which parent shall have custody of a child, is primarily concerned with the welfare of the child, not with the wishes of either parent. Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206.

[4, 5] An application to change the custody of a child from one parent to the other is addressed to the sound discretion of the trial judge and his order will not be reversed except on a clear showing of a breach of that discretion. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Foster v. Foster, supra; Baldwin v. Baldwin, 111 Cal.App. 148, 149, 295 P. 93. Thus the ultimate question before us is this: Was there any showing of such a breach of discretion in the instant case? The answer must be "No". Maxine will live in a good home and will receive every attention and care necessary and proper for her physical, moral and educational development into childhood and womanhood. It is true that the affidavits indicate that defendant would have given Maxine an equally good home and proper care but this is not a sufficient basis for the conclusion that it was a breach of discretion to give the custody of a seven year old girl to her natural mother. Sec. 138, Civil Code. As was said in Peterson v. Peterson, 64 Cal.App.2d 631, 149 P.2d 206, 209: "Section 138 of the Civil Code provides that a court in awarding custody is to be guided (1) by what appears to be for the best interests of the child and (2) as between parents adversely claiming the custody neither parent is entitled to it as of right, but other things being equal if the child is of tender years it should be given to its mother. Further amplification of the quoted portion of said section is found in the case of Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96, 100, wherein it is stated that the mother is the natural custodian of her young, and that the code exacts that she shall have custody of her child, everything else being equal, and that 'in the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give—and so normally they should be in her custody.'"

[6] Defendant urges there was not a sufficient showing of any change of circumstances to justify the changing of the original award of the custody of Maxine to him. We cannot agree with this contention. Plaintiff was ill and therefore unable to care for her child when the award was first made. She has recovered her health and now can care for her daughter. Maxine was originally cared for in the home of her paternal grandmother who could not continue to care for her after July, 1945. These two changes in conditions are sufficiently material to fulfill the requirements of the law so we need not speculate on the care which would have been given the little girl by her stepmother. It is true that some mothers fail in their

maternal duties while some stepmothers adequately substitute for the natural mother. Both women are pictured here as possessing high qualities of womanhood, but there is a change of circumstances in this which the trial judge might have considered.

As there is ample proof of changed circumstances, and as there is no clear proof of a breach of discretion in giving the natural mother of Maxine the custody of the girl, we cannot disturb the order before us for review.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



LUMBERMEN'S MUT. CASUALTY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15223.

District Court of Appeal, Second District, Division 2, California.

May 3, 1946.

Rehearing Denied May 24, 1946.

Hearing Granted July 2, 1946.

1. Workmen's compensation ⇐1358, 1362, 1364

Workman claiming compensation has burden to prove that he sustained an injury arising out of and in the course of his employment and that injury proximately caused disability complained of, and, if injury is by disease, he has burden to establish relation of cause and effect between employment and disease, affirmatively showing existence of a reasonable probability that he contracted disease because of his employment. Labor Code, §§ 3600, 5705.

2. Workmen's compensation ⇐1417

Where workman's disability was caused by cerebral apoplexy, whether workman's employment proximately caused his disability was a question that could have been determined only by medical experts and in absence of such proof workman was not entitled to an award. Labor Code, §§ 3600, 5703, 5705.

3. Workmen's compensation ⇐1396

Where compensation claimant failed to comply with rule of Industrial Accident Commission pertaining to what physician's report should include with reference to background for opinions expressed, reports of claimant's medical experts were unavailing as substantial evidence. Rules of Practice and Procedure Industrial Accident Commission, § 2, rule 11.

4. Witnesses ⇐266

A defendant in a judicial or departmental proceeding is not required to cross-examine adversary witness, that being a privilege to which resort is made only for purpose of eliciting the whole truth or of demonstrating the vice of his testimony.

5. Evidence ⇐75

No unfavorable inference can arise from a party's failure to cross-examine a hostile witness.

6. Workmen's compensation ⇐1396

Where compensation claimant failed to present medical reports as required by rules of Industrial Accident Commission, claimant and commission could not supply deficiencies of physician's testimony by complaining of neglect of employer and insurer to cross-examine physician before the hearing referee. Rules of Practice and Procedure Industrial Accident Commission, § 2, rule 11.

Original proceeding on the petition of Lumbermen's Mutual Casualty Company and Guy F. Atkinson Company for a review of an award by the Industrial Accident Commission of the State of California of compensation to Joseph M. Cacozza.

Award annulled.

J. L. Kearney, Herbert S. McCartney, and Howard J. Scott, all of Los Angeles, for petitioners.

R. C. McKellips, of San Francisco, and Edward A. Sarkisian and John A. Rowe,

Jr., both of Los Angeles, for Industrial Accident Commission.

MOORE, Presiding Justice.

Joseph Cacozza obtained an award from respondent commission for $30 weekly payments to be made by Guy F. Atkinson Company. Petitioners seek an annulment of such award on the grounds (1) that the evidence does not support the finding that applicant's injury arose out of and occurred in the course of his employment, (2) and that petitioners were denied due process of law in several designated respects. Inasmuch as the award must be annulled upon the first ground an enlarged statement of the second point will not be necessary.

Cacozza had worked for respondent Atkinson Company in 1943 and 1944, first as a carpenter and then after November 6, 1944, at lighter work as a derrick operator until February 7, 1945. On that day he arrived at his home before 6 o'clock, ate his dinner, read his paper, listened to his radio and retired at 10:30. Finding himself dizzy on awaking at 4 a. m. he returned to his bed and slept until he was awakened by his alarm at 6 o'clock when he discovered that his right side, leg and arm were numb. He exhibited no symptoms except "generalized feeling of tiredness" which had attended him for some time prior to his disability. Having been advised by his physicians that he had suffered a stroke of apoplexy and that it had been brought on by excessive overwork and long hours, he instituted this proceeding for compensation. The referee who heard the matter made a finding in statutory language that Cacozza had "sustained injury arising out of and occurring in the course of his employment, consisting of cerebral apoplexy"; and awarded him compensation payable weekly during the continuance of his disability. In his "Report of Referee" he recited that applicant was in his fifty-seventh year at the time of his stroke; that he "sat down at his work and worked the levers and brakes with his hands and feet"; that the hours with the employer were very long; that he worked from 8 o'clock a. m. for ten to twenty hours a day; frequently worked until 2 or 3 o'clock in the morning; had often asked for relief without success. Notwithstanding the reviewing referee's recommendation that a rehearing be granted on the ground "that applicant has not proved his case," the commission denied the rehearing and approved of the award.

[1] For a workman to be entitled to an award by the commission he must show that he sustained his injury arising out of and during the course of his employment, and that such injury proximately caused the disability of which he complains. Labor Code, § 3600. And if the injury is by disease, the relation of cause and effect between the employment and the disease must be established and "it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment." Bethlehem Steel Co. v. Industrial Accident Commission, 21 Cal.2d 742, 744, 135 P.2d 153, 154. The burden rests upon the applicant to establish that his disability is due to an injury received in the course of his employment. Labor Code, § 5705.

No untoward incident occurred in the life of applicant on his last day of work for his employer. He had worked but ten hours. He had on that day sat at his work, as he did on all other days as derrick operator, and had manipulated his machine only when loading rock onto barges. While the hearing referee states that applicant would commence work at 8 a. m. and "frequently" work until 2 or 3 o'clock next morning, the payroll statement contained the notation that "this record shows the hours of employment but does not reflect the actual hours of work because this employee, in operating the derrick, was necessarily on duty but actually working only when loading of barges was in progress."

[2] But whether applicant worked long hours is in itself immaterial. The question is whether his employment proximately caused his disability. This could have been determined only by medical experts. William Simpson Construction Co. v. Industrial Accident Commission, 74 Cal.App. 239, 243, 240 P. 58; Pacific Employers Insurance Co. v. Industrial Accident Commission, 47 Cal.App.2d 494, 500, 118 P.2d

334. See Labor Code, § 5703. Such proof is wholly wanting.

Applicant presented no satisfactory evidence that his pathological condition was caused by his working long hours. Not only did the hearing referee indicate that he based his conclusion upon the testimony of the applicant but he made no reference to the reports of the three physicians. Had he relied upon the statements of Dr. Garnett he could have made no award since that physician's report declared that applicant's "generalized and cerebrovascular arteriosclerosis and arterial hypertension have been present for months and probably years. This is based upon the present state of the sclerosis of the palpable and visible arteries. This process in the main is one of degeneration and senescence and is not increased or aggravated by occupation, except where unusual lifting or straining temporarily raises the blood pressure above the usual levels. * * * The man's lesion is a thrombus formation in an already damaged artery within the brain * * * facilitated by the decreased blood flow which occurs when the patient is at rest * * * this accident occurred in spite of rather than because of his occupation." Had he relied only upon the testimony of the physicians employed by applicant, to-wit, Drs. Daley and Petter, he would have been guided by no expert evidence at all. Dr. Daley merely observed that the long hours caused applicant "to become tense and fatigued," but did not venture to opine that such tenseness and fatigue might have caused the disability. Dr. Petter stated that the "condition was brought about by excessive overwork and long hours with no relief." Neither of the two gave any reason for his opinion, or showed qualification, or that he had made roentgen ray or fluoroscopic examinations. Neither disclosed a familiarity with the history of the case. Neither indicated any extent to which he had conducted his examination or gave any reason why there was a causal connection between Cacozza's occupation and the cerebral vascular thrombosis which disabled him. Neither of them explained why the occupational exertions of this man could have caused the formation of the "intra-vascular clot" nor did they dispute Dr. Garnett's diagnosis. No reasons at all having been assigned for their opinions by Cacozza's physicians such opinions are without value for an opinion is worth no more than the reasons upon which it is based. This leaves the award without the indispensable medical opinion support.

But respondents contend that the opinions of Drs. Daley and Petter are the substantial evidence required rather than evidentiary matter they may have considered. Citing Young v. Bates Valve Bag Corporation, 52 Cal.App.2d 86, 97, 125 P.2d 840; Thomason v. Hethcock, 7 Cal.App.2d 634, 640, 46 P.2d 832. These were actions tried in courts of law. In the Young case the opinion of the expert electrician was based upon the facts contained in a hypothetical question and was subjected to cross questioning and redirect examination. The court refused to strike his opinion merely because it was based partially on the rules of the Industrial Accident Commission. Because other reasons were given and because it was based upon "the facts of the case" the motion was denied. In the Thomason case the opinion of the physician had been received without objection.

The rules of the Commission allow a medical expert to present his evidence in the form of a written report. However, one rule requires that "The physician's report should include the history of injury, the patient's complaints, the sources of all facts set forth in the history and complaints, that is, whether furnished by the patient or by some other person, the findings on examination, the opinion and the reasons for such opinion. Such reasons should be set forth fully and in detail." Rules of Practice and Procedure, Industrial Accident Commission, § 2, Rule 11.

[3-6] Compliance not having been made with such rule by the applicant, the reports of his medical experts are unavailing. No rule or statute is suggested that requires a defendant in any judicial or departmental proceeding to cross-examine adversary witnesses. That is a privilege to which resort is made by an opposing party only for the purpose of eliciting the whole truth or of demonstrating the unwisdom of the witness, his obtuseness, his inac-

curacy of observation or memory, the error of his reasoning or other vice of his testimony. No unfavorable inference can arise from a party's failure to cross-examine a hostile witness. Western & A. R. Co. v. Morrison, 102 Ga. 319, 29 S.E. 104, 40 L.R.A. 84, 66 Am.St.Rep. 173. Having failed to present medical reports as required by the rules respondents may not now supply the deficiencies of Cacozza's evidence by complaining of petitioners' neglect to cross-examine before the hearing referee.

The award is annulled.

McCOMB and WILSON, JJ., concur.



74 Cal.App.2d 442

LORI, LTD., INC., et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 15349.

District Court of Appeal, Second District, Division 3, California.

May 10, 1946.

Mandamus ⇐62

Where Superior Court judge indicated intention to continue trial of unlawful detainer action pending final judgment in reformation suit between the same parties and amended complaint for unlawful detainer presented a cause of action, predicated upon alleged waste and maintenance of a nuisance which had never been tried, peremptory writ of mandate would issue directing judge to place unlawful detainer action upon trial calendar and assign it for trial of such cause of action and other proper issues as soon as a trial department should be available. Code Civ.Proc. §§ 1161, 1179a.

Proceeding by Lori, Ltd., Incorporated, and another against the Superior Court of the State of California in and for the county of Los Angeles and another, for a peremptory writ of mandate directing presiding judge of respondent court to place an unlawful detainer action upon his trial calendar and assign the case for trial.

Peremptory writ granted.

A. Brigham Rose, of Los Angeles, for petitioners.

MacFarlane, Schaefer & Haun, Benjamin J. Goodman, Harold W. Kennedy, County Counsel, and Douglas DeCoster, Deputy County Counsel, all of Los Angeles, for respondents.

PER CURIAM.

Petitioners have represented in their application for a writ of mandate that the respondent Presiding Judge of the Superior Court of Los Angeles County has signified his intention to continue the trial of the unlawful detainer action, heretofore filed by petitioners, to and beyond May 15, 1946, the date to which it was previously assigned abiding final judgment in a reformation suit between the parties.

Respondents in their answer state that on March 22, 1946, the respondent Presiding Judge "indicated that if the plaintiffs in the reformation matter filed an appeal within the time allowed by law, he would continue the unlawful detainer action until said reformation matters became final by a judgment of the Appellate or Supreme Court. * * *"

Counsel for petitioners has declared at the hearing this day held his intention to appeal from the judgment rendered in said reformation suit and the parties have agreed in open court, and it otherwise appears to the court, that at least one issue presented by the plaintiffs' amended complaint for unlawful detainer has never been tried, namely, a cause of action predicated upon alleged waste and the maintenance of a nuisance. (C.C.P. § 1161).

Under the provisions of section 1179a, Code of Civil Procedure, proceedings brought to recover possession of real property are entitled to a preference "in the matter of the setting the same for hearing or trial, and in hearing the same, to

the end that all such actions shall be quickly heard and determined."

Accordingly, it is ordered that the peremptory writ prayed for issue directing the respondent Presiding Judge to place the unlawful detainer action, numbered 508773, upon his trial calendar and assign the same for trial on the 15th day of May, 1946, or as soon thereafter as a trial department is available, for the trial of the cause of action above mentioned and other proper issues, if any.



74 Cal.App.2d 414

SCREEN CARTOONISTS GUILD, LOCAL 852, v. WALT DISNEY PRODUCTIONS.

Civ. 14955.

District Court of Appeal, Second District, Division 1, California.

May 9, 1946.

Rehearing Denied May 31, 1946.

Hearing Denied July 2, 1946.

Master and servant ⇐70(1)

Under terms of collective bargaining agreement respecting work week, overtime pay and holiday pay, arbitrator's ruling that employees were entitled to pay for a holiday falling on Saturday, was in direct conflict with bargaining contract and would be vacated. Code Civ.Proc. §§ 1287, 1288(d).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding in the matter of the arbitration between Screen Cartoonists Guild, Local 852, applicant, and the Walt Disney Productions, objector. From an order denying the applicant's motion to confirm an arbitrator's award and granting the motion of the objector to vacate the award, the applicant appeals.

Order affirmed.

Katz, Gallagher & Margolis and Milton S. Tyre, all of Los Angeles, for appellant.

O'Melveny & Myers, Pierce Works, and W. B. Carman, Jr., all of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by Screen Cartoonists Guild, Local 852 (hereinafter referred to as the "union"), from an order denying their motion to confirm an arbitrator's award and granting the motion of Walt Disney Productions (hereinafter referred to as the "company"), to vacate such award.

Under date of October 6, 1942, the union and the company entered into a collective bargaining agreement, clause eleventh of which provided that employees, who worked on certain specified holidays, should receive time and one-half therefor, and "If not worked, these holidays, if they fall within the work week, will be paid for at straight time."

Clause fifth of said agreement specified that the regular hours of work for employees should be "Eight hours per day, forty hours per week, five days per week, Monday through Friday, inclusive * * *."

Christmas Day, 1943, and New Year's Day, 1944, both fell on Saturdays, and no work was performed by the employees on those days. The union claimed that the employees were entitled to pay on the ground that the work week was seven days; the company claiming that they were not entitled to pay because the work week was five days, Monday to Friday, inclusive. The matter was made a grievance under the terms of the agreement, and was ultimately submitted to arbitration in accordance with clause thirteenth thereof which provides in part as follows:

"4. All complaints, grievances, controversies, disputes, questions of interpretation of this agreement and all other differences between the parties hereto, shall be heard and determined by the Impartial Chairman (arbiter), if the same cannot in the first instance be otherwise disposed of under provisions hereof between the par-

ties hereto. Said Impartial Chairman shall have power to make and enter any order, ruling or decree which in its judgment appears to be just and reasonable, having due regard for justice and equity in each case; *such ruling or decree, however, shall not be in conflict with the express provisions of this agreement.*

"5. * * * Each case brought to the Impartial Chairman shall be considered on its own merits, and *this agreement shall constitute the basis upon which such decision shall be rendered.*" (Emphasis added.)

The arbiter ruled that the "work week" mentioned in clause eleventh was a seven day week, therefore, the employees were entitled to straight time pay for the two holidays in question, and made his award accordingly. Upon refusal of the company to comply therewith, the union applied to the superior court for confirmation of the award, pursuant to section 1287 of the Code of Civil Procedure. The company appeared in opposition to such application and moved the court to vacate the arbitral award on the ground set forth in section 1288(d), Code of Civ.Proc.

After hearing the matter, the trial judge denied the union's application for confirmation of the award, and granted the company's motion to vacate the same, giving as his reason therefor, as stated in his memorandum decision, "that the arbitrator exceeded his powers in going outside the agreement to find a definition of the work week and that the award made by him was in conflict with express provisions of the Bargaining Agreement, and therefore falls under the provisions of subdivision (d) of section 1288, C.C.P., which requires that the award be vacated."

An examination of the opinion and award of the arbiter discloses that he understood that his search for a definition of the term "work week" as used in clause eleventh was "not to be pressed beyond the bounds of the contract", because of the limitation imposed upon him by paragraph 5, clause thirteenth, hereinbefore quoted.

Clause fifth of the bargaining agreement reads as follows:

"*Working hours and overtime*-Regular hours of work for employees shall be as follows:

"1. Eight hours per day, forty hours per week, five days per week, Monday through Friday inclusive, with one hour each day for lunch.

"2. All time worked in excess of eight hours per day or forty hours per week shall be paid at the rate of time and one half.

"3. Employees reporting for work shall be paid for at a minimum of eight hours.

"4. Female employees shall not be required to work in excess of ten hours a week overtime.

"5. The following three provisions are by order of the President of the United States:

"a. *Seventh Day of Work.* Where, because of emergency conditions, an employee is required to work seven consecutive days in any regularly scheduled work week, double time must be paid.

"b. *Sixth Day of Work.* Overtime rates must be paid for work in excess of eight hours in one day, or on the sixth day in the work week, must be paid only where such payment is required by law or union agreement, but in no case can the rate be more than time and one-half.

"c. *Holiday Pay.* Whether required by union agreement or not, all war-related industries must pay time and one-half, but no more, for work performed on any of the six holidays: New Years Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas and either Memorial Day or one other holiday of greater local importance."

In analyzing the foregoing clause (fifth), the arbiter argued that as used in subdivision *a* thereof, " 'seven consecutive days in any regularly scheduled work week', the term work week could not possibly refer to a five day week and must mean a seven day work week." As used in subdivision *b* of clause fifth, " 'on the sixth day in the work week', the term could not possibly refer to a five day work week and must mean at least a six day work week." Also, that the "term 'Regular Hours of Work'

is a general heading covering all five sub-sections and cannot therefore be construed as applying only to the five-days clause which is only the first sub-section of the five sub-sections, all under the one general heading 'Regular Hours of Work'. The form of Clause Fifth indicates a concept of the *work-week* as seven days, some of which are straight-time days and others overtime days. * * * Since the term 'work week' clearly means seven days where it is used earlier in the contract, it is reasonable to interpret it as meaning the same thing in Clause Eleventh. * * * This interpretation is also in line with and not in conflict with any part of the present Federal regulations governing the work week. The work week Section (V) of Interpretative Bulletin No. I of the Premium Pay Executive Order (9240) states the following: 'A work week consists of seven (7) consecutive days starting on the same calendar day of each week. This is the definition of a work week under the Fair Labor Standards Act and is generally accepted by industry.' "

There is no doubt that clause fifth of the bargaining contract contemplated and fixed a regularly scheduled work week of five days, and then set up a schedule of overtime pay for those who voluntarily worked on the sixth day, and for those who were required through emergency to work seven consecutive days in the regularly scheduled work week. Under the terms of clause eleventh, as heretofore pointed out, since only those holidays occurring within the work week were to be paid for if not worked, it is an essential corollary that some holidays must fall without the work week. Otherwise, if a work week of seven days had been contemplated, all holidays would fall within such work week, and clause eleventh would cease to have any meaning. In passing it should be noted that all wage scales and classifications set up in clause fourth of the contract were on a "weekly" basis, and not so much per hour or per day.

From the foregoing, it appears that in construing the work week to include Saturday, the arbiter's ruling was in direct conflict with the express terms of the bargaining contract, and thus exceeded the powers conferred upon him under clause thirteenth, heretofore quoted.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.



74 Cal.App.2d 555

HARLAN v. HARLAN.

Civ. 15149.

District Court of Appeal, Second District, Division 3, California.

May 20, 1946.

1. Joint tenancy ⇐10

In action between joint tenants of realty for adjudication as to their rights, finding that defendant had moved into premises and denied plaintiff right to any use, enjoyment or occupancy thereof, was supported by evidence.

2. Partition ⇐13, 14, 22

Court may order a partition of realty owned in joint tenancy, but right to partition is not absolute and may be waived by contract. Code Civ.Proc. § 752.

3. Joint tenancy ⇐8

Under deed creating joint tenancy in realty and agreement between joint tenants, their rights to occupy premises were mutual and equal and neither was entitled to occupy the premises to the exclusion of the other.

4. Joint tenancy ⇐8

Joint tenant, by agreement to join in renting, encumbering, or selling the realty upon demand of co-tenant did not relinquish her right to her half of any amount received as rents or as proceeds of encumbrance or sale.

5. Estoppel ⇐61

Covenants in written agreement between joint tenants of realty giving one

exclusive rights to sell or otherwise dispose of the realty and giving each, right to use and occupy premises jointly with the other were mutual and dependent, and tenant having exclusive right to sell, by wrongfully excluding co-tenant from any use or occupancy of premises, deprived himself of right to stand on agreement as a waiver of co-tenant's right to have a sale of the realty in partition. Code Civ.Proc. § 752.

6. Joint tenancy ⇐10

Joint tenant having been wrongfully excluded by co-tenant from use or occupancy of realty having rental value of $100 per month, was entitled to judgment against co-tenant for damages of $50 per month during period of such exclusion.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Mericia Gonzalez de Harlan against Warren E. Harlan for an adjudication of the rights of plaintiff and defendant under deed by which defendant conveyed realty to himself and plaintiff as joint tenants, and under accompanying agreement and for partition of the realty. Defendant filed a crosscomplaint asking that deed be cancelled and that plaintiff be required to convey to him any claimed interest in the property. From judgments in favor of plaintiff, defendant appeals.

Judgments affirmed.

Button, Herzog & Butts, of Hollywood, for appellant.

A. J. O'Connor and George J. Hider, both of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff is the daughter-in-law of defendant, Warren E. Harlan, being the wife of his son Richard. Plaintiff and defendant own as joint tenants a residential property in Beverly Hills. The lot was purchased by defendant and the house was built in 1937, principally with the money of defendant, his contribution, including the amount of a loan on the property, being some $15,000, although plaintiff and her husband contributed the sum of $7,100, which was needed to complete the house. The property was placed in joint tenancy by deed of February 15, 1938, by defendant, as grantor, to himself and plaintiff, as grantees, and on the same day an agreement was entered into by plaintiff and defendant, reading as follows:

"This Agreement made and executed at Los Angeles, California, this 15th day of February, 1938, by and between Warren E. Harlan, hereinafter designated as First Party, and Mericia Gonzalez de Harlan, hereinafter designated as Second Party, both of the City and County of Los Angeles, State of California; Witnesseth: Whereas, First Party is a widower at present about 67 years of age and is the owner of and resides at No. 1136 North Doheney Drive, in said city and county of Los Angeles, state aforesaid, in a two-story stucco, Spanish type residence dwelling which he has recently constructed and completed, which premises are more particularly described as follows: [Description.] Whereas, Said Second Party is the daughter-in-law of said First Party and, together with her husband, Richard Harlan, the son of First Party, resides with said First Party in said home aforesaid; and Whereas, said Richard Harlan is the only child of said First Party; and Whereas, the said parties, together with said Richard Harlan, son of said First Party and the husband of said Second Party, have resided together for a number of years; and Whereas, by reason of such association between the parties there has arisen and now exists mutual feelings of full faith, trust and confidence; and Whereas, said First Party is the owner of said house and desires to convey the same to said Second Party and himself as joint tenants for the joint and equal use, enjoyment, and advantage of said Second Party and said Richard Harlan, her husband aforesaid, and himself, reserving to himself, however, certain exclusive rights, privileges and options as more fully hereinafter set out; and Whereas, said First Party is further willing to convey said property to Second Party and himself jointly, as joint tenants, with the provision that if he, said First Party, should decease, in that event said Second Party shall use, enjoy and otherwise hold

said property for the joint and equal benefit of herself and her husband, Richard Harlan, the son of said First Party, with the right in said Second Party on the death of said First Party to sell or otherwise dispose of said property if she shall see fit and thereupon apportion the proceeds of the sale thereof equally between herself and said Richard Harlan; and Whereas, said Second Party is agreeable to the same; Now, Therefore, in consideration of the mutual promises and covenants of the parties hereto one to the other, as hereinafter set forth, it is hereby mutually agreed as follows: 1. That First Party does this day by Grant Deed in Joint Tenancy transfer and convey the said real estate and home hereinbefore described and referred to, to himself and said Second Party as joint tenants, with sole right of survivorship, subject only to: current taxes and assessments, if any; restrictions and rights of way; and a Trust Deed encumbrance in favor of Home-Builders' Loan Association of Pomona, California, in the approximate principal sum of $1500.00. 2. That during the lifetime of said First Party he shall have the exclusive right and privilege of selling, mortgaging, renting, encumbering, or in any other manner disposing of said real estate, and said Second Party agrees to execute any and all documents which may be necessary or required in the exercise of any of First Party's rights and privileges herein granted. 3. Upon the death of First Party and consequent vesting of the title to said real estate in said Second Party as sole survivor, said Second Party shall have the sole and exclusive right and authority to sell, assign, transfer, encumber, mortgage, rent, hypothecate, or otherwise deal with said property, without any let or hindrance by any person, provided, however, that, upon the sale, transfer, or other disposition of said property by Second Party, she shall thereupon divide any proceeds thereof, after the payment of any necessary expenses incurred by reason thereof, equally between herself and her husband, Richard Harlan, son of First Party. 4. During the lifetime of First Party he shall at all times have the right to occupy said home, together with Second Party, and use and enjoy same jointly with said Second Party. 5. The parties hereto by this agreement do hereby intend to express their full confidence and trust one in the other and the execution and delivery of the deed by First Party to said Second Party, hereinbefore referred to, is expressly based upon said trust and confidence and upon reliance that Second Party will carry out the covenants and conditions on her part herein expressed to be performed. 6. It is the further intention of these parties by this agreement to protect said Richard Harlan, the son of First Party and who is now the husband of Second Party, so that notwithstanding that by said deed herein referred to said Second Party will upon the death of First Party acquire title to said real estate, nevertheless, said Second Party shall share equally with said Richard Harlan the proceeds derived from any sale or other disposition of said real estate by Second Party. [Etc. Signatures and acknowledgment.]"

For a number of years plaintiff and defendant occupied the premises as their home, and plaintiff's husband also lived there, except at intervals. Defendant, a widower, remarried in November, 1941. Plaintiff and her husband separated in December, 1943, and the husband unsuccessfully sought an annulment of their marriage. Harlan v. Harlan, Cal.App., 161 P.2d 490. The premises were leased to one tenant from December, 1941, to April, 1943, and to other tenants from April, 1943, to May, 1944. During the first of these periods plaintiff retained and occupied living quarters in the house. The rentals were used for the joint benefit of plaintiff and defendant. When the last tenants left, defendant and his wife moved into the house and plaintiff left, taking the furniture with her.

Plaintiff brought this action for an adjudication of the rights of herself and defendant, and for partition of the property. Defendant answered and also filed a cross-complaint, in which he alleged that plaintiff had acquired her joint tenancy interest through the exercise of fraud and undue influence upon him and he asked that the deed be cancelled and that plaintiff be re-

quired to convey to him any claimed interest in the property. The decree denied defendant any relief on his cross-complaint, confirmed plaintiff's joint tenancy interest in the property, awarded her judgment against defendant in the amount of $50 per month from May, 1944, while he remains in the property and until a sale thereof, made the same a lien upon defendant's interest, and directed that the property be sold and the proceeds used to pay expenses of sale, the balance of an encumbrance on the property, the total sum due plaintiff at the rate of $50 a month, as aforesaid, and that the remainder be equally divided between plaintiff and defendant. There was an interlocutory as well as a final decree, and the defendant gave notice of appeal from both.

Defendant makes no attack upon the findings which negative the allegations of fraud and undue influence of his cross-complaint. He challenges the decree only as it directs a sale of the property, division of the proceeds, and awards plaintiff a judgment for money, which was made a lien upon his interest.

The deed was given for a consideration of one dollar "and other good and valuable consideration," receipt of which was acknowledged, subject to a trust deed of $1,500 and "covenants, conditions, restrictions, reservations, rights of way, and easement of record," and not upon any other condition. It established a joint tenancy title in plaintiff and defendant.

[1] The money judgment of $50 per month from May, 1944, to date of sale was based upon a finding that defendant and his wife moved into the premises in May, 1944, and ever since said time defendant has denied plaintiff the right to any use, enjoyment or occupancy of the premises, or any part thereof, all without her consent. This finding is supported by the evidence. Plaintiff testified that she was ordered out of the house by defendant in May, 1944; that she went back in November, 1944, and was again ordered out of the house by defendant, who told her that the house was not hers, and by her husband, who threatened her life. She gave other testimony which, if true, would have furnished additional proof that she was barred permanently from any use of the premises.

[2, 3] The court may order a partition of real property owned in joint tenancy. Code of Civil Procedure, sec. 752. It is the settled law that the right to have partition is not absolute and that it may be waived by contract. Asels v. Asels, 43 Cal. App. 574, 185 P. 419, and cases collected in 132 A.L.R. p. 672. Defendant relies upon the agreement hereinbefore quoted to establish a waiver by plaintiff of the right to have the property partitioned or sold. It is argued that under paragraph numbered 4, defendant has the right to occupy the premises during his lifetime, and that this right stands in the way of a partition, since it would be destroyed by a sale of the property. Defendant did reserve this right by agreement when he created plaintiff's joint tenancy interest, but it was not an unconditional right. Plaintiff also had the right to occupy the home, by virtue of her right as a joint tenant, and also by the agreement. The rights of the parties were mutual and equal under the deed and under the agreement. Neither had a right to occupy the premises to the exclusion of the other.

[4] Although it was provided by paragraph 4 that the right of joint occupancy would continue during the lifetime of first party [defendant], there was a limitation expressed in paragraph 2, under which defendant might at any time rent or encumber the property or sell or otherwise dispose of it. Paragraph 2 may be construed as an agreement upon plaintiff's part to join in renting, encumbering or selling the property upon the demand of defendant that she do so. She did not, however, relinquish the right to her half of any amount or amounts that might be received as rents, or as the proceeds of any encumbrance or sale. The rentals were shared equally, or as agreed, and when the encumbrance was increased, the balance, after the payment of certain charges, was divided equally between plaintiff and defendant.

[5] If defendant had performed the agreement upon his part, paragraphs 2 and 4 might reasonably have been construed as a waiver by plaintiff of the right to have

the property sold in a partition action. But defendant has not performed; he has breached the agreement by ejecting plaintiff from the property and denying her all use and enjoyment thereof. The exclusive privilege which was granted him to make a sale of the property, according to his wishes, and the privilege of living in it, gave him no right to retain it and to occupy it to the exclusion of plaintiff.

Defendant was 67 years of age at the time he gave the deed, and the home was planned for the use of the three persons. Plaintiff dutifully attended to the wants of defendant, and their lives were placid, until disturbed by defendant's remarriage and the marital rift between plaintiff and her husband. The events which followed defeated the purpose of the parties to establish a permanent home. That purpose is clearly stated in the agreement, and the provisions relied upon by defendant cannot be construed so as to defeat plaintiff's right to have a partition sale in the event she should be excluded from all use and occupancy of the property. The right which was guaranteed her to use the property as her home was a consideration for her own promises, including her agreement that defendant should have the option to sell the property at any time. The covenants of the parties were mutual and dependent. Defendant may not deprive plaintiff of the sole consideration for her promises and at the same time hold her to those promises. He has by his wrongful conduct deprived himself of the right to stand upon the agreement as a waiver of plaintiff's right to have a sale of the property in partition. It is unfortunate that the parties have not been able to adjust their differences outside of court. It appears that they were given this opportunity by the trial judge and that defendant would concede nothing. He maintains that he has the exclusive right to the use and occupancy of the home during his lifetime, or until he sees fit to sell it, a position which is clearly unsupportable.

Defendant concedes that one joint tenant has no right to exclude the other from the joint tenancy property. He argues only that the one excluded may not recover damages, but "he can only recover the right to be let into joint possession of the property with his cotenant." But if the right to joint possession was enforceable, plaintiff's only effective remedy was the one she pursued. The conduct of defendant and his son had made it impossible for plaintiff to live under the same roof with them. It was a situation that could not have been cured by a judgment which ordered defendant to allow plaintiff to move into the premises and occupy them with him. Defendant had no right to resist a sale of the property in partition except that which inured to him by virtue of the contract, and he forfeited that right by his violation of his own obligations and his prevention of further performance in accordance with the terms of the agreement.

[6] Defendant does not contend that if plaintiff had a right to recover damages by reason of her eviction the claim could not be adjudicated in the partition action, and we express no opinion upon that point of procedure. Plaintiff was clearly entitled to recover damages computed at $50 per month. There was evidence to sustain the finding that the property had a rental value of $100 per month.

The interlocutory decree fully adjudicated the rights of the parties, and it declared that a sale of the property was necessary. It also declared that a sale would be ordered if the parties were unable to agree upon a settlement of the matters in controversy. The final decree was a reiteration of the matters contained in the interlocutory decree; it recited that the owners could not agree upon a settlement of their respective claims, that defendant continued to insist that he was the sole owner of the property, and it appointed commissioners and ordered them to sell the property, the proceeds of the sale to be applied as hereinbefore stated.

The judgments are affirmed.

DESMOND, P. J., and WOOD, J., concur.

74 Cal.App.2d 433

HALL v. SCUDDER.

Civ. 15029.

District Court of Appeal, Second District, Division 3, California.

May 10, 1946.

Hearing Denied July 8, 1946.

1. Brokers ⇐3

Real estate commissioner had no jurisdiction to conduct inquiry into fitness of real estate broker upon application for renewal of his license which was then in force or to deny renewal on ground of allegedly improper conduct of licensee more than three years before application for renewal was made. Business and Professions Code, §§ 10100–10116, 10150, 10152, 10175–10180, 10200.

2. Brokers ⇐3

Real estate commissioner has only such power to deprive a licensee of further right to do business as a real estate broker as is vested in commissioner by law, expressly or by necessary implication. Business and Professions Code, §§ 10100–10116, 10175–10180.

3. Brokers ⇐3

Real estate broker's license may be suspended or revoked only for conduct within the immediately preceding three years. Business and Professions Code, §§ 10100–10116, 10175–10180.

4. Brokers ⇐3

Real estate commissioner before issuing original license to real estate broker must examine him with respect to ability to properly perform duties and must satisfy himself as to applicant's good character and for that purpose may go as far as he wishes into antecedents of applicant, but once license is issued without fraud, licensee becomes subject to disciplinary procedure as to his conduct committed while a licensee within immediately preceding three years only. Business and Professions Code, §§ 10100–10116, 10150, 10152, 10153, 10175–10180, 10200.

5. Brokers ⇐3

Holder of unsuspended and unrevoked real estate broker's license which is in force at time of application for renewal thereof is entitled to such renewal as a matter of right. Business and Professions Code, §§ 10150, 10152, 10200.

6. Brokers ⇐3

Real estate broker's right to renewal of unsuspended and unrevoked license did not become moot at end of year for which renewal of such license was first denied, since such right included the right to annual renewal for each succeeding year. Business and Professions Code, §§ 10150, 10152, 10200.

7. Mandamus ⇐143(2)

Delay of more than one year in filing petition for writ of mandate requiring real estate commissioner to renew real estate broker's license did not warrant denial of relief, where order denying renewal was void and broker was diligent in efforts to have it set aside. Business and Professions Code, §§ 10150, 10152, 10200; Government Code, § 11521.

8. Mandamus ⇐87

Mandamus would lie to compel real estate commissioner to renew unsuspended and unrevoked real estate broker's license without the necessity of filing a new application for license which would subject licensee to possible hazard of being denied a new license on account of conduct which would not warrant suspension or revocation of license because no disciplinary proceeding was instituted within limited period of three years. Business and Professions Code, §§ 10100–10116, 10150, 10152, 10175–10180, 10200.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by M. D. Hall for a writ of mandate requiring Hubert B. Scudder, real estate commissioner of the state of California, to renew petitioner's license as a real estate broker. The trial court sustained the Commissioner's general demurrer without leave to amend, and from a judgment of dismissal, petitioner appeals.

Judgment reversed with directions.

McLaughlin & McGinley and Howard D. Hanson, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Petition by M. D. Hall for a writ of mandate, requiring the Real Estate Commissioner to renew petitioner's license as a real estate broker. The trial court sustained the commissioner's general demurrer without leave to amend, entered judgment dismissing the proceeding, and petitioner appeals.

The petition alleged the following facts: That petitioner has been for many years a licensed real estate broker; that prior to the expiration of his annual license, June 30, 1943, he filed an application for renewal thereof and paid the statutory fee; that on August 6, 1943, the commissioner, without acting on the application, issued an order requiring petitioner to show cause why his application for renewal should not be denied for the reason, as stated, that in the month of July, 1938, petitioner had overreached one Joan H. Woodbury in the sale to her of two lots and thereby made a secret profit of $300 on one lot and $250 on the other; that petitioner filed an answer to the order to show cause, denying the allegations of the same, and alleging that the lots had been held by him under options and had been sold without any misrepresentation; that a hearing was had on December 7, 1943, following which the commissioner made findings and an order as follows: "* * * the commissioner finds from the evidence that applicant does not meet the requirements as to truthfulness and honesty, as set forth in the Real Estate Law, Section 10152, Division 4, Business and Professions Code, State of California, and does not satisfy him thereon," and therefore makes the following Order: "Order. Where it is ordered, that the application of M. D. Hall for Real Estate Broker license for the year 1943-44 be and the same is hereby denied." It was alleged that petitioner made application in due form for renewal of license for the year 1944-45; that on August 28, 1944, upon petitioner's application, the commissioner made an order reopening the case for the purpose of taking additional testimony with reference to a renewal of the license, and set the matter for hearing on September 13, 1944; that plaintiff appeared at the hearing and introduced evidence which had not been presented to the commissioner on the original hearing, which evidence petitioner claimed to have been newly discovered and which, if true, would have established that said Joan H. Woodbury had given false testimony in the first hearing upon the one material issue involved, which was decided against petitioner and caused the commissioner to refuse a renewal of petitioner's license. It was alleged that since the last hearing the commissioner had taken no additional action in the matter of petitioner's application. There was filed with the petition in the superior court, and made a part thereof, a transcript of the evidence given at the last hearing before the commissioner. The allegations of the petition brought in question the sufficiency of the evidence to support the finding that the petitioner had been guilty of dishonesty, and it also alleged facts which, if true, would have established that the commissioner at the first hearing had been deceived by false testimony given by said Joan H. Woodbury.

The record does not disclose the ground upon which the general demurrer was sustained. The respondent urges several grounds of support for the judgment: (1) the evidence is sufficient to sustain the findings and decision of the Real Estate Commissioner; (2) this proceeding was moot at the time it was filed in the superior court, for the reason that the license which was denied would have expired by lapse of time; (3) this proceeding was not seasonably filed, and (4) that appellant has not exhausted his administrative remedies. We shall have occasion to refer but briefly to these several contentions of respondent.

[1] Petitioner has maintained throughout that the proceeding instituted by the commissioner which resulted in a denial of his application for renewal, and the order itself, were unauthorized by the Real Estate Act, which has been carried into the Business and Professions Code. The briefs

contain a full discussion of the point. From a study of the code sections we have concluded that the proceeding was unauthorized and in excess of the commissioner's jurisdiction.

[2] It is scarcely necessary to say that the powers of the commissioner to deprive a licensee of the further right to do business are no broader than those which are vested in him by law, expressly, or by necessary implication.

[3] An applicant for a license must submit certain proof that he is honest, truthful, and of good reputation (Business & Professions Code, sec. 10150); the commissioner may require further proof and conduct a hearing under the code procedure for that purpose (sec. 10152), and he must give the applicant a written examination along certain lines (sec. 10153). The matter of suspension or revocation of a license is covered by sections 10175 to 10180. The commissioner may, upon his own motion and shall, upon the verified complaint in writing of any person, investigate the actions of a licensee by means of a hearing, this procedure being set out in sections 10100 to 10116. Upon proof of guilt of acts and conduct specifically described in sections 10176 and 10177, the commissioner may suspend or revoke a license. There is, however, a limitation upon this power; it is only conduct "within the immediately preceding three years" which furnishes a cause for revocation or suspension. Although the order was only a refusal to renew the license, it was for all practical purposes a revocation of the license, and it deprived petitioner of his right to pursue a lawful occupation.

None of the procedure which is applicable to the matter of original applications, and none of that which must be followed before there can be an order of suspension or revocation is expressly, or at all, made applicable to proceedings for renewal of licenses. The scheme of the act in this respect is orderly and logical. The three matters of issuance of an original license, renewal of existing licenses, and suspension or revocation are distinct and separate. The procedure for each is complete and adequate. The qualifications of the applicant must be proved in order to obtain an original license. Unless otherwise provided, all licenses expire June 30 of each year at midnight (sec. 10200). If the licensee fails to apply for a renewal prior to the date of expiration, or within one year thereafter, no license shall be issued to him except upon another original application. A renewal applied for within such yearly period carries a double fee. The licensee is privileged to continue in business until his license is either suspended or revoked, and the matter of renewal is an administrative procedure common in licensing systems. No duty rests upon an applicant for renewal to make the proof required in connection with an original application, and the code makes no provision for the commissioner to initiate or conduct an inquiry as to the fitness of the applicant, as he may do upon an original application. There is nothing in the law which suggests an intention on the part of the legislature to tie in the matter of renewals with the formalities of original applications or with the procedure for disciplinary action.

[4] To summarize: the commissioner, before issuing an original license, must examine the applicant with respect to his ability to properly perform his duties. He must satisfy himself as to the applicant's good character, and for this purpose may go as far as he wishes into the antecedents of the applicant. Once the license is issued, the licensee becomes subject to disciplinary procedure as to his acts and conduct committed while he is a real estate licensee and "within the immediately preceding three years." The proceeding here involved intermingles three separate procedures. It attempts to revive the jurisdiction of the commissioner which he has in considering an original application and which is exhausted when he issues the original license (except in cases of fraud in obtaining the license and for other acts not here involved. Sec. 10177). It also in effect revokes a license for alleged acts which would not be a ground for revocation because they were not committed within three years immediately preceding the institution of the instant proceeding. The confused result is that petitioner has not been found guilty of any act which would justify a cancellation of

his original license for fraud in its procurement, or any other reason, and has not been found guilty of any act within three years immediately preceding the laying of the charge which would justify a revocation of the license.

In the memorandum of points and authorities filed with the petition for the writ in the superior court, it is stated that Mrs. Woodbury had previously made a complaint to the commissioner; that he considered evidence, oral and documentary, produced by him at that time, and on September 30, 1942, sent a letter to Mr. Hall reading as follows: "After giving careful consideration to the statements made at the conference, together with the correspondence on file, we are of the opinion that the evidence is not sufficient to warrant the case being set for formal hearing to determine whether or not defendant's license should be revoked. Yours very truly, Clarence Urban, Commissioner By Perry N. Johnson, Deputy." While this statement by defendant's counsel is not pertinent to the ground of our decision, it does emphasize the necessity that all action taken by the commissioner in disciplinary matters be kept strictly within the powers vested in him. Petitioner had been regularly granted annual renewals of his license from 1938 to 1943 and Mrs. Woodbury's complaint was not presented to the commissioner until after the expiration of the time within which he was empowered to act on it.

[5] The proper construction of the several code sections is that the renewal of a real estate broker's license is a matter of right on the part of one who holds an unsuspended and unrevoked license which is in force at the time of the application for renewal.

There is a discussion in the briefs of the sufficiency of the evidence to support the finding which the commissioner made at the first hearing, to the effect that petitioner had been guilty of dishonest acts. For reasons heretofore stated, there is no occasion to discuss this matter.

[6] The question as to petitioner's rights was not and is not moot. Under a proper interpretation of the law, petitioner had a right to a renewal of his license which expired in 1943 and for each succeeding year. He is now without a license, although he is entitled to one. The right which he asserts here is one that did not expire at the end of the year for which his license was first denied. The holder of an unsuspended and unrevoked license occupies a status which entitles him to annual renewals, and for that reason it is important to petitioner that that status be maintained. The order of the commissioner and also the judgment of the trial court denied him that status. We think it should be restored to him. The question is also one of interest to the public and to the commissioner. A final decision upon review would be difficult to obtain within a year following the denial of a license renewal.

[7] It is argued by respondent that petitioner delayed for an unreasonable time in seeking a review by the courts. The petition was filed February 15, 1945. At the time petitioner was refused a license he was not represented by an attorney. Shortly after the order was made on December 7, 1943, he obtained counsel. A transcript of the proceedings at the first hearing was then obtained and the services of an examiner of questioned documents were engaged. Mrs. Woodbury had testified in the hearing that she gave petitioner a check for $50 as a deposit on one of the lots and that there was then written thereon, "Deposit on Lots 7 and 8, Tract 6600, lowest price direct from owners." This notation was corroborative of her testimony that she considered petitioner to be acting as her agent and understood she was buying the property at the lowest price the owners were willing to accept. The order to show cause read in part as follows: "That during the month of July, 1938, you represented to Joan H. Woodbury that you would secure Lots 7 and 8 in Tract 6600, Los Angeles County, California, for her at the lowest possible price; that believing said representations to be true, the said Joan H. Woodbury gave you a check for $50.00 as a deposit on said transaction with the notation, 'Deposit on Lots 7 and 8, Tract 6600, lowest price direct from present owners'; that said Joan H. Woodbury would not have paid said $50.00 deposit on said transaction but for the said represen-

tation; that said representation was false and known to be false by you and was made for the purpose of inducing Joan H. Woodbury to enter into this transaction; that by means of double escrows and the use of dummies you made a secret profit of $300.00 on Lot 7 and a secret profit of $200.00 on Lot 8." Petitioner contended at all times that he held options on the lots and dealt with them as the owner, and not as agent for Mrs. Woodbury, and he testified that he made none of the representations testified to by her. Whether he held options, or only authority to find a buyer at a net price to the owner, as respondent contends, is immaterial in this connection. The report of the examiner of questioned documents was to the effect that the notation on the check was written with a different pen and with different ink from those used in the remainder of the document, and had been placed on the check by Mrs. Woodbury after it had been cashed by the bank. In the meantime, Mrs. Woodbury had obtained judgment against petitioner in the municipal court for $481.51, which he paid, and on March 2, 1944, she addressed to the commissioner a letter stating that petitioner had paid the judgment and that she had no objection to the commissioner's giving favorable consideration to petitioner's application. In August, 1944, as previously stated, petitioner filed with the commissioner a petition for rehearing and reconsideration and also filed his application for a renewal for the year 1944–45, tendering the double fee required therefor. He urged that the original order was void and should be vacated by the commissioner. The matter was reopened, as above stated, a hearing was had September 13, 1944, and no further order has been made by the commissioner. The fact that petitioner paid the judgment and that Mrs. Woodbury wrote a letter to the commissioner, acknowledging payment, does not appear in the record; it is stated in appellant's brief and is mentioned as an incidental fact, although it has little, if any, bearing on the question involved. That question is whether there has been such unreasonable delay as to justify dismissal of the instant proceeding. We are persuaded that the learned trial judge would not have sustained a demurrer on the ground that this proceeding was not timely brought, without giving petitioner opportunity to amend, and we believe that relief should not be denied for that reason. The order in question was void and when the commissioner ordered a rehearing and reconsideration, he evidently was of the opinion that it could and perhaps should be vacated. The law as it stood at that time did not provide for a rehearing, although it has now been changed. (Sec. 11521, Government Code, added by Statutes 1945, Chap. 867, sec. 1.) There was no such delay in applying for a reopening of the case as to indicate an acquiescence in the order on the part of petitioner. The matter was in the hands of his attorneys and there was nothing to indicate that they did not act diligently in making an investigation of facts which they believed would justify the commissioner in setting aside his order. The delay between the date of the second hearing and the institution of this proceeding was due, no doubt, to the failure of the commissioner to make any ruling after he had heard the evidence with reference to the alleged alteration of the check. Certainly no prejudice has resulted to anyone by reason of the delay.

[8] It is argued by the respondent that petitioner, instead of proceeding as he has done, should have filed a new application for a license. We do not believe he was obliged to do this, for in so doing he would have waived substantial rights. He has the status of the holder of an unsuspended and unrevoked license and is entitled to renewals thereof as long as he retains that status. He was not obliged to subject himself to the possible hazard of a denial of an application for a new license upon the ground that he had been guilty of conduct which would not have warranted an order of suspension or revocation, for the reason that no disciplinary proceeding was instituted within the limited period of three years.

Section 10105, Business and Professions Code, reads: "The decision of the commissioner in denying, suspending or revoking any license is subject to judicial review in accordance with law." Counsel have

divergent views as to what evidence would be admissible upon a trial of the proceeding. There will be no need for a trial unless the commissioner wishes to controvert the allegations of the petition with respect to the facts we have stated and which furnish the basis of our decision. If the facts alleged are admitted, a peremptory writ of mandate should issue as prayed for.

The judgment is reversed, with directions to overrule the demurrer to the petition and allow respondent to file an answer if he be so advised.

DESMOND, P. J., and WOOD, J., concur.



74 Cal.App.2d 344

SANDVOLD v. PERROT et al.

Civ. 15100.

District Court of Appeal, Second District, Division 2, California.

May 2, 1946.

Rehearing Denied May 21, 1946.

Hearing Denied June 27, 1946.

1. Appeal and error ⇐1010(1)

Negligence is a question of fact for determination by the trier of fact, whose finding supported by substantial evidence is binding upon appellate court.

2. Negligence ⇐134(5, 11)

Evidence sustained finding that owner of cocktail lounge and head bartender were negligent in maintaining counter-flap across opening in bar without proper safeguards to prevent it from falling back on adjoining bar when opened, and that such negligence was proximate cause of injury sustained by patron sitting at bar when flap fell on and broke glass she was holding, though flap was opened by another patron in order to jiggle telephone hook inside bar.

3. Pleading ⇐237(4, 8)

Trial court may permit amendment to a complaint to conform to the proof at any stage of trial, even after submission of cause, unless amendment introduces a new and independent cause of action.

4. Pleading ⇐237(3)

Where action against cocktail lounge owner and bartender for injuries sustained by patron was tried on allegation that bartender negligently dropped bar flap on glass patron was holding, permitting plaintiff, after submission of case, to amend complaint to conform to proof showing another patron opened and let bar flap fall by adding a count predicating liability on maintenance of unsafe condition on premises was not error.

5. Pleading ⇐248(2)

A count added by amendment does not state a new and different cause of action so as to preclude such amendment, where new count is consistent with former counts, that is, of a like kind of action and might have been originally joined with other counts or if it is only a variation of form demanding the same thing.

On Petition for Rehearing.

6. Appeal and error ⇐195

Defendants could not urge for the first time on appeal that they were prejudiced by trial court's action in permitting plaintiff to amend complaint to conform to proof after case was submitted, where they did not ask permission to reopen case for reception of additional evidence or move for new trial on ground that court erred in permitting amendment.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Bennye L. Sandvold against Paul Perrot and another for personal injuries sustained by plaintiff while seated at the bar of a cocktail lounge owned by named defendant. Judgment for plaintiff, and defendants appeal.

Judgment affirmed.

Charles V. Barfield, of San Francisco, and A. H. Brazil, of San Luis Obispo, for appellants.

J. Emmet Chapman and Frederick C. Dewar, both of San Francisco, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for personal injuries received while she was seated at the bar of a cocktail lounge owned by defendant Perrot in which defendant Taft was employed as head bartender, defendants appeal.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are these:

February 6, 1942, plaintiff entered defendant Perrot's cocktail lounge. There was an opening in the bar counter for the purpose of affording the employees ingress and egress to and from the usual working area behind the bar counter. At the top of this opening there was a counter-flap or hinged horizontal door which was raised to permit the entrance to or from the space behind the bar. The hinges were on the right side (as one faced the bar) of this door. When this door was closed it was firmly held in place and presented a secure, continuous counter, level with the rest of the bar counter, standing 3 feet 9 inches from the floor. This horizontal door was 26 inches long and 20 inches wide, the same width as the rest of the bar. It was one inch thick and of mahogany. In the opening below this horizontal door there was a smaller swinging door or gate, hinged at the same right side of the opening as the horizontal door. On the inside of the bar counter, just to the right of this opening (as one faced the bar) there was a French style telephone about 6 inches below the top of the bar.

Plaintiff seated herself at the bar just to the right of the hinged door. Defendant Taft served her a Tom Collins. Shortly thereafter another customer, Mr. Woods, standing to the left of plaintiff requested the use of the telephone. Defendant Taft laid the telephone on the top of the door which was down in its normal secure position on a level with the rest of the bar. It was customary to permit customers to use the telephone. Mr. Wood, not being able to get the telephone operator, raised the horizontal door for the purpose of "jiggling" the telephone hook. As he did so the door fell on and broke the glass around which plaintiff had her hand, causing her personal injuries.

Defendant relies for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *There is not any substantial evidence to sustain the trial court's findings that (a) defendants were negligent and (b) such negligence was the proximate cause of the injury to plaintiff.*

[1] This proposition is untenable. Witnesses gave direct testimony as to each of the facts set forth above including testimony of defendant Perrot that his co-defendant was the "head bartender." The law is settled that negligence is a question of fact for the determination of the trier of fact whose finding supported by substantial evidence is binding upon an appellate court. (McWane v. Hetherton, 51 Cal.App. 2d 508, 511, 125 P.2d 85.)

The evidence shows that plaintiff was not familiar with the bar or its surroundings and did not have knowledge of the trap door in the bar or of its operation; that such door was used by defendants as a means of ingress and egress from and behind the bar. They should have known that the trap door which was without any catch or stop could fall back on the counter causing injury to an unsuspecting patron sitting within its reach

[2] It is therefore evident that the finding of the trial court that defendants were negligent in maintaining the trap door without proper safeguards to prevent its falling is reasonable and finds substantial support in the evidence and that such negligence was the proximate cause of plaintiff's injury. This being true it is immaterial that another patron rather than defendant raised the door, since it was the maintenance of the door in an unsafe condition that constituted the negligence and not the act of raising the door.

Royal Insurance Co. v. Mazzei, 50 Cal. App.2d 549, 123 P.2d 586, cited by defendants, was expressly overruled by the Supreme Court in Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872.

Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346; Worcester v. Theatrical Enterprises Corporation, 28 Cal.App.2d 116, 82 P.2d 68; Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129; Schwerin v. H. C. Capwell Co., 140 Cal.App. 1, 34 P.2d 1050; Hicks v. Scott, 48 Cal.App.2d 481, 120 P.2d 107; Klarquist v. Chamberlain & Proctor, 124 Cal.App. 398, 12 P.2d 664; Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231; Polloni v. Ryland, 28 Cal.App. 51, 151 P. 296; Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678; Hauser v. Pacific Gas & Electric Co., 133 Cal.App. 222, 23 P.2d 1068, cited by defendants, are all factually distinguishable from the instant case. No useful purpose will be served by pointing out the distinction, it being evident from a reading of the cases that they are not here in point.

Second: *The trial court committed error in permitting plaintiff to amend her complaint to conform to the proof.*

This proposition is likewise untenable. The complaint was tried upon the allegation that defendant Taft negligently dropped the trap door upon plaintiff. After the case was submitted plaintiff was permitted to amend her complaint to conform to the proof by adding a second cause of action, namely:

"II.

"That the said cocktail lounge, cafe and restaurant of the Defendants, situated and located as aforesaid, was, at the time of the commission of the grievances hereinafter mentioned, for a long time prior thereto, and still is, open to the general public for the purpose of carrying on the business aforesaid, and during the regular business hours of said Defendants the doors of said cocktail lounge, cafe and restaurant were open with invitation to the public and its customers to enter, partake of refreshments, and to deal with said Defendants, and it then and there became the duty of said defendants, its employees, and servants, to have and keep the said cocktail lounge, cafe and restaurant in a reasonably safe and proper condition, so that any person or persons entering said cocktail lounge, cafe and restaurant, while open for the conduct of its said business, would be protected from injury to life or limb while therein. But notwithstanding this duty imposed upon said defendants, plaintiff, on or about the 6th day of February, 1942, while on the defendants' said cocktail lounge in the Anderson Hotel as aforesaid, as a customer, not knowing of the unsafe and dangerous condition of said cocktail lounge, which unsafe and dangerous condition the defendants well knew or should have known, and without any carelessness or negligence on the plaintiff's part while plaintiff was served a cocktail and was seated at the bar of said cocktail lounge at or near the trap door hereinabove described, was suddenly and without notice to her from the defendants, or anyone else, struck by said trap-door, which was absolutely unguarded, falling over and upon said bar and the right hand of the plaintiff, causing the cocktail glass in her hand to be crushed and shattered, and severely injuring the right hand of said plaintiff."

[3] The law is settled that the trial court may permit an amendment to a complaint to conform to the proof at any stage of the trial even after submission of the cause unless the amendment introduces a new and independent cause of action. (Burrows v. Burrows, 18 Cal.App.2d 275, 279, 63 P.2d 1135; Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 82 et seq., 142 P. 910.)

[4] In the instant case the original complaint was predicated upon injuries received by plaintiff due to the negligence of defendants. The amendment to the complaint does not state a new or different cause of action. It is a cause of action for damages based on injuries sustained by plaintiff while on the premises of the defendants due to their negligence.

[5] It does not constitute a new and different cause of action where the new count is consistent with the former count or counts, that is, of a like kind of action and might have been originally joined with the other count or counts. It is not a new and independent cause of action where it is only a variation of form demanding the same thing. (Union Lumber Co. v. J. W. Schouten & Company, supra.) The amendment

permitted in this case clearly falls within the foregoing rule of being simply a variation of the form of demanding redress for the same wrong.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

On Petition For a Rehearing.

McCOMB, Justice.

[6] Defendants' contention that they were prejudiced by the trial court's permitting an amendment to the complaint to conform to the proof is without merit. The trial court permitted the complaint to be amended to conform to the proof after the cause was submitted. Had defendants desired to introduce any further or additional evidence because of the amendment, they should have either asked permission of the court to reopen the case for reception of additional evidence or have moved for a new trial upon the ground that the court erred in permitting the amendment. Having failed to follow either course, they are foreclosed from urging the objection for the first time on appeal.

The petition for a rehearing is denied.

MOORE, P. J., and WILSON, J., concur.



74 Cal.App.2d Supp. 984

LESTER et al. v. BEER.

Civ. A. 6169.

Appellate Department, Superior Court, Los Angeles County, California.

May 3, 1946.

1. Parties ⇐40(2)

Where lease was made to father whose son had same name, and notice terminating tenancy and also summons in unlawful detainer action were served on father, but son filed answer, trial court properly disregarded son's answer, since son was a stranger to the action. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

2. Parties ⇐95(4)

Where notice terminating father's tenancy and summons in unlawful detainer action were served on father, but son who had the same name filed the answer and trial court amended complaint by striking the abbreviation "Jr." where it appeared following defendant's name, trial court had jurisdiction of the action and over the father, irrespective of whether or not father was properly named in complaint and summons. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

3. Landlord and tenant ⇐291(17)

Where lease had been made to father whose son had same name, and notice terminating tenancy and summons in unlawful detainer action were served on father, but only the son filed an answer and appeared in the action, trial court properly entered default against father.

4. Appeal and error ⇐127

A defendant whose default has been taken may appeal from the judgment which follows.

5. Appeal and error ⇐865

Ordinarily, a defendant, whose default has been taken, may not on appeal question the sufficiency of the evidence which the trial court may have heard before it granted the relief prayed for, and his attack must be confined to a consideration of jurisdiction or of the sufficiency of the pleadings.

6. Appeal and error ⇐865

On appeal from a default judgment, sole question is whether complaint contains averments sufficient to support the judgment, and every intendment must be indulged in favor of the judgment, and all doubts of construction resolved in support thereof.

7. Pleading ⇐8(2)

Since rent regulation issued under the federal Emergency Price Control Act does not define the phrase "immediate compelling necessity" which will permit a landlord to evict a tenant, landlord's allegation

in unlawful detainer action that there is an "immediate compelling necessity" for his possession of the premises is a pleading of an ultimate fact and not of a conclusion of law. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

8. Pleading ⇐34(2)

Though the allegation of an asserted fact which is stated in the form of a conclusion may ordinarily be sufficient in the absence of a special demurrer, it is rendered inadequate when the recited facts on which it depends fail to support the conclusion.

9. Landlord and tenant ⇐278½
War ⇐4

Landlord's poor health was not "immediate compelling necessity" within meaning of rent regulation issued under the federal Emergency Price Control Act and providing that a landlord may evict a tenant in case of "immediate compelling necessity." Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Immediate Compelling Necessity".

10. Landlord and tenant ⇐278½
War ⇐4

The desire of landlords to economize was not an "immediate compelling necessity" within meaning of rent regulation issued under the federal Emergency Price Control Act and providing that a landlord may evict a tenant in case of "immediate compelling necessity." Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

11. Landlord and tenant ⇐278½
War ⇐4

The fact that landlords' children were attending school seven miles from where they were living but only one mile from house that landlords sought to recover from tenants did not show "immediate compelling necessity" warranting eviction of tenant within meaning of rent regulation issued under the federal Emergency Price Control Act. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

12. Landlord and tenant ⇐278½
War ⇐4

Landlords' inability to find living quarters for themselves and their children, after selling home in which they lived, constituted "immediate compelling necessity" warranting eviction of tenant within meaning of rent regulation under the federal Emergency Price Control Act. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

13. Landlord and tenant ⇐278½
War ⇐4

Provisions of rent regulations issued under federal Emergency Price Control Act that every notice to a tenant to vacate or surrender possession of housing accommodations shall state ground on which landlord relies for removal or eviction of tenants, and that a written copy of such notice shall be given to area rent office within 24 hours after notice is given to tenant, are directory only. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

14. Landlord and tenant ⇐278½
War ⇐4

Provisions of rent regulation issued under Federal Emergency Price Control Act that no tenant shall be removed or evicted from housing accommodations unless, at least 10 days prior to commencement of action, landlord has given written notices of proposed eviction to tenant and area rent office stating ground on which such removal is sought and specifying time when tenant is required to surrender possession, are mandatory. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

15. Landlord and tenant ⇐278½
War ⇐4

Complaint in unlawful detainer action was not defective because it did not allege that, at time notice was served on tenant of proposed eviction, landlords had an immediate compelling necessity to gain possession as provided by rent regulation issued under the federal Emergency Price Control Act, since the "immediate compelling necessity" need not exist when the notice is given but only when the action is

brought. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

16. Landlord and tenant ⇐278½
War ⇐4

Provisions of rent regulations issued under the federal Emergency Price Control Act must be given a construction which will effectuate their purpose, but, since they constitute a drastic limitation on rights of property, they should not be given an interpretation which will operate as a restriction on owner's right to use his own property beyond that clearly imposed by their terms. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

17. Action ⇐65

A plaintiff's right of action must exist when he commences his action, since the rights of the parties are to be judged by the conditions existing when action was begun.

SHAW, P. J., dissenting.

Appeal from Municipal Court of City of Los Angeles; Charles P. Johnson, Judge.

Action for unlawful detainer by Ernest G. Lester and Alice G. Lester against Chester F. Beer, also known as Chester F. Beer, Jr. From a default judgment in favor of the plaintiffs, the defendant appeals.

Judgment affirmed.

Forrest A. Betts, of Los Angeles, for appellant.

W. T. Stockman and Alvin W. Kunke, both of Los Angeles, for respondents.

BISHOP, Judge.

The plaintiffs in this unlawful detainer action were given a judgment evicting the defendant from their premises, he having remained in possession after his month to month tenancy had been terminated. So far as the state law is concerned, the defendant finds no fault with the judgment, his attack upon it being based upon the proposition that the plaintiffs did not appear, within the meaning of section 6(a)(6) of the Rent Regulation for Housing, issued under the authority of the federal Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq., to have had an "immediate compelling necessity" to recover possession of the premises. Because we do not agree with defendant's proposition, we are affirming the judgment.

The problems of this appeal are somewhat affected by the proceedings which preceded the judgment. In the complaint as originally filed, the sole defendant was referred to as "Chester F. Beer, Jr." It was alleged that the plaintiffs had owned certain premises as joint tenants continuously since prior to August 15, 1940, at which time they leased them to the defendant on a month to month tenancy; that the defendant went into possession and remains there, although there had been served upon him a written notice terminating his tenancy. Other allegations touching upon the matters pertinent to the Rent Regulation will be noted presently. An answer was filed by Chester F. Beer, Jr., and the case proceeded to trial.

At the trial, it developed that there were two persons who used the name "Chester F. Beer, Jr.," a father and a son. The lease had been made with the father, the son at the time being some twelve years of age. The notice terminating the tenancy had been served upon the father, not on the son. Summons had been served on the father, not on the son. Yet is was the son who had filed the answer in the case; the father failed to make any appearance, either in the case or at the trial. These facts appearing, the trial court, upon plaintiffs' motion, amended the complaint by striking the abbreviation "Jr." where it appeared following the name "Chester F. Beer" and by inserting in its place the words "also known as Chester F. Beer, Jr." It then dismissed the complaint "as to the answering defendant," entered the default of the real defendant, and gave judgment for the plaintiff. After the filing of findings of fact, judgment was entered, wherein it was adjudged that plaintiffs "have and recover judgment against Chester F. Beer who is the tenant and occupant" of the premises, and that they recover $55.50 from him. The judgment makes no mention of

Chester F. Beer, Jr., but he joined with Chester F. Beer in filing a notice of appeal from the judgment.

[1-3] The trial court acted quite properly in disregarding the answer filed by the son, who was a stranger to the action and had no right to interject himself into it. Mercantile Trust Co. v. Stockton etc. Co., 1919, 44 Cal.App. 558, 560-564, 186 P. 1049. The father was unmistakably the person meant by the plaintiff to be the defendant in the case. The trial court had jurisdiction of the action, and upon service of summons upon the defendant father, obtained jurisdiction over him, quite irrespective of whether or not he was properly named in the complaint and summons. McGinn v. Rees, 1917, 33 Cal.App. 291, 294, 165 P. 52; Welsh v. Kirkpatrick, 1866, 30 Cal. 202, 206, 89 Am.Dec. 85; McDonald v. Swett, 1888, 76 Cal. 257, 259, 18 P. 324; Brum v. Ivins, 1908, 154 Cal. 17, 20, 96 P. 876, 129 Am.St.Rep. 137; Thompson v. Southern Pacific Co., 1919, 180 Cal. 730, 732, 183 P. 153; Smith v. Pickwick Stages System, 1931, 113 Cal.App. 118, 122, 297 P. 940. As the only defendant in the case failed to put in an appearance, his default was properly entered.

[4-6] A defendant whose default has been taken may appeal from the judgment which follows. Ordinarily, however, he may not question the sufficiency of the evidence which the trial court may have heard before it granted the relief prayed for, Crackel v. Crackel, 1911, 17 Cal.App. 600, 601, 121 P. 295; "his attack must be confined to the consideration of jurisdiction or of the sufficiency of the pleadings." Reed Orchard Co. v. Superior Court, 1912, 19 Cal.App. 648, 662, 128 P. 9, 16, 18. He may not take too critical a view of the pleadings, however. We find this statement in San Gabriel Valley Bank v. Lake View etc. Co., 1906, 4 Cal.App. 630, 633, 89 P. 360, 361, expressing the principles governing in such a case: "The sole question is whether the complaint contains averments sufficient to support the judgment. In such cases the rule is invariable that every intendment shall be indulged in favor of the judgment, and that all doubts of construction shall be resolved in support thereof. If the complaint can be construed favorably to the upholding of the judgment, such construction shall be adopted." Again, in Alexander v. McDow, 1895, 108 Cal. 25, 29, 41 P. 24, 25, we find: "Thus, while a judgment will not relieve from the entire absence of a necessary averment it will cure defects in all such averments as may by fair and reasonable intendment be found to have been pleaded, although defectively." See also Nevin v. Gary, 1909, 12 Cal.App. 1, 4, 5, 106 P. 422.

Defendant's appeal resolves itself, therefore, into an attack upon the complaint, and we are called upon to determine whether it states sufficient facts to reveal that the plaintiffs were entitled to the relief which they sought and obtained. We avoided the use of the customary expression "states facts sufficient to state a cause of action" because the question is not whether plaintiffs have a legal right to evict the defendant—that is not in doubt—but whether the complaint shows them to be free from the limitations imposed by section 6 of the Rent Regulation so that they may enforce their right.

The provisions of section 6(a) (6) of the Rent Regulation no longer read as they did upon those previous occasions when we were called upon to consider them.* Section 6(a) still opens with the restrictive paragraph: "So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated * * * unless". Then there are depicted several

* Bumgarner v. Orton, 1944, 63 Cal.App.2d Supp. 841, 146 P.2d 67; Jones v. Shields, 1944, 63 Cal.App.2d Supp. 846, 146 P.2d 735; Lester v. Isaac, 1944, 63 Cal.App.2d Supp. 851, 146 P.2d 524; Wrenn v. Sutton, 1944, 65 Cal.App.2d Supp. 823, 150 P.2d 589; Bauer v. Neuzil, 1944, 66 Cal.App.2d Supp. 1020, 152 P.2d 47.

situations in which evictions may be had, the last of them, as applicable to the case under review, being worded as follows: "(b) Occupancy by Landlord. The landlord owned * * * the housing accommodations prior to [November 1, 1942] * * * and has an immediate compelling necessity to recover possession of such accommodations for use and occupancy as a dwelling for himself * * *."

[7, 8] As we have already noted, the complaint contained an averment that the plaintiffs have been the owners of the premises which they wish to occupy for the period required to bring them within the permissive provisions of section 6(a)(6). One more fact must appear to meet the conditions imposed by that section; that is, that the plaintiffs have an immediate compelling necessity to recover possession of their premises for use and occupancy as a dwelling for themselves. Had such an allegation, without qualification, appeared in the complaint, it would have been sufficient. The Rent Regulation makes no attempt to define what is meant by "immediate compelling necessity," so that the pleader may use these words as the Regulation does, in their ordinary meaning and not as a conclusion of law based upon other, ultimate, facts. Of course, whether or not any particular plaintiff has an immediate compelling necessity is to be determined as a conclusion from the facts which the evidence discloses, but the conclusion is one of fact, not of law, and so is properly pleaded as the ultimate fact. See Estate of Bixler, 1924, 194 Cal. 585, 589, 229 P. 704; opinion by Supreme Court denying hearing in Rivera v. Cappa, 1916, 29 Cal.App. 496, 499, 156 P. 1016; First-Trust etc. Bank v. Meredith, 1936, 5 Cal.2d 214, 221, 53 P.2d 958, and Green v. Darling, 1925, 73 Cal.App. 700, 703, 239 P. 70. In their complaint, however, plaintiffs, while stating that they had an immediate compelling necessity, preface the statement with a number of facts, quite evidently offered as the basis for the ultimate fact, as they were connected with it by "therefore." "While the allegation of an asserted fact which is stated in the form of a conclusion may ordinarily be sufficient in the absence of a special demurrer, it is rendered inadequate, however, when the recited facts upon which it depends fail to support the conclusion. A conclusion has no greater force than the express premise upon which it is founded." Miles v. McFarlane, 1930, 104 Cal.App. 513, 518, 519, 286 P. 507, 509.

[9–12] Many of the facts alleged in support of plaintiffs' conclusion that they had an immediate compelling necessity to obtain possession of their property, fail of their purpose. That is to say, we do not find the simple fact that the plaintiff Ernest is in poor health to be a good basis for concluding that he needs to live in the house he rented to the defendant. Nor is the desire of the plaintiffs to economize made to appear a necessity. That their children are attending school seven miles from their present address, but only one mile from the house they seek to recover, appears to be a great inconvenience, but hardly to create an immediate compelling necessity. However, in the complaint it does appear, from a combination of inferences from facts alleged and from the allegations themselves—and both may be looked to in support of a judgment after default (Nevin v. Gary, supra, 12 Cal.App. 1, 5, 106 P. 422)—that the plaintiffs have three children of school age; that they have sold and passed title to the place in which they are living, giving to the new owners an immediate right to evict them (Subd. 4, section 1161a, Code of Civil Procedure); and that they have sought to rent other quarters for themselves and their children, but in vain. Upon these facts they had a firm footing as they asserted that they had an immediate compelling necessity to secure possession of their own property. It is possible that the circumstances surrounding plaintiffs' sale of the place they were occupying when the complaint was filed were such that on some theory of public policy they should not be heard now to say that they are in dire need of a place to live. Knowing nothing of those circumstances, we go no further than to state that the mere fact that the present compelling necessity would not have arisen had they not sold their former residence does not defeat their right to rely upon it

as an exception to the general rule of section 6, which forbids an owner to dispossess a tenant so long as he pays his rent.

There are other provisions of section 6 of the Rent Regulation which we must take into account as we test the sufficiency of the complaint before us. They are found in subdivision (d) (1), reading, so far as concerns this case, as follows:

"Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant. A written copy of such notice shall be given to the area rent office within 24 hours after the notice is given to the tenant.

"No tenant shall be removed or evicted from housing accommodations by court process or otherwise, unless at least ten days * * * prior to the commencement of an action for removal or eviction, the landlord has given written notices of the proposed removal or eviction to the tenant and to the area rent office, stating the ground under this section upon which such removal or eviction is sought and specifying the time when the tenant is required to surrender possession * * *."

Notice was served upon the defendant, according to the complaint, on November 6, 1945, requiring him to surrender possession on or before December 15, and a copy of this notice was served upon the area rent office November 7. The notice contained these statements, among others: "the undersigned owned [the premises in question] prior to November 1, 1942, has continuously owned said accommodations since prior to November 1, 1942 up to and including the present date, and has an immediate compelling necessity to recover possession of said accommodations for immediate use and occupancy as a dwelling for himself.' The "undersigned" was the plaintiff Ernest Lester. The present action was not commenced until January 9, 1946.

[13-15] The first two sentences of our quotation from section 6(d) (1) we regard as directory only, but the concluding paragraph is plainly mandatory. Measured by its provision, the contents of the notice upon which plaintiffs rely were sufficient, and it was timely served. The complaint, then, is sufficient with respect to the notice, with one possible exception: there is nothing in the complaint to the effect that back at the time the notice was served on the defendant, November 6, 1945, the plaintiffs then had an immediate compelling necessity to gain possession of the premises. Is there an essential allegation, therefore, lacking in the complaint? We think not.

[16, 17] While we are mindful of the fact that the Rent Regulation was issued because of a serious condition respecting housing in defense rental areas, and its provisions must be given a construction which will effectuate their purpose, we also recognize that they do constitute a drastic limitation upon the rights of an owner of property to enjoy the benefits of that ownership, and the Regulation should not be given an interpretation which will operate as a restriction upon the right of an owner to use his own property beyond that clearly imposed by its terms. That which section 6 prohibits is the removal of a tenant, by court action or otherwise, except when one of the enumerated grounds exists. There is no provision which declares that a notice to quit may not be served unless and until the owner's necessity has become immediate. It is the eviction that must await that crisis. The notice that is required to state the ground upon which "such removal or eviction is sought" is a notice "of the proposed removal or eviction." The removal is not brought about by the service of the notice, but is accomplished ten or more days later by court action or self service, in those states where the latter is permitted. It is obvious that the tenses were not chosen with meticulous care, for a notice that more than ten days hence a landlord proposed to evict a tenant, if the tenant does not heed the notice, can only state the ground upon which the eviction will be, not is, sought. It is unlikely that in most of the circumstances listed in section 6(a) as grounds for evictions, the question now being considered will arise. It will not be expected that a landlord will foresee, for example, that his tenant is going to violate a substantial obligation of his tenancy. But it often happens that an own-

er of leased premises, who at the moment has other premises at his disposal, can clearly foresee that by the time he has complied with the state law and brought himself within the federal rent regulations he will be out on the street, unless he can obtain possession of his own property. He may be about to lose the place where he now lives by sale under a trust deed. He may have been given notice by his landlord that he is to be evicted. To hold that he must wait until he is actually without a place to house himself and family before he can give a notice that he proposes to evict a tenant, is to read into section 6(d) (1) a restriction which is not expressly written there, and which is not required by that which does appear. The immediate compelling necessity must exist when the action to evict is commenced, because of the "settled rule that a plaintiff's right of action must exist when he commences his action, for the rights of the parties are to be judged by the conditions existing at the time the action was begun." Stanley v. Westover, 1928, 93 Cal.App. 97, 105, 269 P. 468, 471. It is not required to exist when the notice terminating a month to month tenancy is served, by the fact that that notice must contain a statement, necessarily prophetic in its nature because it has reference to a state of facts that must be in existence sometime in the future, to the effect that the ground upon which the eviction will be sought is the landlord's immediate compelling necessity.

It may be, because the public welfare is involved in the matter of housing in the defense rental areas, that even on an appeal from a judgment after default the sufficiency of the evidence as to the existence of the immediate compelling necessity at the time of trial, may be questioned. We need not decide the matter in this case, for the evidence heard by the trial court was ample to sustain its decision. At the time of the trial, the plaintiff-father was living with a son in a hotel in downtown Los Angeles. His wife and two children were residing in a motel in the suburbs. It is evident that the calamity they foresaw when they served the notice upon the defendant terminating his tenancy has come to pass, and they and their family have an immediate compelling necessity to repossess the property awarded them by the judgment. The fact that they are not actually required to sleep in the fields is not a denial that the condition exists by virtue of which they may, by the provisions of section 6(a) (6) of the Rent Regulation, evict the present occupant of their property.

The appeal of Chester F. Beer, Jr. from the judgment to which he is a stranger and by which he is not aggrieved, is dismissed. The judgment is affirmed. The plaintiffs are entitled to their costs of appeal.

KINCAID, J., concurs.

SHAW, Presiding Judge.

I dissent, because I am unable to agree that the ground on which the landlord seeks the tenant's removal under section 6(a) of the Rent Regulation for Housing need not exist at the time the landlord gives notice of removal to the tenant.

While this regulation, which was issued by the Price Administrator under the Emergency Price Control Act of 1942, is in derogation of the usual rights of an owner of real property to occupy or dispose of it as he pleases, and for that reason its interpretation should not be pushed by strained implication or construction beyond the satisfaction of the purposes which brought it forth, yet those purposes, as declared by the act, in furtherance of which the Price Administrator is authorized to make regulations, are very broad (see sec. 901, Title 50, Appendix U.S.C.A.) and the regulations made under this authorization should receive a reasonably liberal construction to carry out those purposes.

Section 6(a) of the regulation begins with the declaration that "So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession or otherwise, nor shall any person attempt such removal or exclusion * * * unless * * *" Here follows an enumeration of five separate sets of facts, connected by the conjunction "or," one of which is (6) dis-

cussed in the foregoing opinion (without renumbering (6), one set of facts, numbered (5), was removed by amendment). If the regulation stopped here, it must be concluded that the state of facts on which the right of removal is claimed need not exist at any time before an action to evict is brought.

But other provisions of the regulation lead me to a different conclusion. Section 6(d) (1) provides that "Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant. * * * No tenant shall be removed or evicted from housing accommodations by court process or otherwise, unless at least ten days * * * [an exception not applicable here] prior to the time specified for surrender of possession and to the commencement of any action for removal or eviction, the landlord has given written notices of the proposed removal or eviction to the tenant and to the area rent office, stating the ground under this section upon which such removal or eviction is sought * * *."

By these provisions the landlord is required to state the "ground under this section" for his proposed removal of the tenant. A variety of facts are specified in "this section" as grounds for removal. The first four of them are described in words referring to past or completed action. Section 6(a) (1) specifies as a ground that the tenant "has refused" to execute a renewal of the lease; Section 6(a) (2) provides for the case where the tenant "has unreasonably refused" the landlord access to the property, etc.; Section 6(a) (3) authorizes removal where the tenant "has violated" a substantial obligation of the tenancy and "has continued" such violation after notice, but also has provisions couched in the present tense for the case where the tenant "is committing" a nuisance; and Section 6(a) (4) states as a ground of removal that the tenant's lease "has expired," etc. No landlord could state any of these "grounds" as they are described in the regulation by declaring that the tenant was about to do or was expected to do any of the acts specified; but if the acts had not yet been done and for that reason the grounds did not exist he could truthfully do no more. Prophecy is uncertain at best, and it does not seem probable that the author of this regulation intended to sanction its use in the process of removing a tenant. Even in case of a nuisance, the landlord, in order to state the ground as described in the regulation, must declare that the tenant *is* committing it, not that he will do so. It is clear that in all these cases the "ground" which can be stated in the notice is a completed and then existing state of facts, not merely one which the landlord hopes, expects or fears may come to pass in the near or distant future.

The remaining ground of removal sanctioned by Section 6(a), as amended September 15, 1945, and the one here in question, is that the landlord "has an immediate compelling necessity to recover possession of such accommodations for use and occupancy as a dwelling for himself." This also is worded in the present tense, and the landlord cannot state what is here described in his notice without using the present tense and saying that he "has" a necessity, etc. Thus this ground is placed in the same class as the other grounds already discussed. All must exist as grounds at the time the notice is given; for, if not, the landlord must either state what is not true in his notice or depart from the provisions of the regulation in stating his grounds.

Two provisions of Section 6(d) (1) above quoted corroborate, rather than defeat, this construction. The first requires the notice to state the ground "upon which the landlord relies for removal." The second prohibits removal of a tenant "by court process or otherwise" unless the notice served states "the ground under this section upon which such removal or eviction is sought." The use of the present tense in these provisions, if taken literally, prevents the landlord from stating in his notice that he *will* rely or *will* seek removal of the tenant upon any of the specified grounds, and in that sense it need not be characterized as inaccurrate. Indeed, it is quite accurate if the notice is regarded as a part of the

procedure for removing the tenant, whether that be done by court process or otherwise. Since this construction gives full effect to all the words of the regulation, it should be adopted. It is in accord, also, with the definition of the verb "seek," the meaning of which most appropriate to this case is, as given in Webster's New International Dictionary, "to try to acquire or gain." Accepting this construction, the landlord is seeking the removal of his tenant (it "is sought") when he gives the notice which is necessary to such removal. In other words, his pursuit of the possession begins with his notice.

What further steps the landlord must take in order to complete the removal depends upon local law and the compliance of the tenant. If the tenant heeds the notice and departs, the process of removal is complete. If he stays, there seem to be some states in which the landlord may enter and remove him if that can be done peacefully (see 36 Cor.Jur. 600, 601; Notes 45 A.L.R. 314, 49 A.L.R. 517, 60 A.L.R. 280); but in California the landlord must take legal proceedings, of which unlawful detainer is the speediest, to effect the removal. California Products Inc. v. Mitchell (1921), 52 Cal.App. 312, 198 P. 646.) The regulation, being nation wide in its application, must be, and on the construction I have given it is, adaptable to either state of the law.



NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON CIRCULATING

NATIONAL UNIVERSITY LIBRARY
3 1786 10047 1660

